

# Natural Law and Public Reason

## Rawls and Macedo and Public Reason

Stephen Macedo, in his *Liberal Virtues*<sup>1</sup> and in a number of separately published articles, has defended a liberal doctrine of public reason, one which he considers to be in line with John Rawls's conception.<sup>2</sup> According to Macedo, liberalism asks us to consider principles of justice from an impartial point of view, one capable of discerning reasons that should be acceptable to everyone concerned, at least insofar as they are being reasonable. This requires reasoned arguments that are (1) publicly stated, (2) openly debated, and (3) widely accepted.<sup>3</sup> The requirement of public justification demands that we filter out reasons and arguments whose grounds are (1) private, (2) too complex to be widely understood, and (3) otherwise incapable of being widely appreciated by reasonable people.<sup>4</sup>

The conditions or grounds of public justification are three. First, there is the fact of reasonable pluralism: people typically and "reasonably" disagree on important issues, largely as a result of what Rawls has labeled the "burdens of judgment." Second, public justification is required by our respect for people as free and equal moral beings (if they pass certain threshold tests of reasonableness). And third, public justification makes it possible to distin-

guish intractable moral and philosophical issues from problems that are more urgent (from a liberal perspective) and easier to grapple with; for example, securing basic liberties and establishing fair principles of distribution.<sup>5</sup>

There is much that is attractive in Macedo's thought about public reason. For example, a political theory that elevates reasoned deliberation above mere struggles over interests, power, and unreasoned desires is commendable. Moreover, Macedo's conception of public reason is superior to other liberal conceptions, including that of Rawls, inasmuch as it accepts the public accessibility of arguments that reflect a genuine concern for human character or virtue (albeit in what we consider to be a somewhat truncated form).

### Problems with Liberal Public Reason

We have seen that public reason, in Macedo's understanding, requires that arguments providing public justification not be (1) private, (2) too complex to be widely understood, and (3) otherwise incapable of being widely appreciated by reasonable people. Accepting for the moment the requirement that arguments be "public," let us ask what it means to say that an argument may not be either "too complex" or "otherwise incapable of being widely appreciated by reasonable people," which together presumably make up (at least part of) the requirement that arguments be "publicly accessible."

When is an otherwise perfectly reasonable argument "too complex"? When is an argument "incapable of being widely appreciated by reasonable people"? When is such an argument not "publicly accessible"? Macedo is apparently relying on what he takes to be commonsense notions of what these mean, without explaining them in any detail; but that won't do. There are no agreed upon or commonsense meanings of these phrases. Rather, people's disagreements about what is or is not "too complex" or "publicly

accessible" will almost certainly replicate their substantive moral disagreement regarding the underlying matters in dispute.

To pass muster under the liberal doctrine of public reason, does an argument have to be "simple" enough (presumably the opposite of "complex") so that all (or virtually all) citizens understand it, or that most of them do so (and does that mean a large, rather than a bare, majority), or that the "educated" element of the citizenry does so? If *all* the citizens have to understand it, then the doctrine is in trouble, because it is difficult to imagine many serious arguments on difficult issues of basic justice that all (or even virtually all) citizens would understand. Some people lack the requisite intelligence to follow complex chains of moral reasoning; many more have not been educated well enough to be able to do so. And it is easy to imagine important political arguments that *most* citizens would have great difficulty understanding. But it would be foolish, and sometimes literally impossible, to remove from politics issues that necessarily and unavoidably generate such arguments.

Are we to construct some idealized figure—something like the law's "reasonable man"—i.e., a person of "average" intelligence with an "average" education (whatever that would mean)? What are the standards according to which such an idealized figure should be constructed? Or is it that the arguments should be intelligible to well-educated people, who would then serve as representatives of all those who share their views, though perhaps to widely ranging degrees of sophistication? If so, how should we define "well-educated"? And then we might ask whether the well-educated people of a given society or era might not accept as rational some pretty irrational positions. (People typically find the possibility of gross moral error by a putatively enlightened cultural elite easy to accept when they look at the well-educated people of past or foreign societies, but people are perhaps less ready to admit the possibility of error in the case of their own societies, especially when they themselves are part of the elite and share its dominant views.) And, if we go down the road of relying on educated people,

haven't we, at that point, established a strongly elitist—and not very *public*—doctrine of “public reason”?

Moreover, would it be unreasonable to indulge a suspicion that, if liberal public reason is adopted as a standard, those who are most adept at manipulating language and symbols—members of what Irving Kristol labels the “knowledge class”—are going to end up with a disproportionate share of the power to define what can and cannot be admitted into public discourse and decision-making on the most fundamental issues facing a society?

Whether an argument is “publicly accessible” certainly cannot be determined simply on the basis of whether people happen to agree with it (rendering it accessible) or disagree with it (leading to the conclusion that it is inaccessible). That would make any conventional view ipso facto publicly accessible, irrespective of how irrational it truly was, and any unpopular or unconventional view ipso facto not publicly accessible, irrespective of how rational it truly was, which would make reform and improvement of public views excessively difficult.

