

Three Disputes About Public Justification: Commentary on Gaus and Vallier*

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Many philosophers believe that if the exercise of political power must be publicly justifiable in order to be legitimate, this will effectively preclude religious convictions from playing any role in politics. In order to successfully justify the exercise of political power to all citizens, most theorists of public reason claim that we must appeal only to public or political values which all persons (or all suitable idealized persons) are assumed to endorse. Since any given religion, or any particular religious belief, will be the subject of reasonable disagreement amongst the specified constituency of persons, public justification or public reason (I'll use the terms interchangeably) is widely assumed to exclude religious convictions from playing any part in formulating laws or policies.

Gerald Gaus and Kevin Vallier argue that public justification is, in fact, far more hospitable to religious convictions. They claim that the position sketched in the preceding paragraph rests on three errors regarding the nature of public justification. The first is the *Error of Consensus*: the view that laws must be justified by appeal to shared reasons that all citizens can accept as valid. Following some of Gaus's previous work, Gaus and Vallier argue that public justification is not limited in this way – it may also permit citizens to *converge* on a given law for different reasons. Once this possibility is acknowledged, religious convictions can play a major role in the structure of public justification since a law, L, could be legitimately imposed provided each citizen correctly believed L was justified for their own religious reasons. Second, Gaus and Vallier warn against the *Error of Symmetry*: the belief that whatever is true about the nature of reasons that can support the imposition of a law must also be true of the reasons that can defeat a given law. Gaus and Vallier argue, however, that while it would be wrong for a law, L, to be imposed on the general public for purely religious reasons (since such reasons will not be justificatory for many citizens), L could still be *defeated* by a religious consideration. If Alf has a valid (valid within his belief-set) religious reason to reject L, in rejecting L he does not impose his religious views on others, he merely prevents

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L from being imposed on him when it cannot be justified to him. Finally, Gaus and Vallier highlight the *Error of Deliberation as Constitutive of Justification*: the belief that if we want our laws to be publicly justified, citizens must adhere to certain first-order norms of public deliberation such as Rawls's well-known duty of civility. Gaus and Vallier argue that publicly justified laws may in fact be best achieved if we do not, as individual citizens, aim at public justification directly, but rather design our political institutions in ways that promote publicly justified outcomes while allowing citizens to argue and vote with a lot more freedom (including the freedom to introduce religious arguments) than most theorists of public reason typically allow.

Like Gaus and Vallier, I am committed to the general project of public justification, however, I am unconvinced that the three errors they describe are in fact errors. Below I offer some remarks mainly on the first two alleged errors. In section 1 I offer some reasons to be sceptical about the convergence model of justification proposed by Gaus and Vallier. Section 2 tries to cast some doubt on Gaus and Vallier's claim that religious reasons can function as defeaters in public justification by querying *The Liberty Principle* on which their argument depends. Finally, in section 3, I offer some very brief and very tentative worries regarding their apparent rejection of duties of public reasoning, such as Rawls's duty of civility.

1. Consensus vs. Convergence¹

Most advocates of public reason have supposed that if law L is to be legitimate, there must be a reason, or set of reasons, which justify L that all members of the public (however the constituency is defined) recognize and endorse as sufficient to justify L. Public justification, on this view, requires shared reasons. This is the *consensus* model of public justification.² But, as Gaus and Vallier argue, if the aim of public justification is to ensure that political power is never exercised over someone unless the exercise of that power can be justified to the person in question, why require that the reasons justifying L be shared reasons? If L can be

¹ In this section I draw on some material from a book manuscript in progress titled, *Liberalism Without Perfection*.

² Though it is perhaps worth noting that the consensus model can come in a strong or a weak form. On the strong version, there must be a single justification for L which all members of the public accept as correct. On the weak version, there can be multiple justifications for L accepted by different citizens, provided that each justification is grounded in shared reasons that all citizens accept as plausible or reasonable justifications for L. Rawls is sometimes criticized for advocating the strong version of the consensus model whereas in fact he only adheres to the weak position.

justified to each and every person by virtue of a *convergence* of different reasons, doesn't this do just as good a job of respecting the requirement for public justification to each and every person over whom power is exercised? And if the convergence of different reasons is a possible method of public justification, then religious reasons are not precluded from the project of public justification. Some citizens can support L for purely religious reasons, even though such reasons will not be shared by everyone, provided L can be justified to each person on different grounds.

