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BOOK REVIEWS

Pluralistic Perfectionism:
A Review Essay of Making Men Moral

Gerard V. Bradley*

The Holy Grail of contemporary political theory is a coherent, non-utilitarian justification for freedoms like those in our Bill of Rights. This elusive justificatory account must effectively answer the questions that clear-headed and conscientious people pose about the nature and ground of our rights, like: Why should public authority respect them? Why should we respect others' exercise of them, especially when it serves our interests to do otherwise? Answers to these questions must be based on publicly-accessible but not-merely-instrumental reasons. Answers that appeal to self-interest, emotion, or convention will obviously not suffice. Nor will appeals to authority, which after all simply invite the question: Why should we accept the authority?

Since the end of World War II, and especially since John Rawls brought out A Theory of Justice [Theory] in 1971, it has been commonly thought that only scholars working the liberal side of the street are on the trail of the Holy Grail. The chief distinguishing feature of this route has been the "neutrality" principle: public authority must remain "neutral" (i.e. agnostic) about what it is good for persons to be and to do. Scholars in the central preliberal tradition of moral and political reflection, it is often supposed, are fundamentally misguided, even if some are good conversation partners for liberals.

The year 1980 marked a mid-life crisis for liberalism. Besides Ronald Reagan's election to the Presidency, John Finnis published Natural Law and Natural Rights. In that watershed book, Finnis convincingly showed that liberal criticisms of the central preliberal tradition—that preliberalism was inhospitable to individual rights and ultimately depended on revelation or other truths inaccessible to reason—could effectively be met without adoption of liberal premises. Finnis articulated and defended a "perfectionist" approach to political morality and law. The approach was grounded in the new classical theory of practical reason pioneered by Germain Grisez.

In 1981, Alasdair MacIntyre punctured the "neutralist" pretensions of liberalism. MacIntyre's After Virtue1 showed that liberalism was as much a sectarian doctrine (i.e. non-neutral and partial) as the traditions it criticized as sectarian. The emergence and popularity later in the eighties of the "perfectionist" liberalism of Joseph Raz2 and William Galston3 reflected

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these developments. There was also mounting evidence that *Theory* rested upon loaded premises. *Theory*, in other words, begged the critical questions. Since, by this time, almost no one was prepared to argue that our liberal society was actually working very well, attending to the moral soundness of citizens re-emerged as a practical necessity for public authority. Which way to the Holy Grail?

What distinguishes liberalism from the central preliberal tradition, now that so many liberals have conceded the legitimacy of governmental concern for the character of citizens? Liberals characteristically adhere to some form of the "harm" principle: public authority may justly use coercion only to prevent harm to nonconsenting third parties. More specifically, the chief distinguishing feature of liberalism is its opposition to "morals law": legal interference up to and including (sometimes) prohibition of putatively "victimless" immoralities like sodomy, prostitution, fornication, recreational drug use, and suicide. Liberals characteristically claim that morals laws are, in principle, unjust.

Robert George in *Making Men Moral* subjects that claim to sustained critical analysis. George argues that morals laws are not excluded by any global principle of justice. His arguments do not rely upon religious (or any other kind) of authority, nor do they appeal to tradition, or to some contemporary consensus, or to a majority of Americans (or of the Harvard Law Faculty or of the New York Times Editorial Board). He aims to show that the distinguishing claim of liberalism is simply false.

The heart of *MMM* comprises chapter-length engagements with Ronald Dworkin, Jeremy Waldron, and Joseph Raz, as well as a chapter treating both David A.J. Richards and John Rawls. This is hardly liberalism's B-team. These men are, by every conceivable standard, the English-speaking world's leading liberal theorists. George tackles their full-orbed positions, instead of "liberal" amalgams which no one has actually defended.

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4 See infra Part VII.
5 ROBERT P. GEORGE, MAKING MEN MORAL (1993) [hereinafter MMM].
6 I shall hereafter leave aside George's (relatively) brief treatment of Richards. George's criticisms of Richards are straightforward and decisive.
7 George has taken on the entire array of leading, English-speaking liberals, save arguably for Robert Nozick and Richard Rorty. (There is a single passing reference to each in *MMM*.) But George effectively rebuts Rorty if he rebuts anyone at all. The central feature of Rorty's defense (so to speak) of liberalism is his antifoundationalist epistemology. In Rorty's view, moral knowledge really is impossible. What we call knowledge is rather a vagary of culture—a language game which happens to be going on here. If Rorty is right, then virtually nothing George says is of any value. But, if Rorty is right nothing Rorty, or anyone else, says about social theory is of any value. To the extent that Rawls' new "non-foundationalist" liberalism does not pick up Rorty's views (and I deal extensively with Rawls' recent ideas, infra), Rorty really is irrelevant. And, note well, George squarely confronts his own need to defend the possibility of objectively true moral judgments. That is one purpose of his exposition of the new classical theory of practical reason early in *MMM*.

It is harder to say whether *MMM* implicitly refutes Nozick's liberalism. Not because *MMM* is obscure. It is not. Nozick's present position is. Whatever Nozick's current view is, it is not the stringent liberal individualism, and "night watchman state" of *Anarchy, State and Utopia* (1974) [hereinafter ANARCHY]. Nozick now recognizes a great range of government expression of social solidarity. Beyond that, however, his present position lacks precision. Though no longer his considered view, the position defended in *Anarchy* remains interesting and likely retains adherents. That position is certainly inconsistent with morals law, though its "cash value" is more as an argument against redistributive economic policies than against legal prohibition of, say, sodomy. The great weakness of *Anarchy* has been admitted by Nozick and, in my view, warrants putting it
George examines just about every important argument to support the conclusion that morals laws, as such, are unjust. If George can show that these arguments fail to support that conclusion, then his book casts grave doubt upon the validity of liberalism's central distinguishing claim.

George's secondary aim in MMM is to sketch how the new classical theory, which George calls "pluralistic perfectionism," measures up to criteria like those I have identified with the Holy Grail. He takes us through the celebrated debate between Lord Patrick Devlin and H.L.A. Hart over morals laws and shows that Devlin's "conservative" defense of morals laws is quite unsound, though not for the reasons Hart supposed. In another chapter George identifies the most important defects in the thought of the tradition's two intellectual anchors, Aristotle and Aquinas, and shows how his own defense of the basic justice of (at least some) morals laws differs from the main line of the tradition. This defense includes a compact but highly readable and informative summary of the new classical theory of practical reason. The entire last chapter of MMM is a "pluralistic perfectionist" defense of our civil liberties, most notably including freedom of religion.

If George's project is successful—and I shall argue in the first half of this essay that it is—then MMM's importance is manifest: we would have sufficient reason to locate ourselves on the traditionalist trail to the Holy Grail. In the second half of this essay, I shall extend George's arguments to the two leading liberal critiques of morals laws published since he wrote: Rawls' *Political Liberalism* and Raz's article-length defense of the harm principle. My extension is rooted in the same new classical theory of practical reason that grounds MMM.

I

In 1957, a blue ribbon commission headed by Sir John Wolfenden recommended to the British Parliament that it decriminalize private homosexual behavior between consenting adults. The "Wolfenden Report" ignited the most celebrated jurisprudential debate of the twentieth century, which involved a series of scholarly exchanges between Oxford legal philosopher H.L.A. Hart and High Court Judge Patrick Devlin. The Report's specific proposal about sodomy rested upon a controversial and sweeping claim: "it is not the duty of the law to concern itself with immorality as such."9

Lord Devlin attacked head-on the commission's central argument that "there must remain a realm of private morality and immorality which is, in brief and crude terms, not the law's business."10 He maintained that "there can be no theoretical limits to legislation against immorality."11 Devlin shared the traditional belief that no functioning polity worth its name

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8 MMM, *supra* note 5, at 161. George acknowledges his own "massive" intellectual debt to Grisez in the Preface to MMM. *Id.* at xii.
9 *Id.* at 49 (quoting *Report of the Committee on Homosexual Offenses and Prostitution* (1957)).
10 *Id.* at 49 (quoting *Patrick Devlin, The Enforcement of Morals* (1965)).
11 *Id.*
could be just an aggregation of individuals sharing space. "For society is not something that is kept together physically; it is held by the invisible bonds of common thought." Devlin joined this descriptive claim to a normative moral claim: "society is justified, as a means of self-preservation, in enforcing its morality," whatever that morality happens to be.

Devlin's apparently conservative criticism of the Wolfenden Report was hardly traditional. In a speech subsequent to the Maccabaean lecture, Devlin attacked the traditional claim that law ought to inculcate virtue as "not acceptable to Anglo American thought. It . . . destroys freedom of conscience and is the paved road to tyranny." In fact, Devlin embraced a (limited) noncognitivism about ethics: basic moral truths, he maintained, are inaccessible to reason.

Without "theoretical limits," we can now appreciate, meant to Devlin that no particular type or category of act could ever be said to be "in principle" (a priori, or categorically) incapable of posing a threat to social cohesion. Any action (eating meat, eating fish, polygamy, monogamy) might subvert a moral commitment around which people have integrated themselves, thus constituting a society. Morals laws are justified, Devlin argued, to protect society against the disintegrating effects of actions which undermine a society's constitutive morality.

H.L.A. Hart, while saying little directly in favor of the Wolfenden Report's reasoning, attacked Devlin's position that, if the "no-theoretical-limit" claim is taken as either an empirical assertion or as a necessary truth, it is false. Societies routinely survive changes in the basic moral views of their members. It is absurd to suppose, Hart concluded, that when such a change occurs, we must say one society has disintegrated and been succeeded by another.

"[W]e can safely assume, however," Robert George cautions, "that by 'society' Devlin meant, above all, a state of affairs in which individuals identify their own interests with those of others to whom they understand and experience themselves as integrally related by virtue of common commitments and beliefs." If so, morals laws as Devlin understood them really do protect something of great value—that integral relatedness we call community or civic friendship. Thus, Devlin's position as George interprets it survives Hart's criticisms.

But it does not survive George's own criticisms. Against Devlin, George maintains that the genuine immorality of an act is a necessary (but not alone sufficient) condition for the legitimacy of its legal prohibition on moral grounds. George concedes that "social cohesion" is a valuable thing and that it may (partly) justify morals laws if the morality it enforces is true; reason to legally enforce a true moral obligation might well be the role it

12 MMM, supra note 5, at 63.
13 Id. at 74.
14 George points out that Devlin's defense of morals laws as essential for social cohesion strains the coherence of his argument: Is Devlin making a rationally defensible, global claim that "preservation of society outweighs every other good and therefore legitimately may be pursued at any cost?" Id. at 58 n.24.
15 Id. at 61.
16 Id. at 70.
plays in the shared life of a people. Devlin had rejected the traditional idea, now resurrected by George, that the immorality of acts is relevant to the legitimacy of their legal prohibition: for if legislators cannot reason about basic moral premises, they cannot make an authentic moral judgment that pornography, for example, truly harms the character of those persons who produce and use it. They will, in fact, be helpless to gainsay the voyeur’s assertion that his use of pornography is morally good. Devlin’s legislators would only be able to say that there is a majority sentiment in the community against pornography and that this fact of majority disapproval is sufficient to ground a morals law. Devlin’s legislators know a lot about political science, but they are agnostics about morals. Devlin may be a conservative, but he is no perfectionist.

