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Ethical Pluralism from a Classical Liberal Perspective

Chandran Kukathas

> In fact, the real disturbers of the peace are those who, in a free state, seek to curtail the liberty of judgement which they are unable to tyrannize over.
>
> —Spinoza, *Theologico-Political Treatise*

General Considerations

Is the ideal society one that embodies or aims for ethical uniformity, or one that emphasizes instead the accommodation of ethical pluralism? From a classical liberal perspective the answer can only be that ethical pluralism should be accommodated.

But here some caveats are in order. First, such a society would be "ideal" only in a limited sense: in the sense that it is the best kind of society to try to sustain given ethical disagreement—even though it would be a better society if it were governed by the right ethical values. The classical liberal perspective assumes that a society that *embodies* ethical uniformity can only be a society in which uniformity is coerced; and that a society that *aims* for ethical uniformity must either resort to coercion or fail to attain uniformity (or, more likely still, both). Humans tend to disagree, and the larger the society the greater the likelihood of substantial disagreement. As Hume observed, "such is the nature of the human mind that it always lays hold on every mind that approaches it; and as it is wonderfully fortified by an unanimity of sentiments, so is it shocked and disturbed by any contrariety. Hence [our] impatience of opposition, even in the most speculative and indifferent opinions."[1] Ethical pluralism is ideal because of these constrained circumstances and because coercion is undesirable.

Second, even though it is necessary to offer a straightforward answer to the question of the classical liberal response to ethical pluralism, and to the subsidiary question of the extent to which ethical pluralism is acceptable, within the classical liberal tradition there is a measure of diversity—indeed, of ethical pluralism—regarding this very issue. There is a considerable disagreement within that tradition over the extent to which

diversity should be accommodated; over the principles by which such issues should be decided; and, indeed, over the question of what is classical liberalism[2] and who are its exponents.[3]

Third, in view of the fact that the classical liberalism in question is a *tradition*, it is worth noting that the classical liberal pantheon of heroes is equally contested. For some it is very much a modern European tradition, whereas others see traces of classical liberal thought not only in ancient and medieval ideas but also in the writings of Confucius and Laozi.[4] And many of the heroes of classical liberalism are also claimed by other political traditions: by republicans, conservatives, socialists, democrats, and egalitarian liberals.[5] Equally, classical liberals disagree among themselves over rights of membership in the club: some consider Burke a conservative, others find Hume too skeptical, and to a few Mill is an apostate who must be forever barred.

The point of these caveats is to make clear that any account of classical liberalism and its injunctions is bound to be contestable to a considerable degree. It is not possible to offer an account of the classical liberal tradition without offering, in effect, a particular theory within it—one that, in the end, takes sides on issues that are, to varying degrees, in dispute. Indeed, there are some issues on which there is no settled position not because there are competing views but because the tradition is itself evolving. On such matters as the status of women, and human sexuality, and over issues arising out of medical treatment, health, and mortality, classical liberal thinking is evolving in response to developments in technology as well as to changes in society more generally.

The account offered here, then, is as much a particular theory as it is a summary of "the classical liberal position." While it might be expected to be viewed critically (or with disdain) by other ethical traditions, it will surely also be questioned within classical liberalism. It will certainly be questioned by egalitarian liberals, many of whom view themselves as heirs of the classical liberal tradition. Nonetheless, this essay offers one view of what classical liberalism amounts to, leaving the demarcation disputes and issues of inheritance to be settled by the reader.

Putting these qualifications to one side, then, what is classical liberalism, and by what principles does it determine the limits of ethical pluralism? Clearly, classical liberalism will have to be distinguished from other forms of liberalism—notably egalitarian liberalism. But the first point that has to be made about classical liberalism is that it is a *political* philosophy rather than an ethical doctrine. In this respect it differs from religious traditions such as Christianity and Confucianism, and from the natural law tradition. Classical liberalism does not purport to answer a range of important questions about the nature of the human good, or about humanity's place in creation, or about the forms that are most appropriate

in relations among people. Neither does it offer any vision or promise of human liberation, as do various kinds of feminism and critical theory; or, for that matter, any theory of social justice, as does liberal egalitarianism. Although its proponents find its moral commitments compelling, it is, for all that, an austere and somewhat prosaic dogma.