I suspect, however, that the convergence model of justification is inconsistent with a *sincerity requirement* that is embraced by most theorists of public reason.³ Sincerity requires that we not support or advocate laws when we do not sincerely believe they can be justified to others, regardless of what those others may themselves believe. The sincerity requirement is valuable for a number of reasons. Perhaps the most important reason is that it helps to distinguish public justification from rhetoric or manipulation. Public justification does not aim at mere agreement or consent – the aim is for political decisions to be *justified* to each person who is bound by them. In order for decisions to be justified, they must be grounded in sound reasons or arguments. It is imperative not merely that each person accept a given political decision, but rather that they have good reasons to do so. As Gaus and Vallier say, if Alf is going to support law L, which will also govern Betty's conduct, then 'if Alf is to respect Betty as free and equal...he must think, or at least have reason to suppose, that Betty really does have reason to endorse the law' (p. 9). Alf cannot, they point out, believe L is justified for Betty merely because Betty wrongly thinks it is justified on the grounds that a little bird told her so.

Assuming that sincerity is a requirement of public reason, how should it be formulated? Suppose we have a political constituency of only two persons, *A* and *B*, and they face a choice as to whether or not to endorse proposal *X*. A *principle of justificatory sincerity* (PJS) requires that *A* may only endorse *X* if the following are true (and vice versa for *B*):⁴

³ See for example: Gaus, *Justificatory Liberalism* (Oxford: Oxford University Press, 1996) 139-140; John Rawls, *Political Liberalism* (New York: Columbia University Press, 1996), 241-242; or Rawls, 'The Idea of Public Reason Revisited,' in *Collected Papers* (Cambridge: Harvard University Press, 1999), 578. For a detailed defence of the sincerity requirement, and a particular interpretation of it see Micah Schwartzman, 'The Sincerity of Public Reason' (unpublished).

⁴ The principle I present here follows the accounts of sincerity offered by Gaus, Rawls, and Schwartzman, though Schwartzman's principle also incorporates the value of publicity in a way that my principle does not. I don't necessarily reject Schwartzman's formulation of what publicity requires with regard to public reason, it's

- (i) A reasonably believes he is justified in endorsing X ,
- (ii) A reasonably believes that B is justified in endorsing X .

PJS is meant to ensure that one person does not try to impose a law on another when they do not believe that policy can be justified to the other person. But now consider the following simplified example. Person A holds that X is justified for nonpublic reason Ra , whereas person B holds that X is justified for nonpublic reason Rb . Assume further that A rejects Rb , that is, they deny it is a sound reason for X , and likewise B rejects Ra . Finally, assume that there are no other relevant considerations that speak in favour of X : the only possible justifications are the two that are separately held by A and B . So we have:

A believes $Ra \rightarrow X$.

B believes $Rb \rightarrow X$.

A **does not** believe $Rb \rightarrow X$.

B **does not** believe $Ra \rightarrow X$.

This is a pure version of the convergence view, where there are no shared reasons in support of X , but nevertheless each member of the relevant constituency believes X to be justified for their own nonpublic reasons. The fundamental problem is that in such scenarios A and B cannot endorse X without falling foul of PJS. This is true because each person must believe the other is not justified in endorsing X . Consider things from A 's point of view. A believes he is justified in endorsing X for nonpublic reason Ra , but because his reason is nonpublic, he knows he cannot reasonably expect it to serve as a justification for B . Additionally, A believes that the nonpublic reason which explains why B endorses X , Rb , is unsound. Rb , we can assume, is drawn from B 's comprehensive doctrine, a doctrine that A rejects as false. Assuming there are no other considerations that speak in favour of X , then A cannot endorse X without violating PJS. The same obviously applies when we consider things from B 's point of view. If either person were to vote for or otherwise support X , he would be imposing a political decision on his fellow citizen which he does not believe can be

just that discussion of it isn't relevant to the point I want to make here. See Gaus, *Justificatory Liberalism*, 140; Rawls, *Political Liberalism*, 217, 240; and Schwartzman, 'The Sincerity of Public Reason'.

justified to that citizen. This violates PJS, and it is clearly inconsistent with the aim of justifying the exercise of political power to others on terms they can reasonably accept.