So, too, is today’s (typical) judicial conservative. Read carefully the majority and concurring opinions in that rare constitutional victory for morals laws, Bowers v. Hardwick. You will find no straightforward assertion that homosexual sodomy is morally wrong. Nor will you find the Court imposing a requirement that morals laws (such as the Georgia statute therein upheld) be based on reasonable judgments regarding moral truth. There is scarcely evidence in the opinions that any of the majority Justices (again, those who voted to sustain the Georgia anti-sodomy law) thought that moral judgments are the kind of things that can be either true or false, reasonable or unreasonable. Devlin would have felt at home with the Bowers majority.

The closest any of the Bowers conservatives came to a simple statement that sodomy is immoral was Chief Justice Burger’s concurring observation that “[c]ondemnation of those practices is firmly rooted in Judeo-Christian moral and ethical standards.” But without putting too fine a spin on it, Burger’s expression is elliptical for a range of Devlinian claims, precisely because he does not flatly say that those “standards” are sound, true, etc. Burger might be explaining, for example, that Georgians support laws of this kind on the authority of the Bible, or that the fact of those traditional condemnations justifies the law. And so on.

Consider also the standard conservative criticism of liberal judicial activism: when liberal judges talk of “morality,” “justice,” and “right” and “wrong” they in fact utter nothing but their “personal preferences” and individual value judgments. What distinguishes contemporary conservative constitutionalism, it therefore seems, is affirmation of the people’s right to act on sentiment, authority, and on religious faith, unfettered by judicial preferences masquerading as constitutional law.

Liberal judges occupy the same analytical field. Judicial invalidations of morals laws typically cite the challenged law’s roots in religious doctrine or popular sentiment or cultural stereotypes as the constitutional defect in

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17 478 U.S. 186 (1986).
18 For what it is worth, my view is that none of the Bowers majority thought so. 478 U.S. at 196.
19 A close competitor is Justice White’s recognition that law is “constantly based on notions of morality.” Id. In context, however, this statement seems closer to Devlin than to George, for White is really concerned to affirm that “majority sentiments” are, contrary to assertions by counsel for Michael Hardwick, an adequate basis for law.
them. Dissenting Justice Blackmun, in *Bowers*: "[a] state can no more punish private behavior because of religious intolerance than it can punish such behavior because of racial animus."\(^{21}\) What distinguishes contemporary liberal constitutionalism from contemporary judicial conservatism seems to be solidarity with the lonely dissenter.

I am not saying that one should grab the liberal horn of the contemporary dilemma. But there is great rhetorical appeal, and some substantive reason, to side with the liberals. As long as conservatives cling to Devlin's defense of morals laws, such laws are highly problematic, if not unjust. What the friend of morals laws really needs is a better analytical framework.

Any improved framework would first expose how most judicial invalidations of morals laws rest upon a simple intellectual trick. When speaking of the judge's opinion that a law is unjust, that opinion is transparent for the reasons why the judge thinks it is unjust. But when legislators enact laws against sodomy or some other victimless immorality, their "feelings" or "opinions" or "sentiments" or "prejudices" or "biases" about the law are opaque. The fact of majority disapproval, or feelings of revulsion, are as far as we get into their "reasons." The "fact" of majority moral disapproval is no reason at all. Prejudice and sentiment are not reasons either, and legal classifications are basically unjust when there is no reason for them.

No one really thinks that someone's holding of a belief is a reason for action, apart from the reasons why that someone holds it. Laws prohibiting "victimless" sexual immoralities typically proceed from the conviction that the acts are truly wrong, that they really damage the characters of the persons who perform them, and that they block the path of those persons to virtue, and in specific ways offend against the common good.

Are there reasons behind beliefs like sodomy is wrong? Are there ultimate rational bases for moral judgments? The defenders of the preliberal tradition have thought so, and George describes how the new classical theory of practical reason supports the traditional conclusion. What reason(s), George asks in *MMM*, did Devlin adduce for the noncognitivism that takes such a toll on his argument? Devlin asserted "[no] moral code can claim any validity except by virtue of the religion on which it is based."\(^{22}\) And, according to Devlin, religious teachings indeed are based purely on faith, not reason. Morals laws as George understands and defends them are therefore a kind of religious establishment.

George picks out the obvious non sequitur in Devlin's argument: The fact that persons commonly affirm whatever moral norms they affirm as part of their religious practice, does not entail (even assuming for the moment that religion itself is noncognitive) that those norms cannot be rationally affirmed independently of religious authority. Stripped of this fallacy, George (rightly) concludes that Devlin's argument is gratuitous and begs the question.\(^{23}\)

George adds that Devlin's argument that morals laws destroy "freedom of conscience" contains at least one more fallacy: Devlin supposed that

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\(^{21}\) 478 U.S. at 211-12 (Blackmun, J., dissenting).

\(^{22}\) MMM, *supra* note 5, at 80.

\(^{23}\) Id. at 81.
morals laws coerce belief, not just conduct. George points out that the tradition endorses laws that prohibit people from performing certain immoral acts; it does not support laws that forbid people from believing certain illegal acts are in fact moral. In this respect, morals laws are like other laws; murder laws do not prohibit Horace from believing that Jethro should be killed, they merely prohibit Horace from actually killing Jethro. Devlin’s “freedom of conscience” argument is thus an argument against all laws. But, if so, Devlin’s whole case has collapsed into incoherence. Devlin is hardly an anarchist. He is trying to show that there is something peculiarly wrong with enforcing morality on grounds of its truth.

II

George unequivocally endorses the “perfectionism” of the central pre-liberal tradition (even as he critically reshapes some aspects of it): “sound politics and good law are concerned with helping people to lead morally upright and valuable lives . . . .” According to the tradition, “a good political society may justly bring to bear the coercive power of public authority to provide people with some protection from the corrupting influence of vice.” Although George stands basically within the tradition, he is on no nostalgia trip. He concedes that liberalism has been justly critical of some important parts of the teachings of the tradition’s two pillars, Aristotle and Aquinas. To better appreciate George’s own defense of morals laws, we need to consider those objections.

Aristotle’s cardinal error was his monistic perfectionism. According to the philosopher, there is one supremely valuable form of life that is the standard for everyone. The practically inevitable (if not logically necessary) consequence of Aristotle’s monism was the feature of his thought that is most jarring to modern ears: natural slaves. Aristotle mistakenly thought that a person’s apparent failure, for whatever reason, to live up to the contemplative ideal was an imperfection which meant that that person was justly treated by public authority as an inferior. The wise legislator, Aristotle held, strives to ascertain a proper place for the inferior person.

George’s diagnosis of the deep mistake here justifies lengthy quotation because it introduces what George means by “pluralistic perfection.” Aristotle, George writes,

plainly failed to allow room in his ethical and political theory for the diversity of irreducible human goods which, considered as providing basic reasons for action and options for choice, are the bases for a vast range of valuable, but mutually incompatible, choices, commitments, and plans and ways of life. And he lacked anything like a good argument for his view that there must be a single superior way of life, or a uniquely highest life for those capable of it; nor did he provide anything approaching a plausible theory of where those not capable of what he believed to be the highest life fit into a society that treats that way of life as the best.

24 Id. at 75.
25 Id.
26 Id. at 20.
Moreover, people are fulfilled in part by deliberating and choosing for themselves a pattern of their own. Practical reasoning is not merely a human capacity; it is itself a fundamental aspect of human well-being and fulfillment: a basic dimension of the human good consists precisely in bringing reason to bear in deliberating and choosing among competing valuable possibilities, commitments, and ways of life.

Working from an implausibly limited and hierarchical view of human good, Aristotle failed to perceive that persons, as loci of human goods and of rational capacity for self-determination by free choices, are equal in dignity, however unequal they are in ability, intelligence, and other gifts: hence his elitism, not to mention his notorious doctrine of “natural slaves.”

Aquinas rejected Aristotle’s elitism—as any convinced Christian would have to—but he assimilated something from the philosopher that George identifies as a grave defect in Thomistic political thought: the notion of society as a “body politic,” as some organic whole of which persons were (mere) members or parts. So, Thomas likened the execution of a criminal to a “body” simply excising a “diseased member.” Thomas’s deeply corporatist view of society obscured the moral truth that public authority must act (only) for the common good, and the common good is nothing but the basic goods (including life) of all persons in the society.

The central defect in Aquinas’s brand of perfectionism was, George persuasively argues, Aquinas’s commitment to legislating faith. “Aquinas makes the first principle of politics a matter of religious belief.” This view assumes the propriety of legislating morals “precisely in so far as they are accepted on religious authority and are the means to an end (i.e. heavenly beatitude) that religious faith puts forward but reason by itself cannot identify.”

Now, Aquinas recognized (as any convinced Christian would have to) that religious conversion is, by nature, voluntary. “Conversion” simply means accepting certain propositions about God and His communion with persons as true. You can force another to say that they believe propositions to be true, but it is simply impossible to force someone to actually believe they are. Aquinas saw all this, and thus understood that it was useless, from a religious point of view, to try to compel persons to embrace a faith in which they do not believe. He thought that unless one believed the truths of the Faith, one was morally obliged to remain outside the Church. Aquinas also believed that public authority might legitimately punish heresy and apostasy, on the grounds that the heretic and apostate reneged on commitments once voluntarily made.

The value of adherence to a religion, George emphasizes in his last chapter, depends upon the same voluntariness upon which the value of conversion depends. The good of religion cannot be realized at all except

27 Id. at 38-39.
28 Id. at 41.
29 Id.
through free choice. "Communion with God . . . is not communion . . . unless it is the fruit of a choice to enter into a relationship of friendship, mutuality, and reciprocity."30 "Any attempt by government to coerce . . . even true religious faith and practice, will be futile, at best, and is likely to impair people's participation in the good of religion."31

Aquinas's willingness to legislate faith led him to a practical intolerance. Although his view seems to have been that the rites of Jews and "infidels" might, under certain circumstances, be tolerated by public authority, such persons enjoyed no right to religious liberty. Underwriting these convictions was Aquinas's apparent belief that non-Christian religious rites possessed no value at all. This position is mistaken, even if one agrees with Aquinas that the fullness of the truth about God is found in the Roman Catholic Church.32 For, considered precisely as a human good and, therefore, part of society's common good, everyone's sincere worship (as well as other acts to establish communion with a greater than human source of meaning and value) provides a reason not only for that person's action, but for the government to protect that person's exercise of religion within the limits of its legitimate concern for public health, safety, and morals.