As a tradition of political philosophy, then, classical liberalism has two strands or dimensions: social theory and moral theory. Social theory here refers to that dimension of classical liberal thinking which concerns itself with accounting for the nature of human society. Many of the most important figures in classical liberal thought devoted considerable effort to the understanding of society because they were as much interested in the question of what kinds of human arrangements were *feasible* as they were in the question of what arrangements might be desirable. Indeed, some, like Montesquieu, argued that a wise legislator looking to govern well would look carefully at the society his laws would shape, for its nature would bear decisively on his prospects of success. Society had a life of its own and could not be designed and shaped at will. It was already governed by economic, historical, and moral forces that demanded investigation (and which were capable of being understood). From the beginning classical liberals were thus not only philosophers but also economists, historians, and sociologists, as well as moralists.[6]

Although it would be foolish to try to reduce the social theories of these various figures to a single, unambiguous, doctrine, they share a number of important convictions. First, and most generally, they agree that order is possible without design. Society is a self-ordering or self-regulating structure that is not the product of deliberate construction. Order is certainly not the product of government; rather, order, in Tom Paine's words, "has its origin in the principles of society and the natural constitution of man. It existed prior to government, and would exist if the formality of government was abolished. The mutual dependence and reciprocal interest which man has upon man, and all the parts of a civilized community upon each other, create that great chain of connection which holds it together."[7]

In this view, government is necessary to deal with problems or tasks that cannot so readily be addressed through spontaneous cooperation. The precise tasks that are appropriate for government have always been a matter on which classical liberals have held a range of views. While writers like Paine saw little that society could not accomplish itself, others, like Adam Smith and F. A. Hayek, thought there was an important case for government activity to provide not only national defense but also programs for the general welfare. What was not disputed, however, was that society was a self-regulating structure whose tendency was to order,

and which could not be shaped or directed by the impatient legislator or what Smith called "the man of system."

This last point is important not so much because this thinking marked a sharp departure from earlier social theory as because it stood in sharp contrast to the coming challenge of modern socialism. Particularly in its Marxian variant, socialist thought focused on the wasteful competitiveness of modern market or commercial societies and looked to centralized, collective planning to overcome the evils such societies were thought to produce: notably, poverty and alienation. Classical liberalism was, and remains, resistant to the idea that such a means can ever be available to redesign or reshape society that it might accord with this, or any, preconceived ideal.

This leads to the second important feature of classical liberal social theory: it includes within it a wariness of and skepticism about governmental power, and political power more generally. While individuals in society act from a variety of motives and with a variety of purposes, in politics, as David Hume observed, they must be presumed to act like knaves. Indeed, they must be understood as agents with ambitions that often lead them to act in concert with others—in factions—to serve their particular (rather than general) interests. For this reason, sound political institutions were ones that divided and separated power. Concentrations of power were dangerous to liberty and also dangerous for the stability of regimes.

Third, and most generally, classical liberalism stands in contrast to those social doctrines which have looked at the diversity of human religious and moral commitments and wondered how they might be brought into closer harmony, into a closer social unity. For some, an organic—almost spiritual—unity, in which the interests of society would be brought into harmony with the interests of the individual, was the highest ideal for which to strive. For classical liberalism, on the other hand, the assumption has always been that such a unity is impossible, if not altogether undesirable, because society is by its nature pluralistic, and individuals are prone to disagreement and conflict. The social problem was not how to bring about unity and cultural, or religious, or moral harmony, but how to preserve an order within which conflict was kept in check, and the plurality of ways allowed to coexist, if not flourish.

It is worth noting here that some classical liberals, such as Lord Acton, argued explicitly and vigorously that diversity was not simply desirable in itself but also essential if liberty was to be preserved. In his treatment of the issue of nationalities, he argued against John Stuart Mill who, in *Considerations of Representative Government*, presented a defense of nationalism as a new phase in the progress of freedom and had also averred that freedom required that the boundaries of the state should

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coincide with those of nationalities. For Acton, however, this was a profound error. Far from being likely to preserve free institutions, such a condition would jeopardize liberty. A state marked by homogeneity would also turn out to be one whose power was most difficult to limit. A state of a diversity of peoples, however, contained an important check on that power in the form of associations independent of central power. "Liberty provokes diversity, and diversity preserves liberty by supplying the means of organisation."[8]

For Acton, the theory of nationality represented not progress but a retrograde step in the history of liberty. "If we take the establishment of liberty for the realisation of moral duties to be the end of civil society, we must conclude that those states are substantially the most perfect which, like the British and Austrian Empires, include various distinct nationalities, without oppressing them." Indeed, he argued that those states with no mixture of races were imperfect, whereas those in which the effects of that mixture had disappeared were decrepit. And the state that "is incompetent to satisfy different races condemns itself," and one that "labours to neutralise, to absorb, or to expel them, destroys its own vitality."[9]