How, in light of this objection, can Gaus and Vallier believe the convergence view of public justification is acceptable? Their position depends on the claim that *A* and *B* can view each other's reasons as *intelligible* even if they do not share each other's comprehensive doctrines. Gaus and Vallier remind us that the fact of reasonable pluralism (in some form) is a foundational assumption for the project of public justification:

Members of the public...acknowledge that they reasonably employ different values and goods in their reasoning about what laws to accept, and so they view each other as different, but intelligible. All accept that reasoning on the basis of these different values is within the range of the intelligible use of human reason on these difficult matters. An intelligible reason, then, is a reason that is within the ranged of the reasonably pluralistic considerations that members of the public draw upon in reasoning about laws (pp. 9-10).

Thus, according to Gaus and Vallier, because we assume the fact of reasonable pluralism, we must assume that the reasons of any member of the public are intelligible to any other member of the public as the kind of considerations one might reasonably rely on in justifying decisions. I am not, however, persuaded by this appeal to intelligibility.

Suppose Alf sees Betty refuse a delicious ham and cheese sandwich when it is offered to her. Puzzled, Alf asks Betty why she refused the sandwich. Betty replies that she is Jewish, and she believes that God has forbidden her from eating certain kind of foods, or certain combination of foods. Ham and cheese sandwiches are prohibited by God, no matter how delicious they may be. Betty's explanation is intelligible to Alf – he can now understand why Betty acts as she does. He sees that given certain premises which Betty understandably holds to be true (understandable since she was raised in a strictly Orthodox home), she must refuse the ham and cheese sandwich. But just because Betty's reasoning is intelligible to Alf does not mean that Alf can sincerely believe Betty is justified in refusing the ham and cheese sandwich. Betty's reasoning begins with premises that are, in Alf's view, certainly false. Betty may have reasoned impeccably from false premises to her conclusion, but justification requires more than impeccable inferences – it also requires sound premises. Since Alf

believes Betty's premises are unsound, he cannot believe her appeal to what God has commanded does in fact provide her with a valid justification for refusing the ham and cheese sandwich. This consideration cannot be, from Alf's viewpoint, a valid normative reason for Betty.

Let me emphasize this point with another example.⁵ Suppose we have a parent and a child, and the issue is whether the child should go to bed at a specified bed-time, 9pm. The child declares 'I should go to bed at 9pm because if I don't, Santa Claus will know and he won't bring me any presents'. Let's assume that, given what the child believes about Santa Claus, the child has reasoned correctly about the implications of not being in bed at 9pm. This does not entitle the parent to sincerely think that the child's belief is justified, since the parent knows the child has started from false premises.

Gaus and Vallier may protest by pointing out that, unlike the Santa Claus example, the project of public justification applies to members of a public where we assume the fact of reasonable pluralism holds. In these conditions, we must assume that those who disagree with us are reasonable in the sense that their beliefs and values can be valid premises *for them*, even if we do not accept them ourselves. To return to the example used earlier, I think Gaus and Vallier would want to characterize reasonable pluralism as follows:⁶

- A* justifiably believes $Ra \rightarrow X$.
- B* justifiably believes $Rb \rightarrow X$.
- A* justifiably **does not** believe $Rb \rightarrow X$.
- B* justifiably **does not** believe $Ra \rightarrow X$.
- A* recognizes *B*'s belief system as rational.
- B* recognizes *A*'s belief system as rational.

This account makes room for the possibility that what is a reason for *A* may not be a reason for *B* (and vice versa), and also allows for the idea that *A* and *B* can recognize this fact, and thus each can acknowledge that the other holds a justified belief. *A* and *B* can thus each endorse *X* without violating PJS since they can each be satisfied that the other party's argument, though not justified within their own belief system, may nevertheless justifiable

⁵ The example is borrowed (though modified) from Gaus, *Justificatory Liberalism*, 139.

⁶ The following characterization is consistent with the moderately relativist account of epistemology that Gaus develops in part 1 of *Justificatory Liberalism*.

within the other person's belief system. If we characterize reasonable pluralism in this way, then the convergence view of public justification can be made consistent with the sincerity requirement.

There are, however, two significant drawbacks to this position. First, the position entails a radical and controversial view regarding the nature of reasons and rational justification. Not only does it entail the moderately relativist thesis that R may be a valid normative reason for Alf even though R is not any kind of reason for Betty, but it also requires that Betty can *recognize and accept* that R is normative for Alf. One worry about this view is that it is too controversial, and thus we should not expect that citizens in a pluralistic liberal society should accept this account of reasons and rational justification. Following Rawls, we might think our account of public justification should not presuppose a controversial epistemic theory which many reasonable citizens will not accept.