Does public accessibility have to do only with the logical quality of the argument itself? Should we consider the rhetorical effectiveness of arguments put forward on behalf of a position? Might it not be the case that most people in a given society agree with a particular argument—creating the impression that it is publicly accessible—on irrational grounds? Do we factor in (either positively or negatively) the “customary ways of thinking” in a society? Does the existence of a custom provide an argument that the judgment embodied in the custom is publicly accessible, or does its being “merely a matter of custom” undermine its claim to being a genuinely rational judgment?

And, finally, does the argument that public arguments must be “publicly accessible” itself have to meet the standard of public accessibility? After all, Rawls's own argument in defense of the liberal public reason doctrine in *Political Liberalism* is highly complex and controversial. It can hardly be considered more accessible than some of the arguments that the doctrine is meant to

exclude as grounds of legislative action (e.g., the argument that claims to abortion rights are trumped by the right to life of unborn human beings).

At the start, then, there are a whole series of ambiguities about what is to count as the standard of public reason. Let us turn now to another set of questions, by looking at Macedo's critique of natural law from the viewpoint of liberal public reason.

### Macedo's Critique of Natural Law Theory

Macedo's primary, but not his only, claim against natural law ideas is that they fail to meet the requirements of public justification. This is due, he says, to the “large gap between the first principles of natural law and actual moral norms.”<sup>6</sup> To get from one to the other requires much work by a process of moral inference, which requires a wisdom or reasonableness not found in everyone or even in most people. Therefore, relying on such arguments is contrary to the equality of respect embodied in liberal canons of public justification. Or, he suggests, natural law thinking can save itself from elitism by appealing to mere popular prejudices about how human beings should behave, thus transforming itself into an “unreasoned populism.”<sup>7</sup>

Natural law theorists would respond that there is sometimes, but not always, a “large gap” between the first principles of natural law and actual moral norms. In the natural law theory of Thomas Aquinas, for example, there is a movement of some sort from first principles of natural law (e.g., “such and so is a good to be done and pursued. . .”) to actual moral judgments that guide choice and action in concrete cases (“this item should be returned to the person from whom I borrowed it”). The first, most general precepts are known by (or can easily come to be known by) everyone, at least as abstract principles. Even some moral norms (e.g., those at a high degree of generality) are normally known to all, but our knowledge of them and willingness to abide by them can be corrupted by contrary passions, vicious customs, bad hab-

its, and so forth.<sup>8</sup> (Aquinas himself gives the example of theft not being considered wrong among the Germanic tribes, on Caesar's account of their beliefs and customs.<sup>9</sup>) As one moves on to more specific moral norms and concrete moral judgments, there is more room for failures both as to the knowledge of a moral norm and with respect to how generally the norm holds. (For example, borrowed goods should usually be returned, but if someone whom one knows to be planning a terrorist attack asks for a borrowed weapon to be returned, one might be justified in refusing to return it. In such cases, there may be exceptions to general norms.<sup>10</sup>)

The first principles of practical reason state self-evident practical propositions,<sup>11</sup> and the most common moral precepts (which roughly correspond to the right hand table of the Decalogue) are generally known to all, because they are conclusions following closely from the first principles. Human beings move from these general principles to specific moral judgments in various ways.

Some human actions are so evidently good or bad that after very little reflection one is able reasonably to approve or disapprove of them, whereas other actions cannot finally be judged morally good or bad without much careful deliberation, including, ordinarily, consideration of the circumstances. The greater the complexity of the matter, the more difficult the judgment. And, obviously, not all persons are equally competent to deliberate carefully when it comes to the most difficult matters. Some matters, as Aquinas suggested, are evident (or, indeed, self-evident) "only to the wise."<sup>12</sup>

To recapitulate the view held by natural law theorists: basic moral norms are widely known, though in some cases they or their more specific applications may be obscured by wayward passions or corrupt customs or habits. The movement from basic principles to concrete judgments, however, will vary according to the complexity of a given case, and the more complex the case, the more wisdom is required to make the appropriate judgment. (In Macedo's terms, the more complex the issues, the larger the "gap" between first principles and actual moral norms.)

It is particularly important for our purposes to note that knowledge of the moral precepts of the natural law, even the more general ones, does not necessarily imply the ability to construct effective arguments explaining moral norms and their application. Most ordinary people cannot construct sophisticated moral arguments, but, at least according to natural law theorists, they have a grasp of the most basic moral norms. That is to say, it is possible for many or even most people to know that a certain act (e.g., rape, shoplifting, income tax evasion) is wrong, but not necessarily to be able to articulate and defend that knowledge very well.