George holds that religion is only genuine if "it represents a free self-giving."33 Religious liberty may thus be securely grounded in the nature of religion, and not in contingent claims about potential divisiveness, lack of societal consensus, or the practical dangers of deputizing the state as arbitrator of theological claims. This "nature of religion" ground is not itself a religious doctrine, theological tenet, or sectarian dogma. It is a philosophical claim which has most to do with basic goods and how they function as reasons for action. Simply put, religious liberty is a moral philosophical claim, offered as true.

This basis for religious liberty is immune to theological objections that the liberated faiths are false. As the Second Vatican Council put it (in a passage which George endorses), those "acts whereby men, in private and in public and out of a sense of personal conviction, direct their lives to God transcend by their very nature the order of terrestrial and temporal affairs . . . . [I]t would clearly transgress the limits set to [the government's] power, were it to presume to command or inhibit acts that are religious."34

George does not suppose that his defense of religious liberty—fundamentally grounded in the recognition of religion as a reflexive good which simply is not served by coercion—is either uncontroversial or neutral. In a passage that repays reflection, he writes:

Of course, not every religious believer will be in a position to affirm my view. People who believe, as a matter of revelation, that no participation in the good of religion, considered as a natural human good, has any real value unless it is formally within the context of divinely ordained religious

30 Id. at 221.
31 Id. at 220.
32 Dignitatis Humanae, the Vatican II statement on religious liberty, affirms that right for everyone; the new catechism explicitly teaches that Catholics should affirm all that is good and holy in other religions (§§ 889-89).
33 MMM, supra note 5, at 221.
34 Dignitatis Humanae § 3.
institutions or in line with true religious teachings, will reject my view on theological grounds. And people who believe that God has revealed that religious coercion is morally permissible (or even required) will suppose that my defense of religious liberty is utterly mistaken. Many religious believers, however, including many who reject subjectivism, relativism, and radical individualism, deny that God has revealed that imperfect participation in the good of religion is valueless or that religious coercion is authorized. Their view comports well with practical reason's identification of religion as a human good, an aspect of human flourishing, that can be realized only in interior acts that cannot be coerced.\[55\]

III

The arguments, criticisms, and positions so far explored in this essay imply no more than that some morals laws may justly be enacted. Nowhere in MMM does Robert George defend the conclusion that any specific morals laws should be enacted. Though it is clear that he would support some, speculation about which morals law George would endorse contributes nothing to one's understanding of the book. MMM is simply not about answering questions like whether, all things considered, prostitution or sodomy or recreational drug use ought to be prohibited in our society. MMM is about how to think about such questions. For all its criticism of liberalism, MMM is not conservative in any programmatic or popular sense. Rush Limbaugh will not be quoting from it over the airwaves or in the Limbaugh Letter.

How should we think about passing this or that morals law? First, and necessarily, the subject matter must be truly immoral. Yet, in no sense whatsoever may legislators deduce from the genuine immorality of an act the conclusion that the act should be legally prohibited. Deduction is unwarranted not because of some autonomous morality governing public action or because of pluralism or fear of state power but because of the nature of morality itself.

A regulating insight of the preliberal tradition has been, in George's words, that law cannot "in any direct sense" make men moral. "Laws can [only] compel outward behavior, not internal acts of will."\[56\] Morality, George writes, is "a matter of rectitude in choosing: one becomes morally good precisely, and only, by doing the right thing for the right reason."\[57\] Since prohibitory laws compel behavior by threat of punishment, compliance with them does not make anyone moral, even if the practical effect is to stop one from performing some immoral act. Public authority can compel people to pay medicaid taxes, but public authority cannot and does not make taxpayers charitable. One who refuses a prostitute's beckonings solely for fear that she is an undercover policewoman is hardly chaste, even if one avoids a particular unchaste act. The familiar maxim that "you can't legislate morality" is, in a very important way, true.

35 MMM, supra note 5, at 223.
36 Id. at 44.
37 Id. at 25.
What good purpose—if any—do morals laws serve? George argues that they have a "legitimate subsidiary" role to play in helping people to "make themselves" moral. He maintains that laws forbidding certain powerfully seductive and corrupting vices (some sexual, some not) can help people to establish and preserve a virtuous character by (1) preventing the further self-corruption which follows from acting out a choice to indulge in immoral conduct; (2) preventing the bad example by which others are induced to emulate such behavior; (3) helping to preserve the moral ecology in which people make their morally self-constituting choices; and (4) educating people about moral right and wrong.

What is the sense of (1)? George approvingly mines from Aristotle the idea that by providing a subrational motive—fear of punishment—for not choosing an evil, the law may over time settle one down through habituation to upright living. Once settled down, one will be able to exercise choice reflectively.38

What about (2), (3), and (4)? Though constituted by human choices, a society's "moral ecology" (comprised of (2), (3), and (4)) presents itself to individuals largely as an objective force which shapes their choices. Laws by themselves cannot establish and maintain a healthy moral ecology. But laws can shape that environment by declaring certain forms of vice to be illicit, by its educative effect, and by reinforcing the teachings of parents, teachers and religious leaders. Refer not to the criminal law for possible illustrations, but rather to the extensive recent public campaigns to combat drug use among children, against drinking and driving, or (more and more) against cigarettes. The point is, "a good moral ecology benefits people by encouraging and supporting their efforts to be good, a bad moral ecology harms people by offering them opportunities and inducements to do things that are wicked."39 Public authority is going to influence our moral character. It should, therefore, do so for with a view to promoting people's genuine moral good.

Someone might object: we do not agree on what constitutes the genuine good of people. It would be nice if the state inculcated virtue. But "our pluralism" cautions against trusting public authority to know what is right. Besides, law is a blunt instrument, hardly adequate for moral education. Better to steer a neutral course among diverse, extant conceptions of the good than to enforce any particular conception.

This objection wisely counsels caution before enacting a morals law, a kind of Philosopher General's warning on the wrapping of state power. Do these (sound) counsels add up to a conclusion that morals laws are, as such, unjust?

No. "Our pluralism" cannot eliminate the inevitable single-mindedness of at least some leading legal institutions. Thoroughgoing neutrality really is impossible. Because people can only choose what is available to their consciences as a choice. In the limiting case, the true nature of marriage, for example, may be almost entirely obscured by unsound mores and laws in some societies. Given the prevailing attitudes towards women in

38 Id. at 26.
39 Id. at 45.
classical Athens, for instance, it is hard to imagine that marriage, understood as freely given commitment to a lifetime of cooperation and friendship, was available to Athenians.

As George writes:

The option of "having only one spouse" may, of course, be available in a society that does not recognize monogamy or support it through the public's attitude and the society's formal institutions; but the social meaning of "having only one spouse," in these circumstances, will be nothing like the social meaning of marriage in a society which makes a commitment to monogamy. As [Joseph] Raz astutely observes in explaining the symbolic significance of certain actions:

The very relationship between spouses depends . . . on the existence of social conventions. These conventions are constitutive of the relationship. They determine its typical contours. They do this partly by assigning symbolic meaning to certain modes of behaviour.

Furthermore, the unique choice-worthiness of monogamous marriage will be obscured to individuals by society's failure to recognize and support it, though, to the extent that religious or other subcultures which are committed to monogamy flourish, they may help their members to appreciate [sic] the unique value of monogamous marriage despite the failure of the larger society to recognize and support it. 40

George articulates some other brakes upon the drive to legislate morality. Criminal laws should be tailored to the moral character of the people as it is, lest we bear the consequences of imposing burdens that they simply cannot bear. The questions arise: What can the people bear? What is their moral condition? Here is a place to consider and gauge the precise import of "our pluralism" to the question of passing this or that morals law. Toleration of immoral conduct is often the better public policy, depending on considerations including the needs to limit governmental power; to discourage underworld cartels and secondary crimes against innocent parties (just think of how our current drug laws affect rates of burglary, robbery, and other property crimes); and to husband scarce governmental resources, so that the limited capacity of public authority to detect and prosecute crimes is not misdirected towards petty offenses. 41

Another prudential consideration concerns the possibility that puritanical elements in power will suppress valuable activities. Too much morals legislation may well engender a kind of servile attitude among citizen-subjects, at the expense of opportunities to build genuine friendships and valuable communal bonds. George notes that wise legislators, committed to discouraging vice, must strive to create an environment "inhospitable . . . to the vices of moral infantilism, conformism, servility, mindless obedience to authority, and hypocrisy." 42 The most sobering counsel may be that those holding political power might enforce a defective under-

40 Id. at 165.
41 Id. at 42.
42 Id. at 43.
standing of morality. Miscegenation laws are one example. They are unjust because of the racist conceptions animating them, not because they are attempts to enforce morality. Finally, and perhaps most salient, George fully recognizes that the impact upon valuable activities of enforcing a ban upon closely related upright moral actions might well do more harm than good. George offers an example in his concluding chapter, where he sketches a pluralistic perfectionist defense of some familiar civil liberties: no one need carry a brief for defamatory lying to recognize the value of wide legal protection for speech, even that including an immunity for just such statements.

I offer another, more detailed, example, an interpretation of Griswold v. Connecticut which supports the Court’s invalidation of that state’s anti-contraceptive law while presupposing that contraception is always wrong. Assume that the proposition that contraception is always morally wrong can be validated by reason. Assume further that a majority of the Supreme Court believed there was no right to use contraceptives, even for married couples, because contraception is intrinsically immoral, and there cannot be a right to do a moral wrong. In fact, the Griswold opinions do not articulate a right to use contraceptives, even within marriage. Justices White and Goldberg came closest to saying as much, but still stopped short. The center of gravity of the opinions was something quite distinct from contraception. Marital privacy, comprised of the confidentiality which marital friendship requires for its enjoyment, joined to spatial privacy in one’s home, was the core of all the Griswold opinions. The opinion of the Court, for instance, refers to the “intimate relation of husband and wife”; the privacy surrounding that relationship; and, finally, (note well, would-be neutralists) a particular definition of marriage: “a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred.” Griswold is about marriage, not contraception. Its major premises are not everyone’s understanding of marriage, but it is an understanding of marriage offered as sound, true, valid.

The Court did not articulate a right to contracept. Is such a right, even if implicit, necessary to the holding? No. As the Justices repeatedly indicated, that there are many goods of marital intimacy (including non-contraceptive sexual intimacy) which are damaged by exposure to others. These goods are particularly damaged by involuntary exposures to public authority. Suppose further, as the Justices seem to have, that a criminal prohibition upon contraceptive use would damage those genuine goods of marriage as well as, perhaps, marginally discourage contraception (which we suppose to be, considered just in itself, something we want to discourage). A responsible but firmly anti-contraceptive public official might well conclude that, all things considered, a ban would do more harm than good.

43 381 U.S. 479 (1965).
44 Id.
45 Id. at 485-86.
46 Id. at 486.
This interpretation of Griswold makes more sense of the rhetoric of "marital privacy," of the opinions' grave concern for the baneful side effects of police enforcement efforts, and the intense focus of some Griswold Justices upon the sanctity of the marital bedroom.