But suppose we set this worry aside, and simply define members of the public as only those persons who accept this controversial thesis about the nature of rational justification. Consider what this implies about the constituency of public justification. It implies that we cannot view others as *reasonable* (as members of the justificatory constituency) unless we can also recognize their belief systems as *rational* (in the sense of being able to ground valid reasons). This greatly reduces the constituency of public justification since it precludes us from viewing others as reasonable when we are also certain that their comprehensive doctrines are irrational or otherwise incapable of generating valid reasons. I think such a restriction is both unnecessary and undesirable. Following Rawls, I think it is important to draw the boundaries of the reasonable in a way such that 'there are no restrictions or requirements on how [reasonable] religious or secular doctrines are to be expressed; these doctrines need not, for example, be by some standards logically correct, or open to rational appraisal, or evidentially supportable'.⁷ I think we should have an account of public justification where citizens need not view each other's comprehensive doctrines as rational, but can view each other's doctrines as reasonable but also clearly false or incapable of generating sound reasons. This, incidentally, is surely a more accurate characterization of religious disagreement. Most people do not view people with other religious views as having rational systems of belief which generate valid reasons, rather they understand that certain conditions have made it plausible or reasonable for others to have adopted different religious

⁷ Rawls, 'The Idea of Public Reason Revisited,' 592.

views, but they remain certain such other views are mistaken. The convergence model of justification cannot be deployed amongst a constituency of persons who view each other's doctrines as clearly mistaken while remaining consistent with the sincerity requirement. The consensus model, however, does address itself to this kind of pluralism since it assumes that we cannot sincerely justify the exercise of political power to everyone unless our justifications are grounded in reasons that we all share in our capacity as free and equal members of the public. I think this is a powerful reason to reject the convergence model as a possible type of public justification.

2. Religious Reasons as Defeaters

According to advocates of public justification, it would be wrong to impose law L on the public if the only justification for L was based in religious (or otherwise nonpublic) reasons. This would be wrong since such considerations are not justificatory for a significant segment of the population. Many theorists of public reason have thus inferred that it would also be wrong for any citizen to oppose the imposition of L for purely religious reasons. After all, this too is an appeal to considerations that other citizens will reasonably reject. Gaus and Vallier argue that this is a mistake. We can permissibly *oppose* the imposition of laws for reasons that it would be wrong to deploy as the sole *support* of the imposition of a law. This asymmetry holds because the requirement for public justification only applies to the imposition of laws. According to Gaus and Vallier one of public justification's foundational premises is

The Liberty Principle: Liberty should be the norm, respect for free and equal persons requires that coercion always needs some special [i.e. public] justification. Unjustified coercion is wrong (p. 3).

Thus, if Alf rejects the imposition of law L for religious reason R, Alf does not violate the demand for public justification since he does not attempt to impose a law on anyone, he merely points out that L cannot be imposed on him since he can justifiably reject it for his own religious reasons.

The view that religious considerations can be used as 'defeaters' in public justification even though they cannot be used as the sole supporting arguments for the

imposition of a law thus depends heavily on the Liberty Principle (LP). If we could show that the demand for public justification applied with equal force in at least some cases where we must choose between the coercive imposition or non-imposition of some action, this would show that LP was at least sometimes false. This would then considerably weaken Gaus and Vallier's claim regarding the permissibility of religious defeaters. With that objective in mind, consider the following pair of examples:⁸

Barry Gets a Date: Barry tells Cathy that unless she agrees to go on a date with him, he will destroy a painting that belongs to Cathy, a painting that she loves very much even though it has absolutely no financial value.

Dave Gets a Date: Dave tells Edna that unless she agrees to go on a date with him, he will destroy a painting that belongs to Dave, a painting that Edna loves very much.

I think it's evident that Barry's action is coercive – threatening to destroy someone else's property unless they do something you want them to do seems like a paradigm case of coercion. But what about Dave's behaviour? I suspect that most people will, like me, deny that Dave's behaviour is a form of coercion. If Dave's attempt to get a date with Edna is not coercive in the way that Barry's is, this seems to show that our beliefs about whether a given action is coercive depends on our prior beliefs about rights or justice. If Dave's action is not coercive, it must be because Dave, unlike Barry, is acting within his rights. He is only in threatening to destroy his own painting, not someone else's. Determining whether or not someone is acting within their rights (not acting unjustly) thus appears to be at least one of the variables necessary to decide if an action is an act of coercion.