Take a simple example. Murder is wrong. Few people object to that proposition. They know it to be true. If you want to have some fun, however, simply play devil's advocate for the contrary proposition with a group of students and observe their (usually lame) efforts to "prove" that murder is wrong. Their inability to articulate a well-reasoned argument does not mean that they are wrong about murder or even that their belief that murder is wrong does not really amount to knowledge; it suggests, rather, that there is a difference between "articulate" and "inarticulate" knowledge. We suspect that a high proportion of the moral knowledge possessed by any of us is more or less inarticulate—and none the worse for that.<sup>13</sup>

Now the question that must be posed is this: when advocates of the public reason doctrine contend that liberalism requires reasoned arguments that are or can be "widely accepted," ones that "should be acceptable to everyone concerned," is it sufficient that these arguments be "acceptable" to people on the basis of what we have called "inarticulate knowledge"? If the answer is "no"—that is, if more developed and articulate knowledge is required—then the liberal public reason doctrine is utopian, at best. As such, it is simply unfit to govern political affairs in a world inhabited by actual human beings. If, however, the answer is "yes"—that is, if arguments can be considered publicly accessible even if they can be widely accepted only on the basis of inarticulate knowledge—then, contrary to what Macedo supposes, natural law arguments meet the standard of public accessibility.

Note, too, that if a realistic standard is adopted—i.e., a standard that admits inarticulate knowledge—Macedo's simple distinction between natural law teachings that are "too complex" to be publicly accessible, on the one hand, and mere "popular prejudices" about how human beings should behave, on the other, tends to break down. What are from the liberal viewpoint mere "popular prejudices" may or may not truly be prejudices. If the liberal view of sexual morality is wrong, for example, as most natural law theorists believe it to be, then opposition to homosexual and other nonmarital sex acts may be based on moral insight, not mere prejudice. And the insight may constitute not only the "articulate knowledge" of philosophically trained natural law theorists, but also the "inarticulate knowledge" of ordinary people who are not adept at constructing philosophical arguments. The view of ordinary people about the wrongness of nonmarital sexual conduct may be no more a "prejudice" than their view about the wrongness of murder.

### Slavery and Abortion

It is also worth considering the possibility that what are truly prejudices can masquerade as rational judgments. As a result of corrupt customs, self-interest, and other factors, mere prejudices can become widely shared in a society or within a segment of a society, including a society's most elite segment. And where prejudices are widely shared by an elite, they may receive the most sophisticated (albeit, in the end, specious) rational defenses from influential intellectuals and other highly regarded figures. We think that these considerations highlight a particular difficulty in all efforts known to us to establish a plausible doctrine of liberal public reason. To expose this difficulty, let us reflect as Macedo has done, on a moral issue that was once debated by apparently reasonable people of goodwill, but on which we now have a moral consensus, namely, slavery.

In his contribution to the current volume, Macedo strives mightily to differentiate slavery, which was once, but is no longer, a subject of intense moral controversy, from abortion, which, of course, is such a subject today. For the moment, let us put aside questions about public reason with respect to the religious foundations of much abolitionist thinking and activity. We want simply to ask this question: Does Macedo give us any reason to believe that the arguments against slavery and the arguments against abortion are essentially different, in that one of them (the antislavery argument) meets the demands of public reason and the other (the anti-abortion argument) does not? We think that the answer to that question is no.

Macedo's position is that abortion comes "down to a fairly close call between two well-reasoned sets of arguments" and therefore "the best thing for reasonable people to do might be to acknowledge the difficulty of the argument and the burdens of reason, to respect their opponents, and to compromise with them, and to find some middle ground that gives something to each side while the argument goes forward."<sup>14</sup> Macedo explicitly rejects arguments by John Finnis and Robert George that abortion is not usually even a close call.<sup>15</sup> Crucially, he denies George's claim that the development from zygote to adulthood occurs without "substantial change."<sup>16</sup> He simply asserts, without argument, that it is "unreasonable to deny that there are also grounds for ascribing substantial moral weight to the development of basic neural or brain functions—the development of sensory capacity, consciousness, or sentience—and viability."<sup>17</sup>

Our main concern here is not the correctness *vel non* of Macedo's argument about abortion, so the following section is something of a digression, but it is one that we cannot omit. Macedo misunderstands George's argument in a profoundly important respect, and fails to come to grips with it in another. First, he takes George's reference to "substantial change" to mean "a lot of change," when in fact George's point, which is scientifically and philosophically incontestable, is that there is no *essential* change

or change of natures. The development of a human being from the zygotic stage of its existence to the adult stage is the development of a distinct, unitary substance. At no point in its development was the human being that is now an adult a different substance, being, or thing than he or she is currently. Using the phrase in its accepted philosophical sense, that is precisely what George means in saying that there is no "substantial change." At every stage of its existence—from zygote to adult—the human individual remains the same self-integrating human organism, an organism which, given a hospitable environment, develops itself and directs its own integral organic functioning.

To be sure, the human individual develops and changes in many ways—with respect to basic neural or brain functions, for example, or becoming viable outside the womb—but those changes never involve a change from its being one sort of thing (or, in philosophical terms, "substance") to its being another, much as occurs when sperm and egg unite and those two things become one new essentially (or "substantially") different thing.