Consider another example of how a foreseeable detrimental impact upon upright action may warrant an effective legal protection for actions that are, in themselves, wrong. Consider an example, in other words, of how perfectionism is comparable to, if not the best available argument for some familiar civil liberties: the "right to die" and the Supreme Court's treatment of it in Cruzan.47 Cruzan recognized some constitutional right to refuse life-sustaining artificial nutrition and hydration. Did Cruzan thereby recognize a right to assisted suicide? One federal district court recently opined that it did. But Judge Rothstein's opinion in Compassion in Dying48 founders on precisely her failure to analyze Cruzan in the subtle terms made available by Robert George's discussion of morals laws.

Though the Cruzan Court did not literally say as much, its holding in favor of a right to refuse treatment is certainly compatible with the following premise: suicide is always wrong, and ought to be legally prohibited. The Justices seem to have recognized that some persons exercising the Cruzan right might actually be choosing death. Some might be, in other words, suicides. But most would only be accepting death as a side effect of a choice to give up expensive, possibly useless treatment. Their use of the Cruzan right, coupled with the law's inability to draw enforceable bright lines for what is, after all, the silent operation of the mind, defeat, the Court might have concluded, the reason for a prohibitive policy is supplied by the wrongness of suicide.

Judge Rothstein dealt, by definition, only with persons who had chosen to kill themselves. A question truly analogous to Cruzan would have been presented if a potent analgesic, with many beneficial uses, was entirely banned because of its likely abuse by an unspecifiable but small number of suicides (and their doctors). That was not Rothstein's question.

Rothstein concluded that there was no constitutional distinction to be made between Cruzan and Compassion. She treated all choices which actually result in death as suicides. Since Washington law (which allowed for refusal of life-sustaining treatment) permitted some terminally ill patients to hasten inevitable death, all have a right to do so. Precisely the distinction between the chosen and intended object of an act which principally defines it for moral evaluative purposes, and foreseeable side effects, was lost. With it goes the possibility of adequately dealing with the complex of considerations that answer the question: should public authority enact this or that morals law.49

49 The Ninth Circuit's opinion, which affirmed Judge Rothstein's decision, also treated all acts which foreseeably result in death as suicides.
IV

Do the Griswold and Cruzan examples amount to saying that there is a moral right to do a moral wrong? Is that, in any event, a better (stronger, clearer, indubitable) way of expressing and defending the results of cases like Griswold?

George takes up the affirmative case of Jeremy Waldron. According to George, in "an exceptionally elegant" 1981 essay, Waldron argues that "anyone who correctly understands the function of moral rights as protecting individual choice in humanly important areas of decision must acknowledge that 'wrong actions as well as right actions can be the subject of moral rights.'" Waldron certainly has hold of the popular pulse. Many people today, including some who hold that abortion is objectively a grave injustice, embrace Mario Cuomo's view that pregnant women nevertheless have a moral right to have an abortion. Contemporary defenders of this type of claim, notably including Waldron, do not restrict its application to "victimless immoralities," though leading examples would undoubtedly be drawn from that class of actions. Waldron includes as examples, though, callous refusal to share one's excess wealth with the destitute, joining a racist political organization, and deliberately confusing a simple-minded voter to influence his vote.

We can see from the Griswold and Cruzan examples that there can be a legally protected liberty to do actions that are morally wrong. We can see that one can consistently hold the following: P's doing A is morally wrong; it is morally wrong for Q to interfere with P's doing A. Thus, there can be a sound argument for a "moral immunity," so to speak, for immoral acts. Waldron, therefore, is not logically compelled to say that "P has a moral right to do A" in order to effectively liberate P from legal interference. He may, with George, say that P has a legal right to do A, and that others (who correctly conclude that A is immoral) have good moral reason not to interfere with P's doing A. The virtue of this formulation is that it allows others (like Q) to affirm P freedom to do A without having to affirm that A has a moral value which, in truth, it does not have. That is, moral objectivists may concede all that P would like to do, so long as the concession is under some description other than, simply, A. This formulation helps people of diverse moral views live together.

Are there still good reasons for preferring Waldron's statement? Does Waldron's version more effectively justify (or protect or clarify) civil liberties? Two concerns prompt Waldron to think so. One is his fear that if "rights" are limited "to actions that are morally permissible, we would impoverish the content of our theory of rights."

The decision to begin shaving on chin rather than cheek, the choice between strawberry and banana ice cream, the actions of dressing for dinner and avoiding the cracks on the side walk—these would be the sorts of actions left over for the morality of rights to concern ourselves with.

50 MMM, supra note 5, at 113-14 (emphasis added).
51 Id. at 114 (quoting Jeremy Waldron, A Right to Do Wrong, 92 ETHICS 21 (1981)).
52 Id. at 126 (quoting Jeremy Waldron, A Right to Do Wrong, 92 ETHICS 21 (1981)).
In other words, if rights were confined to actions that were morally indifferent, actions on which the rest of morality had nothing to say, then rights would lose the link with the importance of certain individual decisions which, as we have seen, is crucial in their defense.53

The dispositive response is that this is a false view of morality. It supposes that morality is an exhaustive code or a straightjacket several sizes too small. Waldron has mistaken “morally permissible” for “morally indifferent.” He uses examples of actions that have no moral significance at all, as if “moral significance” equalled “one right answer for everybody.” Lots of important self-constituting decisions leave people free to select from a wide range of worthwhile options: where to go to school; choice of employment or profession; whether to get married, and (if so) to whom; how many children to have; what religion to embrace, etc. One may effectively exercise one’s capacity for practical deliberation and self-determination in all these (and many other) important matters without bringing into view immoral options. The truth is, as George points out, one frequently has reason to perform two or more mutually exclusive actions but lacks a conclusive reason to do either. In such situations, there is an opportunity for creative free choice.

Waldron offers a variant of the preceding argument that runs something like this. There is special reason not to interfere in certain types of self-determining moral decisions because of the centrality of those types of decisions to personal identity. Some types of choices are so important to identity or character that, as I understand Waldron, the government’s duty not to interfere assumes an unusual, maybe unsurpassed, significance. One might say that the mere possibility of coercion justifies special concern for freedom. If autonomy means anything, Waldron seems to be saying, it means that such choices must be entirely one’s own.54

Waldron is here defending something very much like the contemporary judicial privacy project, consummated in the following passage from Casey: “These matters, [abortion, child rearing, marriage, etc.] involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment.”55 May public authority assist us in making worthwhile decisions about these matters? May the law, in other words, rule out some truly worthless options? No. “At the heart of liberty is the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood they formed under the compulsion of the State.”56

The Casey “mystery” passage, however attractive it may seem to some as a rhetorical weapon in the fight against abortion regulation, has a nasty undertow. If taken in anything approaching literalness, it is surely false. People simply are not existentially capable of setting up their own worlds.

53 Id. at 126.
54 Id. at 122-23 (quoting Jeremy Waldron, A Right to Do Wrong, 92 ETHICS 21 (1981)).
56 Id.
Besides, if there is any validity to the new classical theory of practical reason then there is no escaping from a structure of principles governing all deliberation about what to do. The *Casey* mystery passage (and Waldron, in this interpretation of his argument) stays aloft only by obscuring inescapable truths about practical reason from the practical reasoner. Persons simply would not know what they are doing.

Waldron seems to want an argument against morals laws that is not caught up in contingencies like those Robert George thinks are pertinent. Waldron seems to want to make autonomy a trump over such prudential considerations. Unlike the *Casey* Court, Waldron (the political theorist) cannot rely upon appeals to authority. He has to rationally vindicate his "trump's" status as trump. Waldron does not deny, though, that options he wishes to protect against legal interference include some that are, in moral truth, worthless. Waldron may be saying that autonomy is itself a "good" in such a way that, at least sometimes, it can offset the "badness" of the object of the choice. But on this supposition, the problem disappears. As I understand it, we would then be asking whether there is a moral right to perform an action that is, all things considered, morally upright. Indeed, there is, just as there might still be no moral right to do a moral wrong, and that is the proposition Waldron set out to defend.

V

The strain of liberalism embraced by the Supreme Court, prescribed by the ACLU, and taught by orthodox political theorists is the anti-perfectionism of (prototypically) John Rawls. Perfectionists of every stripe deny one of the defining features of Rawlsianism. Perfectionists deny that government can be agnostic about the good. Perfectionists hold that this neutrality is, in fact, illusory. But perfectionists are not perfectionists only by default: they also hold that government ought to promote and foster genuine human flourishing.

Robert George opines that the criticisms of Rawls by the leading perfectionist liberal of our time—Joseph Raz—have been "overwhelmingly successful."57 Raz's master work, *The Morality of Freedom*, is largely (though hardly entirely) consonant with the central preliberal tradition, especially as George critically appropriates that tradition. How so? Raz places great value on "autonomy." One must, he says, "author" one's own life. Raz does not mean by "autonomy," however, that persons might determine what is good and what is evil. For him, the moral ideal of autonomy requires only the availability of morally acceptable options; someone (like him) who believes in the value of autonomy may nevertheless reasonably oppose the extension of greater choice into areas of life where choice may be harmful. "The widespread use of contraception, abortion, adoption, *in vitro* fertilization and similar measures has increased choice but also affected the relations between parents and their children."58

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57 MMM, *supra* note 5, at 163.
58 *Id.* at 172, n.31 (quoting JOSEPH RAZ, *THE MORALITY OF FREEDOM* 410 (1986)).
[But] it would be a mistake to think that those who believe, as I do, in the value of personal autonomy necessarily desire the extension of personal choice in all relationships and pursuits. They may consistently with their belief in personal autonomy wish to see an end to this process, or even its reversal.\(^5\)

Raz is a perfectionist: “it is the goal of all political action to enable individuals to pursue valid conceptions of the good and to discourage evil or empty ones.”\(^6\)

Raz is a pluralistic “perfectionist”: There is a plurality of irreducible, distinct basic goods. Hence, there is a wide variety of worthwhile but incompatible life plans, choices, and commitments. This, for George and for Raz, is the fundamental moral fact that leads to a perfectionist basis for civil liberties.\(^6\)

What, then, distinguishes Raz’s view from George’s? Raz adheres to a (modified) harm principle which excludes morals laws. As George puts it, Raz “excludes in principle the legal prohibition of ‘victimless’ immoralities as insufficiently respectful of the value of autonomy.”\(^6\)

The moral ideal of “autonomy,” according to Raz, provides reason enough to conclude that using coercive means to enforce true moral obligations is, in principle, unjust. The heart of George’s chapter on Raz is his clarification of Raz’s apparently puzzling position, and George’s criticism of it.

What is “autonomy,” as Raz understands it? George writes that, by “autonomy,” Raz seems to mean “the effective freedom (from internal compul-

\(^5\)Id.
\(^6\)Id. at 170 (quoting JOSEPH RAz, THE Morality OF Freedom 133 (1986)).