I think this pair of examples illustrates that the underlying reason why LP appears true is because coercive acts are *prima facie* unjust: they involve violating or threatening to violate someone else's rights. If it is their *prima facie* unjust character which causes them to stand in need of justification, then we might infer that it is in fact all *prima facie* unjust acts which stand in need of justification, and not merely coercive ones. This inference, I believe,

⁸ The argument in this section closely follows a critique of Gaus's views made by Steven Wall in 'On Justificatory Liberalism,' *Politics, Philosophy & Economics* (forthcoming), though Wall doesn't focus on the issue of religious defeaters. Obviously Wall might not agree with everything that I say here.

is the right one to draw. We decide what is just and unjust by appealing to public reasons or public justifications because justice sets the terms and conditions under which we can legitimately interact with others. When we violate those terms our action is *prima facie* unjust, and thus our action stands in need of some special justification. Let me now try and show why this claim about *prima facie* unjust acts standing in need of justification undermines LP.

Saving from Strychnine: George notices that Hilda has unknowingly put strychnine in her coffee (thinking it was sugar) and she is now certain to die unless George gives her the antidote, which is on the table next to him. George decides to do nothing.

George acts unjustly in this example. He fails to adhere to a basic duty of justice: rescuing those in dire need when you can do so at little cost to yourself. I think it is correct to say that George's behaviour stands in need of justification in exactly the same way coercive acts stand in need of justification. If someone ran up to George and demanded he justify his outrageous behaviour, their demand would be perfectly appropriate. Only a very compelling reason could serve to make George's inaction permissible (perhaps George cannot save Hilda because he has been told by a terrorist that if he does so, a bomb will be detonated in central London). George cannot simply reply by saying he doesn't have to justify those things he fails to do, only those coercive things he does do. But now consider a different example:

Saving from Strychnine 2: George notices that Hilda is about to unknowingly drink coffee with strychnine in it (having mistaken the strychnine for sugar). Hilda will certainly die if she drinks the coffee and the only way for George to prevent her from doing so is by threatening to kick her in the shin if she drinks her coffee (Hilda doesn't trust George and wouldn't listen to his warnings, but she does have a serious phobia of being kicked in the shin).

As with the first example, I submit that in this case George is required by justice to save Hilda. Although George must use a very mild degree of coercion in the second case, he

cannot refuse to save someone's life when he can do so at little cost to himself, especially when the coercion involved will be directed at the person whose life will be saved. If he fails to act in the second example this too should stand in need of special justification – in both cases George's inaction would be illegitimate absent suitable justification. But now we have a problem. Justice in the second example requires that George threaten the use of coercion, and LP tells us that coercion always stands in need of special justification. But this implies that if George were to act, his action would be illegitimate absent suitable justification. It seems that, in *Saving from Strychnine 2*, George faces circumstances where no matter what he does or doesn't do, his (in)action will stand in need of special justification.

This conclusion has serious implications for LP. That principle, recall, tells us that liberty is the norm, and coercion stands in need of special justification. But there is an implicit premise required to reach this conclusion, namely, that a state of affairs is presumptively legitimate provided it contains no unjustified coercion. But *Saving from Strychnine 2* shows this implicit premise is not true. In this example George will not be able to do what justice requires without using coercion: he faces a choice between coercive action or unjust inaction. Even if we accept the premise that coercion stands in need of special justification, this doesn't entail an asymmetrical relationship with non-coercive action. If we believe that it is all *prima facie* unjust acts (not just coercive ones) that stand in need of special justification, then coercive action and unjust inaction are symmetrically situated: they both stand in need of special justification. LP, by assuming liberty is the default legitimate option, fails to see that (sometimes) inaction has no more presumptive claim to legitimacy than coercive action.