Macedo does not really *argue* that it is "unreasonable to deny that there are also grounds for ascribing substantial moral weight" to certain developments (neural or brain functions, viability), he just asserts it. George's principle is simple and straightforward: the being in the womb is a human being, the same human being from conception onward. As a human being, it shares with other human beings certain fundamental rights, including a right not to be killed. If there are reasonable grounds for saying that more developed human beings should not be killed, but that human beings at an earlier stage of development can be killed, then Macedo ought to give them. But, frankly, we doubt that any argument about human rights that turns, for example, on lung capacity—as the viability argument does—will meet the most minimal standards of reason or public accessibility.

This is not to say, of course, that the proponents of a right to take unborn human life have no legitimate concerns on their side. And therefore, as Macedo argues, "the best thing may be to try to

give something to both sides,"<sup>18</sup> to find some middle ground. But, contrary to what Macedo argues, *Planned Parenthood v. Casey* is not the middle ground, since it attends to the innocence and right to life of the unborn child hardly at all.<sup>19</sup> Consider the following as a proper middle ground: prohibiting abortion, in order to give fair weight to the unborn child's right to life; providing assistance (financial, medical, emotional) to women with difficult pregnancies, in order to minimize the costs of carrying through such pregnancies; promoting laws that make adoption easier, to provide for children whose biological parents are unable or unwilling to care for them (and to minimize the long-term costs of carrying an unborn child to full term); educating people (especially young people) to the enormous costs (especially human costs) of irresponsible sexual activity and also to the equal responsibility of men for the children they participate in conceiving; and focusing penalties for abortion not on pregnant women, but on those who perform abortions.

Now some people probably will find the assertion that this is a "middle position" outrageous. They will say that it simply represents the position embraced by the pro-life movement in this country, and on that point they would, of course, be right. This experience of outrage may be useful, however, if it gives them some inkling of how their opponents feel when *Casey*, and a variety of other recent, much ballyhooed "compromises," are described as a "middle ground" in this debate.<sup>20</sup>

But let us return to the central question of this paper, namely, the liberal doctrine of public reason. We have considered Macedo's position on how the public reason doctrine applies to abortion. What is his position on its application to slavery? The question arises, of course, because of the many striking similarities between abolitionist and pro-life causes and movements and the public controversies surrounding them. Macedo says that "there is something a little slick in drawing quick analogies between slavery and abortion in order to impugn public reason,"<sup>21</sup> but he does not explain why. If morally principled antiabortion arguments fail to

meet the test of public reason today, would similarly morally principled antislavery arguments have somehow met the test of public reason in the 1850's? We think the answer has to be no.

Here is what Macedo says on the point:

Projecting myself back to, say, 1857, it seems quite doubtful to me that the merits of the arguments for slavery would have appeared in as reasonable a light as do both sides in today's abortion debate. . . . I suppose there were some whose defense of slavery, coupled perhaps with opposition to "wage slavery" in the North, amounted to a reasoned public case, worthy of some sort of respect.<sup>22</sup>

He then goes on to deny that this situation called for principled compromise, citing George's argument that "respect may sometimes be owed to persons who in general exhibit reasonableness and good will, but not to some position they have adopted, which one regards as so deeply misguided and wrong as to be unworthy of respect."<sup>23</sup>

The difference between abortion and slavery, as Macedo views the matter, then, is simple: he thinks that both sides of the abortion debate really have reasons (so a "principled compromise" such as *Casey*—which, on its own terms, reaffirms "the central holding" of *Roe v. Wade*<sup>24</sup>—is appropriate), whereas even decent people who supported the slavery position had no reasons, but were merely the victims of their own prejudices and corrupt traditions (so public reason would not have required some sort of principled compromise, such as Stephen Douglas's proposal to leave slavery to individual states and territories, perhaps). The problem, of course, is that there were many Americans—even decent ones—who believed that slavery was just and good for everyone concerned, and there are many people today (ourselves among them) who believe that the pro-abortion rights position Macedo finds reasonable is "so deeply misguided and wrong as to be unworthy of respect," even though people of general reasonableness who happen to hold that position should be respected.

So where has the requirement of meeting conditions of public reason gotten us? Nowhere very useful.<sup>25</sup>

### Public Reason as Argumentative Sleight-of-Hand

In the case of *Trimble v. Gordon* (1977), then-Justice William Rehnquist wrote an interesting opinion analyzing the judicial use of the Equal Protection Clause. Rehnquist argued that the prevailing equal protection doctrine authorized such broad second-guessing of legislative decisions that it could be viewed "as a cat-o'-nine-tails to be kept in the judicial closet as a threat to legislatures which may, in the view of judges, get out of hand and pass 'arbitrary', 'illogical', or 'unreasonable' laws."<sup>26</sup>

Public reason is a similar "cat-o'-nine-tails." A good example of this can be found, we think, in Macedo's debate with Robert George, Gerard Bradley, and Hadley Arkes on the issue of homosexuality.<sup>27</sup> Macedo's original position on natural law theory, in *Liberal Virtues*, as we saw above, was that it failed to meet the requirements of public justification. But later, in a book chapter responding to John Finnis's defense of public authority to discourage homosexual conduct (within the limits of the subsidiarity principle), he seemed to change directions somewhat. In his conclusion, Macedo argued that