Raz is also no consequentialist. His “incommensurability” critique of consequentialism’s pivotal claim that basic human goods can be aggregated and measured according to some common metric is, in my view, definitive. (See Chapter 13 of The Morality of Freedom). The incoherence on the “commensurability” thesis defeats Ronald Dworkin’s familiar argument for “rights” as “trumps” over “collective interests.” As George demonstrates, what Dworkin calls “collective interests” are really “concrete aspects of the well-being of individual members of the collectivity” (MMM at 90). George writes:

[L]egislatures are not properly designed or understood as institutions devoted to advancing aggregate good, constrained by courts empowered to protect individual rights. Rather, legislative responsibility for preserving and advancing the common good includes an obligation to honor and protect moral rights. Courts—even those which do not enjoy the power of judicial review of legislation—share this obligation, albeit in a more or less circumscribed way. But it is certainly not a peculiarly (or even primarily) judicial obligation.

This natural law theory of individual rights and collective interests has the advantage over anti-perfectionist liberalism of providing a rational account of the moral foundation of rights by understanding them as implications of intrinsic human goods and basic moral principles which rationally guide and structure human choosing in respect of such goods. Its thoroughgoing rejection of aggregative conceptions of collective interests makes it possible, moreover, to understand moral rights not as constraints on the pursuit of such interests, but as constitutive aspects of the common good.

\(^6\)Id. at 170.

George also provides cogent criticism of Dworkin’s most recent work in basic moral theory, work which suggests that Dworkin has converted to perfectionist liberalism. That is, Dworkin has tried to produce a coherent account of the foundations of ethics so that liberal political morality (the “harm” and (a modified) “neutrality” principles) is consonant with what might be called personal morality. I agree with George that, while provocative, Dworkin’s work is still incomplete and, in important respects, deeply flawed. Id. at 102-09.
sions and neurotic impediments as well as from external constraints) to bring reason to bear in making self-constituting choices . . . .” Now, there is something apparently valuable in autonomy, just by itself. Something really is more perfect about the realization of goods when they are realized “autonomously,” that is, through one’s own unfettered deliberation and choice. The non-autonomous person (one who is delusional or emotionally out of control) cannot realize certain goods. But, is autonomy a value that defeats the case for morals laws?

According to George, it is not. George’s argument begins by locating a logical difficulty in Raz’s position. Raz holds both that autonomy is intrinsically valuable, and that nothing of value is realized in autonomous immoral choices. But every choice (including immoral ones) realizes the putative intrinsic good of autonomy. If autonomy is a genuine (and not just putative) moral value, then something of moral value, namely, autonomy, is realized even in the most egregiously immoral acts. Thus, it cannot be the case that autonomy is intrinsically valuable and that nothing of value is realized in autonomous immoral choice.

George recommends that Raz adopt the view that autonomy is not, despite appearances to the contrary, an intrinsic good. Autonomy is not a reason for action. Autonomy enables one to make the sort of choices in which one can realize other human goods. Autonomy is neutral: the autonomy exercised in an immoral choice is bad; the autonomy exercised in an upright choice is good.

George develops an alternative interpretation of Raz’s position. Raz holds that coercion for the sake of preventing “victimless immoralities” is, in principle, wrong. Punishing morals law offenders is therefore morally wrong. How so? Raz argues, correctly, that a “victimless immorality” is, by definition, not an injustice, for justice refers to right relations between persons. If there is no “victim,” no interpersonal duty has been breached. Thus, Raz continues, we cannot “punish” the morals offender for violating the order of retributive justice. Violation of that order is, according to the tradition George defends, a sine qua non of licit punishment.

The premises so far adduced are sound, and Raz draws the correct conclusion from them. But he leaves out one premise which alters the conclusion. George supplies it. Once a piece of morals legislation is in place the morals offender acts wrongly in two ways: one is the immoral (and possibly unjust) act itself, the other is the unfair (and therefore unjust) act of seizing more than one’s fair share of liberty. This (latter) act disturbs the order of retributive justice. Law-abiding folks have, by following the law, given up (in the interests of fair cooperation for the common good) just that portion of their liberty to which the morals offender helps

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63 Id. at 177.
64 Id. at 176-77.
65 Id. at 182.
66 Id. at 175.
67 Id. at 176.
68 Id. at 182-87.
himself. Punishment to restore the order of retributive justice so disturbed is, at least in principle, morally legitimate.69

It seems to me that Raz may also have in mind an objection to morals law as, in no recondite or technical sense, pointless intermeddling, coercion to no good end. Melding his various concerns together, Raz may view the introduction of a subrational fear of detection and punishment into the offender’s field of practical considerations as producing no moral good to offset or defeat the good reasons not to pass the law. While morals laws cannot simply make one moral (because one may conform one’s conduct to the morally upright standard not for the right reasons but to avoid imposition of punishment), it does not follow, as Raz seems to think it does, that morals laws are valueless even from the putative offender’s point of view. George notes the law’s possible educative effect and prevention of further self-corruption in the sense (which Raz ought to appreciate) of acquiring a habit of behaving in an upright manner, and of settling down the individual generally. As I said, morals laws may not make this fellow moral, but it may well do him some good.

The decisive criticism of this interpretation of Raz’s case against morals laws is that he altogether neglects considerations collectively, “moral ecology” which constitute the weightier reasons for morals laws. If the only effect of a morals law that mattered was (as Raz’s position implies) the moral character of the target (e.g., the prostitute, pimp, john, or recreational drug user) then the case for any particular morals law might well be weak. But there are other effects.

Someone might object: balancing the (alleged) futility of “direct paternalism” against “moral ecology” (understood, in part, as a moral norm shared by many in society but not by the morals offender) treats, say, the prostitute, as a mere means to society’s ends. And that, the objector concludes, is just plain wrong.

It is untrue that the prostitute is treated, in any important sense, as “means” to an “end.” The objector would have to grant that performing the immoral act (a prostitute turning tricks), harms the character of the offender. (If not, if prostitution is not truly immoral, then no morals law prohibiting it would be just.) We must suppose that legislators are aiming at his or her genuine good, as well as the genuine good of others affected by the law against prostitution. (That is to say, legislators may act partly upon prejudice or stereotypes, but the decisive question is whether the law can be rationally vindicated.) We also must suppose that the act of prostitution affects the common good. (If not, if one is persuaded that prostitution is a “private” immoral act and that it is not within the purview of public authority charged to care for the common good, then that is the decisive objection: the morals laws violates just limits upon government.) On these suppositions, which the objector would have to grant, when the prostitute complies with the law, he or she effectively acts for the genuine common good, just as everybody else complying with the law does, in that everyone who conforms his or her conduct to the law cooperates for the good of the

69 Id. at 186.
community. The prostitute has good moral reason—the requirements of the common good, authoritatively specified—to comply with the law.

Raz advances more explicitly an illicit means argument: morals laws express "an attitude of disrespect for the coerced individual." While this could be the case, it need not be. As John Finnis has argued, legislative prohibition of immoral conduct may manifest instead a profound sense of solidarity and appreciation of the equal worth and human dignity. Morals laws may engender a feeling of unequal respect or of second-class citizenship. But that feeling is not decisive.

Where demeaning, degrading, or destructive self-regarding conduct is involved, there certainly need be nothing inegalitarian in legislative action aimed at preventing it. Such legislative action certainly (but not arbitrarily) prefers some types of conduct over others; but it just as certainly need reflect no preference of one person (or class of persons) over another. It condemns some conduct as unworthy of persons; but it need condemn no human being as less worthy than any other.

VI

At a September 1992 meeting of the American Public Philosophy Institute Joseph Raz delivered a paper titled *Liberty and Trust*. It is a spirited argument for the basic injustice of morals laws, particularly (it is Raz's only example) laws which convey a morally unfavorable view of homosexual conduct.

Raz's paper works a Copernican revolution in familiar arguments against morals laws. George's response (quoted just above) holds that the reasoning of legislators, and what that reasoning entails, does not support the claim that morals laws are unjust. Legislators enacting morals laws do not treat some persons as second class citizens. Some persons affected by the law, George allows, may feel otherwise. Some may feel like second-class citizens, if for no other reason than that they will not appreciate the distinctions in the preceding paragraph. Raz now makes this feeling of second-class citizenship, so long as it is "reasonable," the center of gravity of his criticism of morals laws.

The defender of morals laws' basic justice cannot gainsay the factual premise—some active homosexuals feel that legislators treat them as inferiors in dignity. (Whether their feelings are "reasonable," and what it might actually mean, are questions I consider below).

Raz gives genuinely good reasons why legislators ought to care about feelings of second-class citizenship:

In any well ordered political community, that is one which is stable and which has a fair prospect of continued existence, citizenship is enjoyed by

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71 MMM, *supra* note 5, at 96-97.
72 MMM was already in production at Oxford University Press when Raz presented his new argument. A copy of Raz's paper is in the author's possession. Page references in the text of this Part are to that manuscript.
all members of that community. The existence within a political society of estranged groups, who do not identify with the State, or the nation, and regard the government as an alien, potentially hostile, government, is destabilising. Beyond that is the fact that human beings are political animals. That means more than that they can only thrive in political societies which provide the opportunities for the activities which make their lives. It also means that feeling part of a larger community, and being able to identify oneself as a member of such communities is an essential ingredient in people's well-being. Those who are second class citizens are marked by this experience which forces a flawed life on them.73

Full-citizenship is now a trump. "One of the most important ways in which governments can [promote peoples' well-being] is to make sure that they all enjoy full citizenship . . . ."74 To be a full citizen "one must be able to profess one's basic beliefs, and conduct one's life in accordance with them and with one's deepest feelings without fear of criminal sanctions, legal or social discrimination, or social ridicule or persecution."75

Raz uses this example to illustrate his point:

Gay men and lesbians do not enjoy full citizenship in a country where their conduct, or some aspects of it, are criminalised, where open avowal of their sexual preferences leads to discrimination in public or private employment, where portrayal of gay conduct and its culture in the public media is legally or voluntarily censored, or where they are not free to display affection in public in the same way that heterosexual people do. Such manifestations of bigotry, where officially sanctioned or socially widespread, condemn gay men and lesbians to second class status in their own society.

Raz adds that it is important to remember that the case I am making does not depend on the fact that homophobia is an unfounded prejudice. Groups whose own beliefs and ways of life are misguided and worthless have the same claim to be admitted as full citizens as do gay men and lesbians.76

Now, if the case for a morals law depends upon "homophobia," and if by that we mean that negative moral judgments on, say, sodomy, are not reasonable but are irrational fears, then Raz is entirely right. But nowhere in Liberty and Trust (or in any of his other publications) does Raz defend the judgment that homosexual sodomy is morally acceptable. His argument here is thus not the straightforward perfectionist one, that sodomy is, or can be, morally valuable (or, at least, innocent) and that public authority should therefore protect and promote it.

On what less obvious perfectionist basis does Raz accord "full citizenship" trump status? How can it be that even if a way of life is "misguided and worthless," that the most important way to promote the well-being of people who lead such a life is still to secure for them a static-free environ-

73 Liberty and Trust, supra note 70, at 16.
74 Id. at 17.
75 Id.
76 Id.
ment, bereft of signals that they are misguided? Since Raz continues to hold that autonomy is a condition for well-being and not itself a basic good, there is no apparent basis for a prime directive to accord full citizenship which entails that it is better that someone's life be his than it be any good at all. Raz's argument is still afflicted by equivocation on the value of autonomy.