Without LP, Gaus and Vallier's claim that nonpublic reasons, such as religious reasons, can be deployed as defeaters within public justification is suspect. Imagine Alf attempts to deploy a religious reason to defeat a requirement that he rescue a small child who is drowning nearby – a requirement that might be coercively imposed on Alf if necessary. Alf says, 'My religion instructs me not to interfere with God's plans, and thus if the child is drowning, that means God intends the child to drown and it would be contrary to God's will to interfere. Within my belief system this reason defeats the public reason that I owe a duty of rescue to others when I can do so at little or no risk to myself'. Alf's appeal to his religious views (even if sound within his belief-system) only works as a valid defeater if we assume the truth of LP. But I hope to have shown we should not accept LP in the form

offered by Gaus and Vallier. The more fundamental reason why coercive acts stand in need of special justification is that such acts are *prima facie* unjust. It is this more fundamental set of acts that stands in need of justification – coercive acts are only a sub-set. Since Alf is refusing to do what (we assume) justice requires, his refusal should stand in need of public justification in exactly the same way an act of coercion would. Since Alf does not offer a public justification, only a religious reason, his religious appeal cannot defeat the requirement to rescue the child any more than a purely religious appeal could legitimate the use of coercive force against someone who did not accept that religious conviction. Whenever we treat another person in ways that appear *prima facie* unjust (coercion, refusals of easy rescue, etc...), we must justify that treatment by appeal to considerations that the other person can reasonably accept. I therefore think that religious reasons cannot be used to defeat the requirements of justice, though this does leave room for the possibility that they may be permissibly used to defeat the imposition of laws that are not *required* by justice, but only *permitted* by justice (I think this may explain why religious and cultural exemptions from uniform requirements, employment holidays, etc...may be justifiable solutions in a pluralistic society).

How can Gaus and Vallier respond to the argument offered above? One response would be to deny, in our pair of *Strychnine* examples, that George acts unjustly if he fails to rescue Hilda, or more generally, to claim that justice never requires such positive duties of aid, that justice only requires negative duties of non-interference. If justice only required negative duties of non-interference, then every *prima facie* unjust act might be a coercive one (or at least every *prima facie* unjust act would be an imposition or an interference). But I don't think this reply can serve as an effective defence of LP. This reply assumes the truth of what is basically a libertarian account of justice. Even if we think that public justification might yield libertarian *conclusions* about justice, it doesn't seem plausible to claim our description of what public justification *is* must include an assumption about the truth of libertarianism.

There is, however, a different response available to Gaus and Vallier. Recall the pair of examples used earlier:

Barry Gets a Date: Barry tells Cathy that unless she agrees to go on a date with him, he will destroy a painting that belongs to Cathy, a painting that she loves very much even though it has absolutely no financial value.

Dave Gets a Date: Dave tells Edna that unless she agrees to go on a date with him, he will destroy a painting that belongs to Dave, a painting that Edna loves very much.

Gaus and Vallier could insist that our two examples are in fact analogous – that Dave, just like Barry, is guilty of trying to obtain a date via coercion. On this view coercion is identified entirely by the severity of the harm (physical, psychological, financial) that the coercer threatens to impose on their victim, regardless of whether or not the coercer has the moral right to impose this harm. Since (we assume) the harm Dave threatens to impose on Edna is equivalent to the harm Barry threatens to impose on Cathy, then if Barry's action is coercive, so is Dave's. By defining coercion in this way Gaus and Vallier can reject what I claimed earlier, namely, that we already need to have beliefs about justice in order to accurately define which acts are coercive.

Even if we set aside any doubts about the plausibility of this account of coercion, this reply will not serve as an effective defence of LP. The reply runs into the following problem. LP tells us that coercion always stands in need of special justification, and now it's being suggested that Dave, like Barry, is guilty of coercion. But this means that Dave's behaviour stands in need of justification – that his proposed course of action is illegitimate unless it can be publicly justified. I think this conclusion will strike most people as false. Why does Dave need to justify destroying his own painting in order for that action to be legitimate? It seems inconsistent with the very idea of rights to suggest that Dave cannot permissibly act within his rights unless he can publicly justify his action. Rights are supposed to provide individuals with a domain where they are free to make decisions *without* having to justify their behaviour to others. This is not to deny that people often act very badly while nevertheless acting within their rights. The miser who doesn't give to charity, the person who refuses to give directions on the street, or the spiteful person who delights in pointing out other people's flaws, all act badly without violating anyone's rights. But these sorts of examples aren't relevant to the argument being pursued here.⁹ LP is about what people may

⁹ It may well be morally wrong or bad for Dave to make Edna aware that he will destroy his painting if she does not go out on a date with him – it may be bad to make conditional demands like this when we know they will make others unhappy. But it cannot be impermissible to do what we have a right to do, and that is the relevant question when we consider where the demand for public justification should apply.

legitimately or permissibly do, and it asserts that coercion stands in need of special justification, in the sense that without a valid public justification, coercive acts are illegitimate or impermissible. If we can act coercively and yet within our rights, this entails the paradoxical conclusion that when we cannot publicly justify such coercive acts, it will be illegitimate or impermissible to do what we have a right to do.