[t]he best way of thinking about political power in a democratic constitutionalist regime such as ours is as the shared property of reasonable citizens, who should be able to offer one another reasons that can publicly be seen as good to justify the use of that power. Many natural law arguments (including those discussed above [i.e., Finnis's arguments about homosexual acts]) are indeed acceptably public, as Finnis asserts: the reason and evidence on which they are based are not overly complex or vague, and they can be shared openly with fellow citizens. The vice of the new natural law position described above is not its vagueness, complexity, or lack of public

accessibility but, as we saw, its unreasonable narrowness and arbitrary extension.<sup>28</sup>

It is worth noting that Finnis' arguments in his paper were not the stuff of everyday conversation. If not "overly complex or vague," they were still arguments requiring some measure of learning and a high degree of intellectual ability.

Macedo then extended his critique of contemporary natural law thinking on homosexuality in a *Georgetown Law Journal* article, to which George and Bradley (and, separately, Arkes) responded at length.<sup>29</sup> In Macedo's article there is some ambivalence about the relationship between conservative moral arguments and public reason. In a footnote early in the argument, he says that

[t]here may be something appropriate about the limited depth in which we can consider the new natural law arguments. As Rawls has recently argued, the reasons offered for justifying and shaping our basic rights and liberties ought to be ones whose force can be appreciated by people lacking specialized intellectual sophistication and by people proceeding from a variety of abstract, not unreasonable, philosophical assumptions.<sup>30</sup>

There is also a somewhat ambiguous reference to public reasonableness at the end of the article. It is ambiguous, because moral arguments advanced by natural law thinkers and other "conservatives" are said to fail the test of public reasonableness, but the ground for the failure seems to be that they are simply not reasonable arguments, rather than that they are overly complex and inaccessible to ordinary citizens.<sup>31</sup>

As we indicated above, Macedo's argument drew a very lengthy response from George and Bradley. Macedo's subsequent reply argued both that their response was not adequate philosophically and also that

it now seems to me even clearer, moreover, that insofar as it is not possible to defend the value of some homosexual relationships in natural law terms, this is true for reasons that are neither understood

nor accepted by the vast majority of the public. These reasons are too open to reasonable disagreement to furnish a basis for demarcating fundamental rights and liberties in a regime properly dedicated to the authority of public reason.<sup>32</sup>

Macedo repeats this argument in his concluding remarks on George and Bradley's response:

If our disagreements indeed lie in these difficult philosophical quarrels, about which reasonable people have long disagreed, then our differences lie precisely in the territory that John Rawls rightly (on my view) marks off as inappropriate to the fashioning of our basic rights and liberties. It is . . . inappropriate to deny people fundamental aspects of equality based on reasons and arguments whose force can only be appreciated by those who accept difficult to assess claims about the nature and incommensurability of basic goods, the relationship between intrinsic and instrumental value, and the dispute over whether pleasure is a reason for action. I submit that if the new natural law does not fail for the fairly straightforward reasons I have offered . . . then the new natural law argument fails as a basis for fashioning basic liberties and the principles of equality on grounds of its esotericism.<sup>33</sup>

So Macedo, at this point, has come full circle, back to his original position that natural law is unable to meet the demands of public justification.

Macedo is apparently trying to establish a "Catch-22" situation for natural law theorists. If they do not put forward a powerful and intellectually sophisticated argument for their positions regarding political life and moral issues, then they fail the requirement of reason per se. Their positions become nothing more than the popular prejudices, the "unreasoned populism" criticized in *Liberal Virtues*. If, on the other hand, natural law theorists do provide powerful and intellectually sophisticated reasons for their positions, then ipso facto they are going beyond the limits of public justification, because their arguments become too complicated and



controversial. "Public reason" is serving as that ever-convenient cat-o'-nine-tails that can be dragged out as soon as the argumentative going gets tough. In fact, the more sophisticated the natural law argument, the easier it becomes to dismiss it for not being "publicly accessible"! Yet in his article in the current volume, Macedo asks, in regard to Michael Sandel: "Or is Sandel just [incorrectly] supposing that the sort of moral arguments with respect to nuclear deterrence offered by the Catholic bishops, or *natural law arguments on homosexuality*, are in some basic way at odds with public reasonableness?"<sup>34</sup> So, it appears, natural law arguments regarding homosexuality are now back in the other column: legitimate, from the standpoint of public reasonableness (whatever their truth value otherwise).

Whatever Macedo's final stance on the relation of natural law arguments against homosexual conduct, for example, and public reasonableness, so many shifts and such inconsistency in the argument of an impeccably honest and highly sophisticated advocate of the liberal public reason doctrine itself suggests that something must be wrong with the doctrine.