Morals laws, says Raz in what is clearly his main argument, engender reasonable feelings of mistrust toward government. Because trust is an absolute precondition to pursuing "coercive moral paternalism" against someone, Raz concludes:

the eschewing of moral paternalism is required to secure people full citizenship. Quite apart from the fact that it is the duty of governments to grant their subjects full citizenship, a duty which—as I have claimed earlier—can be overridden, there is a further factor: the dependence of the authority for paternalistic coercion on trust. That factor means that governments cannot resort to moral paternalism for by doing so they undercut their rights to do so, for they lose the trust of those against whom the coercion is used. This is but one of several reasons for which perfectionists should be at one with those who reject coercive moral paternalism. 77

Raz's argument has taken another Copernican turn: it retains (part of) the position George successfully criticized in the passage quoted at the end of Part V. In Liberty and Trust Raz consistently elides the distinction between a legislator's prohibition on conduct and his (global) attitude towards morals offenders as such. Raz conflates a morals law which, on George's account, may well deny a proposition a citizen holds true, with "some essential aspects of my way of life." 78

Raz's mistrust argument, no matter how many Copernican turns it takes, here makes a familiar mistake. Raz's "trust" is a precondition not to a conversation between a legislator and a citizen but to passing a generally applicable law. Raz's "trust" is thus a bipolar condition to a multipolar (or global) undertaking: enacting a generally applicable law. Trust is, he says, a precondition to "direct paternalism" or to "coerc[ing] people for their own good." 77 Raz treats a morals law as transaction between (in principle) a specified individual who disagrees with the law, and public authority. He leaves aside, without explanation or justification, all the relevant considerations arising from concern for the well-being of those (in principle, the entire population minus one) who agree with the moral judgment embodied in the law.

I grant that the educative effect upon a committed homosexual of an anti-sodomy law depends upon a relation of "trust," i.e., the homosexual's subjective conviction that the lawmaker really is trying to promote his good. But morals laws may be granted to have no such educative effect without undermining public authority's right to pass them. Compliance without conversion may still help the convinced sodomite, for example, avoid further self-corruption. And when we bring into view all the consid-

77 Id. at 19.
78 Id. at 18 (emphasis added).
erations embraced by the term “moral ecology,” there is no reason to think that morals laws do more harm than good. Raz does not mention those citizens who favor morals laws because without them morally worthwhile practices (monogamy, for instance) might be culturally unsustainable for them. What would these folks “reasonably feel” about a government that sacrificed their interests for the “feelings” of a few who are leading, as Raz is willing to grant, a truly worthless life? Why should those few trust a government that values their loyalty to it, more than their true good?

Raz concedes that his norm (that trust is a precondition to the authority to pass a morals law) may be defeated by the need to force one “to give others their due or preventing him from violating other people’s rights.”79 Do not parents rearing children have (at least on perfectionist premises) a right to a “moral ecology” that helps them make themselves and their children moral? Besides, what would these “other people’s rights” be? How would they be ascertained if not by reference to a sound (i.e. pluralistic perfectionist) account of upright choice in light of how culture and law must support persons to perfect themselves?

The basic problem with Raz’s and any similar idea of autonomy is that by constricting the common good to a single mega-right to be oneself, they evacuate the philosophical ground which (at least in the perfectionist tradition) specifies and secures rights: all the genuine goods which constitute aspects of human fulfillment. In the new classical theory of practical reason, these are the basic human goods, including life, health, friendship, knowledge, and religion. “Moral ecology” would be, under George’s view, all the concrete aspects of upright human lives, present diffusely in the whole background supplied by law, culture, institutions. Under Raz’s view, legislators may not consider such judgments to be sound premises of law. It is not so much, then, that Raz fails to argue against “moral ecology” or to weigh it against autonomy. For Raz, the autonomy trump effaces precisely the considerations (in bulk “moral ecology”) which solidify the case for the justice of morals laws.

Does anyone integrate his or her whole life around certain activities, so that a morals law which prohibited them from engaging in those activities would “reasonably” engender feelings of second-class citizenship?

Raz must think that at least some persons integrate their lives around a single moral proposition. Let us consider his example, gays and lesbians. Do their views on the propriety of gratifying sexual desires “underpin” a “way of life”?80 Perhaps. Can public authority steer entirely clear of “discriminating” against them? I think not.

Consider the ongoing legal and cultural battle over gay “marriage.” The traditional view, embodied in state laws which restrict marriage licenses to couples comprised of a man and a woman, is not that homosexuals should not be allowed to marry, implying that while possible, such marriages are prohibited. Instead, the traditional view is that homosexual

79 Id. at 12.
80 It is indeed my view that sodomy is always wrong, and for that reason, that homosexuality is a handicap to upright living. For a sketch of an argument like the one I would develop, see John Finnis, Law, Morality, and “Sexual Orientation,” 69 NOTRE DAME L. REV. 1049 (1994). I should add that I take up the example of gays and lesbians because it is Raz’s only illustration.
marriage is impossible. Given this impossibility, public authority should not say that enduring homosexual relationships are marriages.

That marriage is impossible for some people is hardly a strange idea. Minors and incompetents may not legally marry. No one argues that they are victims of "discrimination." Given what marriage is, they simply cannot marry. Our law also precludes everyone who is already married from marrying again. Bigamy—actually being married to two persons—is impossible. The putative second "marriage" is, in law, null and void.

It is hardly novel to suppose that our law should be premised upon a definition of marriage. Griswold was. The traditional definition has been and is that marriage is an irreducible form of interpersonal communion grounded in the complementarity of reproductive functioning, even where reproduction for this or that couple is impossible. Obviously, this view of marriage is not shared by everyone in our society. I do not here argue for it; I have elsewhere on the basis of publicly accessible reasons. It is that public policy depends upon a sound (true, value) view of marriage, whatever it is. As Raz wrote in The Morality of Freedom,

[s]upporting valuable forms of life is a social rather than an individual matter. Monogamy, assuming that it is the only morally valuable form of marriage, cannot be practiced by an individual. It requires a culture which recognizes it, and which supports it through the public's attitude and through its formal institutions.

One more or less determinate ideal will determine the basic shape of marriage and the family. Raz wrote in 1986 that "homosexual families [ ] may be here to stay." (He ventured no moral evaluation of the prospect.) But, he said, "one thing can be said with certainty. They [i.e. changes such as the introduction of homosexual families] will not be confined to adding new options to the familiar heterosexual monogamous family. They will change the character of that family. If these changes take root in our culture then the familiar marriage relations will disappear."8

Someone might object. The law commonly bridges these types of awkward situations with fictions. Why not just call or treat gay relationships as "marriage" in scare quotes or with an asterisk? Because for a time straight and gay marriage might co-exist in the law and in popular consciousness as somehow superior and inferior forms. But they will not for long. Sooner rather than later, persons will wonder, superior and inferior versions of what? The ranking presumes a common metric or a genre embracing both species. If the genre is the traditional one, gay partnerships are not inferior versions of it at all, but morally indistinguishable from what the tradition has always considered an affront against marriage: cohabitation. If marriage and gay partnership are variations on a single theme, some new ideal of domestic partnership has replaced marriage, one which has con-

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82 The Morality of Freedom, supra note 2, at 162.
83 Id. at 393.
84 Id.
clusively cut off our understanding of marriage as, in some decisive way, a community grounded in the complementarity of reproductive functioning.

This is hardly to declare open season on gays and lesbians, or to brand them nonpersons. There can be no question that homosexuality is irrelevant to almost all decisions that those exercising public authority for the common good have to make. Homosexuals should pay the same taxes, observe the same traffic regulations, and so on, that everyone does. But this has nothing to do with anything reasonably called gay rights. It has everything to do with the fact that our most important civil rights are basic human rights. They do not depend for their sense and do not vary in scope depending upon one's sexual orientation, or, for that matter, on the state of one's character in regard to other matters, such as justice. It has also to do with the fact that most opportunities, privileges, rights, obligations, etc., in civil society are specified such that some particular trait or habit or ability—or limited set of them—is all that is necessary to qualify one for the right, privilege or duty. Anyone who can be "fair and impartial" can be a juror, anyone who can safely operate an automobile can get a driver's license, and so on.

Someone might object: in light of this (by and large) irrelevance of homosexuality to public policy, why not adopt the kind of nondiscrimination ordinance Raz would favor, like those adopted in places like Denver and a growing number of other jurisdictions?

The likening of reservations about the gay and lesbian political agenda to racism, implied by grouping them together in comprehensive nondiscrimination statutes, is false. Homosexuality is defined by a more or less strong propensity to engage in conduct—sodomy—which everyone agrees is morally significant and which many believe is truly immoral. To make the sexual orientation analogy work, its proponents need to show not just that "black" and "homosexual" are both "involuntary conditions," but that "black" is defined by a tendency to specific actions, and that those actions are intrinsically immoral. Being black, however, plainly involves no such propensity.

There is, finally, an epistemologically more modest—call it Rawlsian—interpretation of Liberty and Trust which allows us to make sense of some otherwise puzzling statements in Raz's paper. Remember that Raz has not retreated from his commitments to objectivity in morals and perfectionism in politics. He says, for example, that at least broadly speaking, engaging in valueless and worthless activities does not "contribute to the well-being of the agent . . . ."85 But, he cautions, "[i]n today's conditions for most of the inhabitants of the industrialized world the good life is a successful autonomous life, that is life consisting in the successful pursuit of valuable activities and relationships largely chosen by the person involved."86 "Personal autonomy is the contemporary Western condition for personal well-being. In other societies and other cultures (as well as in subcultures which persist in the post-industrialized world) people can have a successful and flourish-

85 Liberty and Trust, supra note 70, at 13.
86 Id. at 1.
ing life not only through leading an autonomous life, and in some cultures well-being cannot be achieved through autonomy at all."\(^{87}\)

What, precisely, Raz has in mind is a bit unclear, but I think it is this. Individuals in our culture are not (for better or for worse) embedded in thickly contextual, highly ordered enveloping communities of persons united by familial, tribal, or other nonpolitical bonds. In those kinds of cultures, I take Raz to be saying, one can lead a successful heteronomous life because one's given roles are given by others whom we (rightly) trust.

Not so for us. We are adrift in an impersonal, function-driven world of individuals. Heteronomous forces of coercion and manipulation surround us, and they are ready to prey. Just think of media advertising, the brittle remains of loyalty and friendship in the marketplace, the instability of family ties, opportunistic, if not predatory, sexual encounters. Raz may well be saying: "Look, for us, the critical thing is to overcome the fractured quality of our lives, to restore wholeness and integrity and, thereby, independence. The greatest threat to our well-being, all things considered, is the pervasive possibility of being manipulated and coerced. All things considered, we ought to accord everyone an unconditional respect, and stop trying to force them into lives they do not want and honestly believe to be worthless." Right here and now the best thing that public authority can do to help persons genuinely flourish is to promote and protect their independence (that is, their effective freedom to act as authors of their lives), and we can do this best by bracketing our judgments about the immorality of others' conduct.