Someone sympathetic to LP might try a different tack, and suggest that it's not coercion that stands in need of justification, but rather *interference* (we needn't focus on how exactly interference is defined).¹⁰ Whenever we interfere with someone else, we must justify our interference in order for our behaviour to be legitimate. Suppose this Interference Principle is otherwise identical to LP. The Interference Principle, however, fares no better. It is vulnerable to the same dilemma faced by LP. Either we think Barry's, but not Dave's, behaviour constitutes interference, in which case our definition of interference depends on our prior beliefs about rights or justice, thus rendering the argument vulnerable to the objection already developed. Or we think that Dave, like Barry, is interfering, but this then implies the implausible claim that Dave's behaviour stands in need of justification – that he cannot legitimately destroy his own painting unless he can publicly justify doing so. Any term – coercion, interference, other-regarding – will face the same dilemma. If we think some behaviour stands in need of special justification, it will always be because we already have some beliefs about what rights people have or what justice allows us to do. And this takes us back to the beginning. I think it illustrates that justice is the primary subject of public justification, and so we rightly assume that acts which appear unjust, however they are categorized or defined, are the ones which most urgently stand in need of justification. If this is true then I think religious reasons cannot serve as defeaters against the imposition of a law if that law is something that justice requires.¹¹

¹⁰ See Gaus, *Contemporary Theories of Liberalism* (London: Sage, 2003) 206-208.

¹¹ As an aside, I'm also uncertain about the argument Gaus and Vallier offer against the 'strict interpretation of symmetry' in section 4.2. Gaus and Vallier argue that strict symmetry entails unanimity both for support of laws and for rejection of laws. That is, unless a law can be justifiably rejected by every member of the public, it cannot be permissibly rejected, and unless a law can be justifiably imposed on every member of the public it cannot be permissibly imposed. But Gaus and Vallier argue this makes public justification irrelevant to a significant range of issues since for many laws there will be neither unanimous support nor unanimous rejection, paradoxically making both imposition and non-imposition impermissible. Their argument, however, depends on a particular construal of the unanimity condition. If *A* can only justifiably reject a proposal for 'his own' reasons, then Gaus and Vallier's conclusion appears sound. However, if *A* must reject a law once he realizes that *B* has justifiable public grounds for rejecting it, then the unanimity condition will be easy to meet – once one person can reasonably reject a law everyone else must do the same. As an example, consider a particular distribution of income and wealth DS. When *A* looks at DS purely from his own point of view, he

3. Politics as Public Reasoning

Many theorists of public reason, especially Rawlsians, have been tempted to endorse something like what Gaus and Vallier call the *Principle of Politics as Public Reasoning*:

Because (i) all laws must be publicly justified and (ii) politics is (ultimately) about what laws are to be selected, then (iii) politics should aim at public justification, and so (iv) politics should be a form of public reasoning – arguments addressed to those who disagree with us that they could reasonably accept (p. 20).

Rawls's well-known moral duty of civility is a clear example of this view of politics as public reasoning.¹²

Gaus and Vallier argue, however, that in large-scale modern democracies the task of establishing laws that are in fact publicly justified may not be best achieved by asking citizens to directly aim at this goal. Particularly if we accept that public justification can occur due to a convergence of non-shared reasons, it will be very difficult, if not impossible, for any given individual to assess whether their favoured law is publicly justified, since no one person can be expected to have the necessary local knowledge regarding the beliefs and values of every other citizen in society. Gaus and Vallier argue that we would do better by paying far more attention to the issue of constitutional design – building institutional mechanisms that will tend to promote publicly justified outcomes even though no individual citizen necessarily aims at this objective. If we drop the requirement that citizens must always aim at public justification in their political discourse, Gaus and Vallier claim we will likely get more information into the public system, and this may yield better results. It is also, of course, another argument for allowing religious convictions into politics.

I have only a few brief (and very tentative) remarks on this section of the paper, mainly because I'm not yet sure what I think about it. First, Gaus and Vallier don't aim in

has no reason to object to the distribution. *B*, however, claims she can reasonably reject DS since there is an alternative distribution where no one would be as badly off as *B* is under DS. The argument *B* offers appeals to a shared reason (a conception of fairness), and *A* (as well as everyone else) is now required to join *B* in rejecting DS. As David Estlund points out, though social contract theories may not be able to permit reasonable rejection-joining, such rejection-joining may be essential for justice in democratic societies. See Estlund, *Democratic Authority* (Princeton: Princeton University Press, 2008), chapter 13.