Note also how Macedo's line of argument exemplifies an enduring and characteristic feature of liberal argumentation. "Equality" (between, e.g., what law and moral tradition have long understood to be marital intercourse, on the one hand, and sodomitical relations—heterosexual or homosexual—on the other) is assumed to be the undifferentiated "default" position for society; it doesn't require being established by an argument, and it's nothing if it's not simple. Having arbitrarily established this as the starting point, the burden of proof is placed on the opponents of liberalism to justify any departure from the liberal conception of equality, and if they don't come up with a *compelling* but *simple* response, the liberal position wins. But this is not much more than playing a game with loaded dice.<sup>35</sup>

If, on the other hand, advocates of homosexual rights and other liberal ideas about sexuality, for example, were subject to the same requirement of establishing a satisfactory philosophical basis for

their position—and if their simple assertions of a right to engage in sodomitical acts or a right of same-sex couples to obtain marriage licenses were dismissed just as easily as conservative positions on the grounds that they reflect mere "prejudices," undisciplined desires, or special pleading—then their arguments would quickly have to become more sophisticated, and thereby become "inaccessible" to "people lacking specialized intellectual sophistication"<sup>36</sup>.

### Public Reason and Religion

There is much that might be said about liberal public reason and religion, though we do not have the space to explore the question very far here. Let us take this occasion simply to mention a few problems.

By emphasizing the "reason" of public reason, liberals can significantly circumscribe the role that religion plays in public discourse, at least insofar as religion is considered to be nonrational. And the "public" part of public reason can further this process insofar as religion is understood as essentially a set of beliefs based on claims to private revelation. Rawls and Macedo both adopt this general approach at various points in their writing. But both elements of the approach are problematic. Religion claims, in at least some forms, or at least up to some point, to be rational; moreover, it typically proposes that the revelation to which it responds is in the most important respects fully publicly accessible.

To take one example from current controversies, let us consider euthanasia. There are various reasons for opposing euthanasia on moral grounds, and we suppose that some of these might pass muster before the bar of liberal public reason. But let us consider a straightforward theological ground for opposing euthanasia, and ask whether it meets the requirements of public reason.

But though this be a State of Liberty, yet it is not a State of Licence, though Man in that State have an uncontrollable Liberty, to dispose of his Person or Possessions, yet he has not Liberty to destroy

himself, or so much as any Creature in his Possession, but where some nobler use, than its bare Preservation calls for it. The State of Nature has a Law of Nature to govern it, which obliges everyone: And Reason, which is that Law, teaches all Mankind, who will but consult it, that being all equal and independent, no one ought to harm another in his Life, Health, Liberty, or Possessions. For Men being all the Workmanship of one Omnipotent, and infinitely wise Maker; All the Servants of one Sovereign Master, sent into the World by his order and about his business, they are his Property, whose Workmanship they are, made to last during his, not one another's Pleasure.<sup>37</sup>

This argument comes, of course, from “the greatest liberal of them all”<sup>38</sup>, John Locke. Is it compatible with public reason?

Before 1947 and *Everson v. Board of Education*<sup>39</sup>, it is fair to say that American public philosophy took the political relevance of a providential God for granted. Perhaps the greatest testimony to this was the publicly declared judgment that men's inalienable rights, the protection of which was government's supreme purpose, rested on a (natural) theological foundation: “We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable rights . . .” This was, presumably, the foundation for Justice Douglas's famous statement in *Zorach v. Clauson* that “[w]e are a religious people whose institutions presuppose a Supreme Being.”<sup>40</sup> Beginning with *Everson*, however, “separation of church and state” has been gradually, but radically, redefined to view public acknowledgment of God as a violation of fundamental constitutional principles. This has primarily been the work of intellectuals and their allies in the “knowledge class,” whose religious beliefs and practices, it should be noted, are in most cases dramatically out of line with the beliefs and practices of their fellow citizens.

In this area, as in the area of morality, we would argue that one must distinguish between different levels of knowledge: “inarticulate knowledge” and more fully developed knowledge. Most

Americans believe in God, though few could get very far with, say, an unbelieving professor from their state university in arguing on the subject. We would nonetheless contend that they possess genuine knowledge. Their views are, to be sure, less sophisticated than the views of professional academics or other intellectuals, but they possess the considerable virtue of being true. Is the existence of a providential God (e.g., a God who creates and attends to his Creation), therefore, “publicly accessible” and thus defensible at the bar of public reason (broadly and properly defined—not Rawlsian public reason)? We, like virtually all the founders of American government, think it is.

Some religious believers (perhaps especially certain evangelicals) might go further. They appeal to the Bible, and argue that the Bible is true, and should be recognized as true by any reasonable person. To the extent that “faith” is necessary, they would argue that faith is available to all. (They make no gnostic claim to a body of special, secret knowledge, accessible only to an elite.) And such believers are nothing if not willing to share their “reasons” in public! On what nontheological grounds can liberals deny that such claims are, in fact, “publicly accessible” to all? The simple fact that “some people don't believe” won't do; that's true of virtually all positions (certainly including liberal contentions). Unless “reason,” as liberals understand it and its implications, is said to be, in principle, a superior source of knowledge, why should liberal reason be privileged over evangelical faith? In a given society, faith might actually be viewed by a large majority of society as a more, rather than less, “publicly accessible” form of knowledge. Aside from comprehensive liberalism's religious scepticism, is there a clear reason, other than the conventional beliefs of American intellectual class, why religion—even in the form of revealed religion—should be considered any less publicly accessible than, say, Rawlsian liberalism?