Raz no doubt captures much in our culture that is antithetical to upright, integrated life. I think, however, that the central challenge to upright living in our time is moral subjectivism which convinces persons that in order to live authentically, they must author what is good, and what is evil. And I think that Raz adopts as a working assumption, just such a subjectivism in *Liberty and Trust*.

VII

The liberalism familiar to educated Americans is the anti-perfectionism of John Rawls. In *A Theory of Justice*, as almost any undergraduate can tell you, Rawls devised a thought experiment—the "original position"—to identify the basic principles of justice for a well-ordered society. The Rawls of *Theory* is confident that persons in the original position would, in Robert George's apt description, reject "perfectionism completely and permanently."\(^{88}\)

Why? Not, according to Rawls, because choosers in the original position presuppose moral skepticism or subjectivism, and therefore deny that there is an objective morality that public authority might enforce. Choosers in the original positions, Rawls allows, may well be cognitivists who believe in objective moral norms. But

\(^{87}\) *Id.* at 11.

\(^{88}\) *Id.* at 132.
they do not have an agreed criterion of perfection that can be used as a principle for choosing between institutions. To acknowledge any such standard would be, in effect, to accept a principle that might lead to a lesser religious or other liberty, if not to a loss of freedom altogether to advance many of one's spiritual ends . . . . They cannot risk their freedom by authorizing a standard of value to define what is to be maximized by a teleological principle of justice.

Rawls judges that a chooser who would "gamble" in the original position does not take his moral convictions seriously. And Rawlsian choosers are not so frivolous.

Despite its massive influence, Theory has attracted many criticisms that, if sound, are decisive refutations of the work's central claims. The "communitarian" critique (endorsed by George in MMM) is one. It identifies some loaded presuppositions built into the original position. Communitarians point out that parties in the original position are "unencumbered" solitary selves bereft of commitment, context, and community. Start with such autonomous individuals, communitarian critics say, and you will end up about where Theory does. But why start there?

George articulates in MMM a new criticism that, in my view, decisively undermines Theory. Rawls' argument fails to take account of what George calls the "transparency of reason": "I judge that P is true" is transparent for 'P is true,' which, in turn, is transparent for 'P.' Thus, 'I judge that' is always transparent for the proposition judged to be true. So, for example, 'I judge that "slavery is wrong" is transparent for 'slavery is wrong.'

George clarifies Rawls' presuppositions:

[a]s a party in the original position, I am motivated to protect the beliefs and ends I will turn out to have not because I "take them seriously" (i.e. I believe them to be true or worthy) but because I suppose I will turn out to "take them seriously . . . ." Behind the veil of ignorance, I am self-interested in the radical sense of being concerned not with beliefs qua true or ends qua worthy, but with beliefs and ends qua mine.

But moral deliberation is not about wants or other subrational motives that explain or cause me to hold them regardless of reasons, but about reasons for choice and action. Rational people in the real world, George points out, care about their beliefs because they are thought by them to be true, not because the beliefs are theirs. Rational people will therefore abandon a belief which is exposed as false, rather than cling stubbornly to it as theirs. That I hold a belief is no reason at all for the belief itself.

George has identified better than Rawls' many other critics the "distinctively anti-perfectionist practical reasoning" of the original position. Persons there conceive themselves as having interests in getting what they want and seek as much freedom as possible to do so. One may grant that Rawls effectively draws out the implications of such premises. But it en-

89 Id. at 132 (quoting JOHN RAWLS, A THEORY OF JUSTICE 328 (1971)).
90 Id. at 134 n.11.
91 Id. at 135-36.
tirely begs the question to assert that these premises are the only basis of sound principles of justice.

VIII

George mentions but leaves aside the unfolding debate about Rawls' writings of the 1980s, articles in which Rawls disowns the widespread understanding of *Theory* as a foundational account of justice, a theory that aspired to simple truth, validity, soundness. If Rawls has taken a "pragmatic" turn—if he now claims to have worked out the basics of a local theory of justice suited to our society—then he may avoid George's counterarguments. For George is asking whether morals laws are always unjust, not whether they are (locally) "unjust." The scare quotes signal that, on its own terms, all that Rawls can claim for his new version of "justice" is that it fits with our conventions. George is not concerned to deny that the prevailing prejudices of a given society might include a thorough aversion to morals laws.

George wrote before publication of Rawls' *Political Liberalism,* the long-awaited sequel, or refinement, of *Theory.* *Political Liberalism* does not address, in literal terms, morals laws. That Rawls nevertheless considers them fundamentally unjust seems clear from his explicit rejection of perfectionism as entailing a kind of slavery, and from his exclusion from the "public reason" of the political community all comprehensive moral and philosophical doctrines. A conclusion that an action is truly immoral cannot be a public reason, a fit basis for action by the legislator.

What is this public reason? Public reason is a restricted form of practical reasoning which rests on the shallow foundations of widely held conventions (themselves held by citizens to be moral truths), like those against slavery and in favor of liberty of conscience. Rawls envisions public reason as "a self-contained module which can be fitted into, at the appropriate interval, citizens own comprehensive moral doctrine." A rough analogy, in my view, is the law (statutes, constitution, regulations, judicial opinion, etc.) as conceived by a committed positivist: law is an autonomous, but restricted and artificial, set of premises, definitions, and canons of reasoning, sufficient to generate answers to (ideally) all questions that citizens raise about how to cooperate for the common good.

Rawls thinks that this modular conception of reasoning by public authority is the only hope for stability and peace in our pluralistic society.

The advantage of staying within the reasonable is that there can be but one true comprehensive doctrine, though as we have seen, many reasonable ones. Once we accept the fact that reasonable pluralism is a permanent condition of public culture under free institutions, the idea of the reasonable is more suitable as part of the basis of public justification for a constitution a regime than the idea of moral truth. Holding a political conception as true, and for that reason alone the one suitable basis of

public reason is exclusive, even sectarian, and so likely to foster political division.\textsuperscript{93}

It is well worth noting that public reason is, in effect, an ingenious end run around the usual route to the Holy Grail. Rawls concedes the pertinence of questions like, why should government respect our rights? Why should I respect your rights? Public reason does not answer these questions. But it tells us that there are answers, and where they might be found. We find them in our various comprehensive moral, philosophical and religious doctrines. The module has hinges at the bottom, and it stands atop a personal booster doctrine which connects the module to each of us.

Rawls states that a comprehensive doctrine may be discouraged by public authority because it conflicts with the principles of justice, for example, "a conception of the good requiring the repression or degradation of certain persons on, say, racial, or ethnic, or perfectionist grounds, for example, slavery in ancient Athens, or in the antebellum South."\textsuperscript{94} This looks like a flat denial of the propriety of morals laws. But Rawls' exposition and defense of the doctrine is vague enough to permit an interpretation that is entirely compatible with, at least, George's view on morals laws. Let me explore this ironic possibility before moving on to criticism of "public reason."

Rawls denies that his liberalism is individualistic. He affirms that the liberal state is dedicated to protecting a wide range of associations, including the family and church.\textsuperscript{95} Rawls defends a doctrine of limited government characterized by "subsidiarity," a positive evaluation of intermediate nonpolitical groups which stand between the individual and the modern megastate. Rawls thus denies that his analytical field is bipolar, in which the individual is pitted against the megastate. Rawls does not claim that his doctrine is neutral in effect. He concedes that any political order will "inevitably encourage some ways of life and discourage others, or even exclude them altogether."\textsuperscript{96}

Rawls denies that his position entails skepticism about comprehensive moral doctrines. He concedes that some such doctrine actually is true. Rawls denies that there is any such thing as "private reason" even as he distinguishes the "nonpublic reason" of social institutions like corporations from public reason.\textsuperscript{97} Rawls allows, moreover, that public reason includes all the background principles of "theoretical and practical reason." Since George claims no more than that sound practical reasoning defeats any argument that morals laws are in principle unjust, one may then conclude that his only dispute with Rawls is (could be?): what truths does practical reason yield?

Rawls defends the exclusion from public life of appeals to "moral authority, whether a sacred text, or institution,"\textsuperscript{98} and that the "truths of reli-
gion" are similarly off the table. And George can go along this far: reason, and no authority of any kind, is the coin of the public realm. And if by "truths of religion" Rawls means (as I think he does) "truths held by beliefs on bases other than reason"—for example, revealed truths mediated by religious authority—he is right.

One of Rawls' conditions for the acceptability of public reason reinforces the possibility of Rawls' agreement with the defender of morals laws. Public reason applies, and holds more comprehensive doctrines at bay, only where society is "well-ordered"; that is, where there are no basic injustices. Where basic injustices are present, Rawls states, the appropriate limits of public reason cannot be specified with much exactness. But if there are no "basic injustices," then there is good reason to think that public reason—the widely shared if only implicitly recognized basic ideas and principles in our society—includes all the principles of justice. And a society whose public reason includes all the principles of justice is well-constituted, and likely to be well-ordered.

Rawls implicitly concedes that a true comprehensive doctrine of justice is necessary to figure out this or that society's eligibility, so to speak, for governance by public reason. Neither the political theorist (like Rawls in Political Liberalism) nor the legislator guided by public reason can actually change the basic nature of the common good: being simply the basic human goods as pursued cooperatively by persons politically united, it is objective. Persons will and should discuss the common good, precisely to see if public reason serves it. If so, then public reason cannot rationally defend itself when citizens raise questions about its applicability.

My basic criticism of Rawls' doctrine is that his self-commentary—what he says public reason does—is not what it actually does. Consider the two settled principles which Rawls would establish as foundations: slavery is wrong, and everyone is entitled to liberty of conscience. If these are to serve as anything more than promiscuously used slogans—if they are to serve instead the purpose Rawls assigns to them, which is clearheaded analysis—the legislator must figure out what, exactly, is wrong with slavery and religious intolerance. Reasoning by analogy to slavery requires that we identify the precise moral defect in slavery. Is it, as the abolitionists alleged, interference with slaves' freedom of conscience? If so, Rawls has just one foundational principle. Does slavery violate just principles of labor relations? Anti-abolitionists claimed that slaves were treated better by their masters than northern wage laborers were treated by the captains of industry. Is slavery wrong because it treats persons as property? If so, Rawls' legislator now has a conclusive reason to reject any other public policy that possesses the same characteristic.

Is the central moral defect in surrogate motherhood, in vitro fertilization and other reproductive technologies precisely that a human individual is brought into the world as property, as a manufactured thing? The recently-released report of an NIH study panel, which recommends federal funding of scientific projects which create human embryos in vitro in order to experiment on them, cites Political Liberalism's treatment of public rea-
son as the panel's way of reasoning about moral questions.\textsuperscript{99} The panel said that it did not need to decide which view, of the many held by American citizens, on the moral status of the preimplantation embryo was correct. The Report's authors nevertheless approved creation of what they conceded to be developing "human life" precisely to exploit, and then discard, it.\textsuperscript{100} Is this not the \textit{sine qua non} of slavery: some human beings reduced to the status of thing, to be dominated and exploited by other human beings?