¹² Rawls, *Political Liberalism*, 217.

this paper to provide a detailed blueprint as to what their alternative institutional mechanisms might look like, so it's not yet possible to offer a detailed assessment. I would want to know, for example, whether they would be happy to permit insincere or strategic behaviour in the political sphere, and if so, what moral limits there might be on such behaviour.¹³

Second, part of the motivation for their proposed rejection of politics as public reasoning hinges on their endorsement of the possibility of convergent forms of justification. If convergence is a viable method of public justification, then things become much more complicated in the political domain: it will be difficult for any given individual to assess whether a law is publicly justified since no individual can have access to all the different nonpublic justifications that might exist for a proposal. But if, as I've argued we should, we reject the convergence view, then things are much simpler since any individual can decide whether a law is publicly justified by asking themselves whether the law is supported by sufficient shared or public reasons. Since I don't share Gaus and Vallier's view about convergent public justification, I'm less worried about the difficulty of any individual trying to directly ascertain whether a law is publicly justified.

Third, Gaus and Vallier's argument relies on some empirical claims the truth of which I'm uncertain about. For instance, Gaus and Vallier claim that,

Oftentimes, even unreasonable citizens, dogmatists, and radicals promote reason-discovery in part through *reaction* towards their views. Principles of restraint [e.g. Rawls's duty of civility], like their counterparts in the market, are apt to distort the dispersal of information: the most reasonable voters may self-censor their views, leading to widespread misperceptions about the real issues and the breadth and depth of consensus (p. 25).

Is this claim true? I don't have an informed view, but I think it's safe to say something like 'it depends'. In some contexts it may be true that principles of restraint, like Rawls's duty of civility, will impede reason-discovery and may actually harm the project of public

¹³ It would also be interesting to know whether Gaus and Vallier now reject the view, expressed in Gaus's *Justificatory Liberalism*, that in order for a justification to be declared *victorious* it needs to meet a *publicity condition*. That is, the proposed justification must be presented in the public sphere and subjected to sustained critical scrutiny by other members of the public. See Gaus, *Justificatory Liberalism*, 147-148.

justification. But in other contexts the reasonable public justifications we seek may get drowned out in a din of noise if we allow people to push their sectarian or comprehensive agendas into political debate without any concern for uncovering shared public reasons. It's also worth noting that many principles of restraint, like the duty of civility, do not preclude the introduction of nonpublic reasons into politics, they only require that citizens also provide public reasons for the policies they support,¹⁴ thus Gaus and Vallier's concern about the 'distorting' effect of such principles might be unwarranted. I agree, however, that the question of when, or under what conditions, principles of restraint such as the duty of civility would be effective or appropriate is an important question, and one that philosophers of public reason need to spend more time thinking about. I also very much agree with Gaus and Vallier that theorists of public reason have paid insufficient attention to questions of institutional design.

One final worry I have about Gaus and Vallier's rejection of politics as public reasoning has to do with what we think is valuable about the practice of public reason. For Gaus and Vallier, it seems that what matters is whether or not the laws we live by are in fact publicly justified, but it doesn't much matter how those laws are brought about. If this is a fair portrait of their view, and not a caricature, then I think it is a slightly impoverished conception of public reason's value. When citizens and public officials engage in the practice of public reason, they manifest respect for one another as free and equal citizens, and they directly honour the idea that each person is owed reasonable justifications for the rules and laws that govern their life. By *practicing* public reason with one another, and not merely indirectly aiming at publicly justified laws, we may thus realize certain valuable forms of civic respect. This is not the only reason to value public justification, but I think it is one important value that might be lost if we reject the principle of politics as public reasoning.

I'd like to conclude by emphasizing that, while I disagree with Gaus and Vallier about some of the issues raised in their paper, my disagreements with them are minor in comparison to those issues where we agree. I share their belief in the importance of public justification, and I think they are exactly right to be drawing attention to the tricky task of deciding what a commitment to public justification entails for our political practices and institutions.

¹⁴ See for example Rawls's remarks about the wide view of public reason in 'The Idea of Public Reason Revisited,' 591-594.