We do not deny that religious differences—especially those based on differing views of divine revelation—can make for considerable tensions in the public sphere, and that prudence dictates

that the fact of religious pluralism be taken seriously into account in determining the appropriate character of social discourse and deliberation. In the absence of a more extensive discussion of that complex issue, let us only say for the moment that we see no reason to believe that liberal public reason will prove itself to be more helpful a concept when considering the relation of religion and politics than it is when considering the relation of politics and morality.

### Conclusion

These observations indicate that liberal public reason is ultimately implausible and, in any event, an intellectually unhelpful doctrine. Its measures are unclear. It is difficult to square with the complexities of human knowledge. It is easily susceptible to partisan manipulation, especially by comprehensive liberals whose partisan interests, after all, it almost always serves. On the whole, we would be better off without it.

The alternative, we suggest, is to expand the concept to a genuine, broad—i.e., not arbitrarily truncated—idea of public reason. That would be welcome to natural law theorists, who are happy to contend on that level playing field in the struggle to identify and embody in law and public policy truths available to rational inquiry, understanding, and judgment.

### Notes

1. Stephen Macedo, *Liberal Virtues*. Oxford, UK: Clarendon Press, 1990.
2. The main difference between Rawls and Macedo is that Macedo is much more definite—and unapologetic—about political liberalism's fostering of a particular way of life that is incompatible with other ways of life. Public policy, moreover, can fairly attend to fostering the essential prerequisites of this way of life. At points, therefore, we think that Macedo may cross the line into a form of comprehensive

liberalism, though he would probably deny this. See *Liberal Virtues*, pp. 59–64.

3. Macedo, *Liberal Virtues*, p. 12.
4. *Ibid.*, pp. 63–64.
5. *Ibid.*, p. 47.
6. *Ibid.*, p. 211.
7. *Ibid.*, p. 212.
8. *Summa Theologica* I–II, Q. 94, a. 4: "It is therefore evident that, as regards the general principles whether of speculative or of practical reason, truth or rectitude is the same for all, and is equally known by all." Qualified in Q. 94, a. 6: "As to those general precepts, the natural law, in the abstract, can nowise be blotted out from men's hearts. But it is blotted out in the case of a particular action, in so far as reason is hindered from applying the general principle to a particular point of practice, on account of concupiscence or some other passion."
9. *Summa Theologica* I–II, Q. 94, a. 4. "... the natural law, as to general principles, is the same for all, both as to rectitude and as to knowledge. But as to certain matters of detail, which are conclusions, as it were, of those general principles, it is the same for all in the majority of cases, both as to rectitude and as to knowledge; and yet in some few cases it may fail, both as to rectitude . . . and as to knowledge, since in some the reason is perverted by passion, or evil habit, or an evil disposition of nature; thus formerly theft, although it is expressly contrary to the natural law, was not considered wrong among the Germans, as Julius Caesar relates . . ."
10. *Ibid.*
11. On the (much misunderstood) meaning of "self-evidence" as natural law theorists use the term in relation to the most basic principles of practical thinking, see Robert P. George, "Recent Criticism of Natural Law Theory," *University of Chicago Law Review*, 55 (1988), 1386–89.
12. "Some matters connected with human actions are so evident, that after very little consideration one is able at once to approve or disapprove of them by means of these general first principles; while some matters cannot be the subject of judgment without much consideration of the various circumstances, which all are not compe-

- tent to do carefully, but only those who are wise." *Summa Theologica* I-II, Q. 100, a. 1.
13. For a clear and, we think, decisive answer to Macedo's claim that moral norms as understood by natural law theorists are beyond the capacities for understanding of "most people," and therefore not legitimate grounds for legislation, see John Finnis, "Is Natural Law Theory Compatible with Limited Government?" in *Natural Law, Liberalism, and Morality*, ed. Robert P. George. Oxford, UK: Clarendon Press, 1996, pp. 1-26, esp. 10-11.
  14. Macedo, p. 29 of this volume.
  15. Finnis, "Is Natural Law Theory Compatible with Limited Government?" in *Natural Law, Liberalism, and Morality*; George, "Public Reason and Political Conflict: Abortion and Homosexuality," *Yale Law Journal* 106 (1997), 2475.
  16. George, "Public Reason and Political Conflict," p. 2493.
  17. Macedo, p. 32 of this volume.
  18. Ibid.
  19. 120 L.Ed.2d 674 (1992).
  20. See, for example, Eileen McConaugh, *Breaking the Abortion Deadlock: From Choice to Consent*. New York: Oxford University Press, 1996, and Roger Rosenblatt, "How to End the Abortion War," *The New York Times Magazine*, 141 (Jan. 19, 1992), p. 26.
  21. Macedo, p. 42 of this volume.
  22. Ibid.
  23. Ibid.
  24. 120 L.Ed.2d 674, p. 699.
  25. Rawls, in "The Idea of Public Reason Revisited," *University of Chicago Law Review*, 64 (1997), 802, contends that it is a "misunderstanding" that "an argument in public reason could not side with Lincoln against Douglas in their debates of 1858. He simply asserts that "[s]ince the rejection of slavery is a clear case of securing the constitutional essential of the equal basic liberties, surely Lincoln's view was reasonable (even if not the most reasonable), while Douglas's was not" (ibid.). But, of course, whether blacks were fully human beings and appropriate subjects of "equal basic liberties" was precisely the point of contention in the slavery debate of that time, as it is the point of contention, in our time, regarding very young