"Liberty of conscience" is, in our society, not a special liberty attached to belief (which no one thinks ought to be coerced) but to actions associated with "religion." What is the distinguishing feature of this phenomenon, "religion"? Why is it worthy of special treatment? Robert George provides cogent answers, but they depend upon access to unrestricted practical reason, what Rawls would likely call a comprehensive moral doctrine. How would a Rawlsian legislator answer the question: what is religion? How would the Rawlsian legislator resolve this question: surrogate motherhood, it is believed by this legislator, is a form of slavery, but he knows that some persons, as a matter of conscience, feel obliged to avail themselves of any nonlethal means of begetting children. What resources within the realm of public reason may be brought to bear upon questions at the intersection of our two pillars?

Consider as a response to that question a rare, concrete application by Rawls of public reason. Here, in full, is his explanation and defense of a moderate "pro-choice" position on "the troubled question of abortion":

Suppose further that we consider the question in terms of these three important political values: the due respect for human life, the ordered reproduction of political society over time, including the family in some form, and finally the equality of women as equal citizens. (There are, of course, other important political values besides these.) Now I believe any reasonable balance of these three values will give a woman a duly qualified right to decide whether or not to end her pregnancy during the first trimester. The reasons for this is that at this early stage of pregnancy the political value of the equality of women is overriding, and this right is required to give it substance and force. Other political values, if tallied in, would not, I think, affect this conclusion. A reasonable balance may allow her such a right beyond this, at least in certain circumstances. However, I do not discuss the question in general here, as I simply want to illustrate the point of the text by saying that any comprehensive doctrine that leads to a balance of political values excluding that duly qualified right in the first trimester is to that extent unreasonable; and depending on details of its formulation, it may also be cruel and oppressive; for example, if it denied the right altogether except in the case of rape and incest. Thus, assuming that this question is either a constitutional essential or a matter of basic justice, we would go against the ideal of public


\textsuperscript{100} \textit{Id.}
reason if we voted from a comprehensive doctrine that denied this right.\textsuperscript{101}

The note is intended to illustrate this textual proposition: “the principle of legitimacy” means we “must live politically in the light of reasons all might reasonably be expected to endorse.”\textsuperscript{102} Note the obvious non sequitur: that there are a lot of cross-cutting reasons in play does not imply that the only reasonable answer is some “reasonable balance” of all the reasons, save on the assumption that reasons are somehow opaque to reason, that they cannot be ordered according to deeper critical principles. Does Rawls mean to say that the only “reasonable” solution where everybody cannot get all they want is to give all of them some of what they want? It seems so.

In every other area of our public life—criminal law especially—it is clear that life is more important than property, leisure, and mental health. No one defends against a murder charge by saying that the victim owed him five dollars. One assumes, in other words, that Rawls is not describing in the note on abortion the ethics of killing ordinary persons, people like you and me. On that assumption, Rawls entirely begs the critical question: why is it that the unborn are valuable—so that abortion is morally problematic in a way that slaughtering cows is not—but not as valuable as people who are already born? Is the reason that the unborn feel no pleasure or pain? That they cannot think? That they cannot feed themselves? That they have not the present capacity for friendship?

It is surely not the case that rational persons in the original position would rule out reasoned consideration of just who is protected by homicide laws. No one, it seems to me, would risk a situation in which one’s own life depended upon a “balance of political values.” Reasonable constitution makers would specify a right of all persons not to be intentionally killed, and specify that “persons” in the legal sense is anyone who truly is a person. It seems to me this is precisely the type of question they would refer to apolitical and independent judges, beyond the reach of political balances.

Rawls might try to deflect my criticism by reemphasizing his central distinction between morality (and philosophy and religion as well as, I assume, metaphysics) and “public policy” in our pluralistic society. Rawls might say that in truth the unborn may be persons, but “public policy” cannot simply track truth. Public policy must combine and balance various points of view and interests of those already counted as persons. But this move undermines Rawls entire project. While “public policy” may balance, compromise and otherwise meld points of views and interests on a lot of things, it cannot do so when the question is, who does this entire edifice serve? That is a prepolitical matter that must be resolved on the best view of the truth of the matter. Any society which regards that question as a matter of self-interested calculation by some unproblematically referenced “we” is fundamentally unjust, ineligible for public reason.

\textsuperscript{101} Id. at 243-44 n.32.
\textsuperscript{102} Id. at 243.
Rawls effectively concedes much of the discussion of the preceding few pages. "To be sure," he says, "people do not normally distinguish between comprehensive and public reasons; nor do they normally affirm the ideal of public reason . . . ." Rawls allows that the limits of public reason do not necessarily apply (at least he is not prepared to argue that they do) to ordinary, as opposed to constitutional, politics. It therefore seems that debates about criminal justice, nuclear deterrence, foreign policy, and health care are going to be unrestricted. Exactly how public reason is distinguished from unrestricted practical reasoning is unclear, save that the (remaining) difference—if any—is too small to accomplish the great ends assigned to it.

What is driving the public reason project? What are its ends? Rawls justifies public reason as the alternative to "divisive," "oppressive," "sectarian" politics. He does not explain the concepts, nor does he justify the accusation. It is reasonably clear, though, that these terms are transparent for public reason, and are not reasons for adopting that doctrine. By "oppressive" Rawls simply means public action based upon a comprehensive doctrine. By sectarian he means the same thing. By divisive he refers to the effects of adhering to a doctrine other than his "public reason." Rawls does not suppose this fact will, or is even likely to, erupt in some brawl. Divisiveness, like oppression, does not refer to any empirical state of affairs. Rawls is clearly not talking about raw commotion, right here on the ground.

Rawls is most concerned about the grounds of political obligation. Political Liberalism gives us the ultimate consent theory: Every single public action is taken for reasons that everyone, at least everyone who is reasonable, can endorse. But Rawls' consent theory is weak on its own terms, for my endorsement is quite shallow. The political conception of justice is, on Rawls' terms, "congruent with or supportive of, or else not in conflict with" my comprehensive conception. It is not mine, in other words, but I can be expected to live with it.

Why should one think that personal authorship of public action, in any form, is a condition of legitimacy? Rawls' understanding of the problem to be solved by public reason is distorted by the same "transparency" problem that George identified in Theory's original position.

Rawls says that constitutional essentials must not be "intended to favor any comprehensive doctrine." Further,

There is no reason why any citizen, or association of citizens, should have the right to use state power to decide constitutional essentials as that person's, or that association's comprehensive doctrine directs. When equally represented, no citizen could grant to another person or association that political authority. Any such authority is, therefore, without grounds in public reason, and reasonable comprehensive doctrines recognize this.

103 Id. at 251.
104 Id. at 214-15.
105 Id. at 226.
Conceded: No one has a right to use state power as that person's comprehensive doctrine directs. But should not everybody who participates in constitution-making act on sound reasons? Rawls holds that only a political conception of justice that all citizens might "reasonably be expected to endorse in the light of principles and ideals acceptable to them common human reason" is legitimate. Just so. But why should I endorse any principle if none is offered as true? Am I supposed to recognize something of mine in the mix, and for that reason endorse it? But, as George argued, the fact that a principle is mine is no reason even for me to hold it, much less for anyone else to endorse it. I should endorse if, and only if, I think it is true.

Rawls allows that citizens understand themselves to be operating transparently on the basis of sound reason. But they are treated "from a political point of view" as opaque to reason, their claims are "self-validating," and count (somehow) as claims, entirely apart from the reasons advanced in support of them. They register as wants or desires, as simple "facts." No doubt some people make unreasonable demands, but people also recognize that their reasons are part of their requests.

The most plausible account of just what Rawls is up to might go something like this. Rawls does not really mean to distinguish his politics of public reason from, say, Robert George's unrestricted reasoning about the common good in any way but this: public authority must not use the language of comprehensive doctrines. Public authority's reasons are those consonant with our traditions, or they are drawn from our collective conscience, not true reasons, as such. But this presents the transparency problem again, this time with whiskers. Those who made the tradition (through a host of decisions) did not think that their making it was a reason for making it. They made it because they thought it was good, that their decisions contributing to the tradition were morally sound. Their making it is hardly a reason for us to continue it. We should continue it if it is sound, and otherwise not.

The doctrine of public reason, the centerpiece of Political Liberalism, is an illusory solution to a misconceived problem.

CONCLUSION

This review essay has focused on, and now offers as warranted, the central aim of MMM: the distinguishing claim of the best contemporary liberals is false. It just cannot lead us to the Holy Grail.

In the final chapter of MMM, Robert George sketches how pluralistic perfectionism is not only compatible with important civil liberties, but how it provides the most excellent reasons for respecting and protecting them. The appropriateness of this denouement is easy to grasp. As George writes in the opening paragraph of the chapter, readers persuaded by his arguments against the liberal prohibition of morals laws "may fear that a political theory which allows any room for coercive government ac-

106 Id. at 137.
107 MMM, supra note 5, at 190.
tion to uphold public morals will perforce validate too broad an exercise of coercion.”

We have already seen much of this brief defense (which George rightly says would take one or more books to present adequately). The most important example in the last chapter is religious liberty. George describes in some detail how that freedom is best grounded in the nature of religion as a voluntary choice to accept the truth of some propositions and to enter into communion with God.

Freedom of speech, George argues, is best grounded in the need for communication among persons. Most simply, “[c]ommunication is well nigh indispensable to co-operation; and co-operation is vital to the realization of human goods.” In light of the fact that “government officials often have bad motives for restricting” even “valuable forms of speech,” a broadly inclusive definition of protected speech, including some speech which by itself is valueless, is reasonable. Freedom of press is a “species” of freedom of speech, and government should respect and protect it for the same reasons it respects and protects freedom of speech generally.

The Griswold and Cruzan examples, described in Part III, indicate the great explanatory and justificatory value of concern to protect persons’ genuine well-being against possible detrimental action by public authority through protective laws that shield actions which are, themselves, morally wrong.

Since MMM means to undermine the prevailing liberal interpretation of a “right to privacy,” George understandably does not defend it in the book’s concluding chapter. He defends instead the traditional conception of privacy as eminently defensible. It is a “necessary implication of the same premises that ground the right to freedom of speech,” under his perfectionist defense of that right. This right to privacy is what the Fourth Amendment protects: “The essentially procedural right to be free from governmental and other intrusions into one’s home or office or other premises, or into one’s files, papers, or other records, unless the government can justify invading private space or reviewing private information by providing powerful reasons.” All things considered, MMM indicates persuasive justification for our civil liberties while showing the falsity of the liberal objection to morals laws. It seems we are back on track to the Holy Grail.

108 Id. at 189.
109 Id. at 195.
110 Id. at 198.
111 Id. at 208.
112 Id. at 211.