- human beings still in the womb. Rawls is right about Lincoln and the rights of blacks, of course, in just the same way as those who seek to protect the rights of the unborn today.
26. 430 U.S. 777 (1977).
  27. Stephen Macedo, "Homosexuality and the Conservative Mind" and "Reply to Critics," *Georgetown Law Journal*, 84 (December 1995), 261-300 and 329-38. See also the Finnis-Macedo exchange on the same subject in George, ed. *Natural Law, Liberalism, and Morality*.
  28. Stephen Macedo, "Against the Old Sexual Morality and the New Natural Law," in George, ed. *Natural Law, Liberalism, and Morality*, p. 44.
  29. It is characteristic of Macedo's intellectual integrity and fair mindedness that he personally encouraged the editors of the *Georgetown Law Journal* to solicit essays critical of his views on homosexuality for publication in response to his article.
  30. Macedo, "Homosexuality and the Conservative Mind," p. 264, n. 15.
  31. Ibid., p. 299.
  32. Macedo, "Reply to Critics," p. 329.
  33. Ibid., p. 335.
  34. Macedo, p. 36 of this volume (emphasis added).
  35. Again it strikes us as a recurring feature of much liberal argumentation. One of us noted the same mode of argument in Bruce Ackerman's *Social Justice and the Liberal State* in a review written over fifteen years ago. See Christopher Wolfe, "Liberal Foundations for Liberalism?" in *The Public Interest*, 62 (winter 1981), 127-28. Although it is less clear in the earlier discussion of abortion, we think that the same principle operates there. The burden of proof is placed on anti-abortion advocates to prove that life begins at conception and that such life is entitled to all the normal protection accorded at least to innocent human life. The battle rages, with arguments put forth on both sides, and then a draw is declared, and a "moderate compromise" that reaffirms abortion rights is put forward as the appropriate resolution.

Complex moral argumentation is always considered to be inconclusive, and as "ties go to the runner" in baseball umpiring, the resultant "ties" on civil liberties issues always go to the side favoring more "freedom," which is assumed to be the liberal position. This

approach is particularly questionable in a democracy, since it usually involves judicial overruling of legislative enactments, despite the "antimajoritarian problem" implicit in that disposition. In a democratic republic, one would think that "ties" ought to result in upholding legislative acts.

36. In this regard, note particularly Macedo's own efforts to prevent his rejection of natural law norms regarding sexuality from becoming a defense of promiscuity. (Macedo, "Homosexuality and the Conservative Mind," p. 261). Even apart from the question of whether Macedo makes an adequate intellectual case against promiscuity (which we doubt; a case merely for moderation doesn't rule out anything other than "immoderate promiscuity"), it seems likely that the same kinds of objections Macedo uses against the accessibility of natural law arguments can be used against his own arguments.
37. John Locke, *Two Treatises of Government*, ed. Peter Laslett. New York: Mentor, 1965, p. 311.
38. Stephen Macedo, "Multiculturalism for the religious right? Defending liberal civic education," *Journal of Philosophy of Education*, 29 (1995), 231.
39. 330 U.S. 1 (1947).
40. 343 U.S. 306, 313 (1952).

John Finnis

## Abortion, Natural Law, and Public Reason

### Public Reason and the "Right to Kill the Unborn"

The issue I was asked to debate with Professor Reiman was: Is the abortion question the kind of question that should be publicly regulated, or should it be outside the public sphere in a liberal society, on the grounds, for example, that it is not amenable to "public reason"? As Reiman will I'm sure agree, the issue thus framed for debate between us is scarcely debatable. Will anyone argue that abortion should be left to private judgment, so that people who judge it as homicide are entitled to use force to prevent their fellow citizens engaging in it (just as they are entitled to use force to prevent infanticide or sexual intercourse between adults and eight-year-old boys)? Every society, liberal or illiberal, takes a public stand on the question of whether abortion is or is not a form of criminal activity.

The need for the law and public policy to take such a stand has become more and more obvious, for two reasons. The first has to do with the standard purpose of abortion, as that term is commonly used: to end the life of a fetus/unborn child. As Reiman argues,<sup>1</sup> the right to abortion that he is interested in defending, and that many others are interested in having, is a right that would be *negated* if it were reduced to "[a woman's] right to expel an