Saying this put Acton squarely within the classical liberal tradition. His contention here is a variant of James Madison's claim that the liberty of the extended republic rested, in good measure, on the plurality of interests that lay within it. Diversity might bring with it problems of destabilizing social conflict; but it also offered the very resource most needed to address social instability: the pluralism that made difficult the rise of irresistible power.This is why federalism has also been an important strand of classical liberal argument. If it is important that power be dispersed rather than concentrated, a federal structure offers one way of weakening the hold of central authority on society—by devolving power to provincial authorities. The basis of this is not an attachment to states' rights, or to any form of group rights, but simply the recognition of the importance of having in place institutions that will resist or impede the concentration of power.[10] Indeed, federalism is an important way of resisting the power of the majority, which is all too likely to tyrannize over the minority if unchecked. In any decision-making process, the majority will have its way at any particular step. Checking majority power can only be accomplished by institutions that do not enable the same majority to be decisive on all occasions. Federalism accomplishes this, at least to some degree, by creating multiple majorities. Power is concentrated when majorities collude, and dispersed when they collide.

In this social theory can already be detected the commitments that make up the second strand or dimension of classical liberalism: its moral theory. Here, however, it must be borne in mind that this liberalism is a political

rather than an ethical doctrine. It rests on a moral theory but with respect to one dimension of moral life: the political. It does not offer an account of what kinds of life are valuable or what morality should govern all our relations. Indeed, it takes as its starting point the fact of ethical pluralism. In classical liberal moral theory two commitments are preeminent and also importantly related—the first to liberty and the second to the conviction that the liberty in question is the liberty of individuals. Classical liberalism is, broadly speaking, libertarian and individualist.

Within this tradition, it must be acknowledged, the proper understanding of liberty is a matter of some dispute. Conceptions of liberty vary, with some falling into Berlin's category of negative liberty, and others into the category of positive liberty.[11] And the justification of liberty has also varied, with some appealing to natural right, others to utility, and some to perfectionist[12] doctrines of the good life. For some, freedom is secured if individuals are merely unimpeded; for others, freedom means autonomy or self-direction. But however differently freedom has been construed philosophically, the concerns of classical liberals have been more plain: to argue that individuals ought to enjoy some liberty so that they might live by their own religious beliefs, and not be subject to arbitrary power. States should not deprive people of freedom—or of their property without their consent (or without just compensation). Liberty of conscience ought to be respected, along with freedom of association. In general there should be a presumption in favor of toleration of differences.

Within classical liberalism, toleration holds an especially important place, although there are surprisingly few substantial treatments of the idea by the great figures in the tradition. It is defended implicitly by J. S. Mill (in his defense of freedom of thought and discussion), explicitly but briefly by Spinoza in his *Theologico-Political Treatise*, and vigorously by Locke in a series of letters concerning toleration; however, the most powerful and comprehensive defence remains that offered by Pierre Bayle in his *Philosophical Commentary* (1686).[13] The roots of the liberal theory of toleration lie in arguments offered by these thinkers (and by others such as Bodin, Althusius, and Milton) for religious tolerance. But it ought to be noted that the status of toleration within liberalism is philosophically problematic. If liberalism is indeed a political doctrine that maintains that ethical disagreements must be put aside, along with questions about the nature of the human good, then toleration has a fundamental place in liberalism. Liberalism becomes, in effect, a doctrine of toleration. If, however, liberalism were to be regarded as a doctrine with particular substantive commitments—say, to the promotion or upholding of individual autonomy—then toleration would become much less important.[14]

Tempting though it is to say that a commitment to toleration is central to classical liberalism, whereas in other versions of liberalism (notably

egalitarian liberalism) toleration is subordinated to other, substantive, commitments, such a view would be difficult to sustain historically. Too many classical liberal thinkers have revealed to us important, substantive, convictions guiding their thought. Nonetheless, if there is a philosophical distinction to be drawn between classical and egalitarian liberalism, it is surely here. Classical liberalism is committed to a toleration of difference or diversity, which makes substantive equality an implausible goal. Equality can only be pursued if diversity is brought under control so that there is at least one common dimension to social life, and so one common subject of value—which might then be equalized. But in a regime of diversity there will not be sufficient agreement to make this possible. Toleration would make for a regime in which different traditions coexisted, including different traditions of social justice. What makes a regime a liberal one is not its commitment to equality but its toleration of dissent. The greater its capacity to tolerate dissenting views or traditions or ways of life, including nonliberal ones, the more liberal the regime.

This does, however, raise the important question of the place of "equality" in classical liberal thinking. After all, classical liberal thinkers such as F. A. Hayek have maintained that equality is a notion that is central to the liberal standpoint: "The great aim of the struggle for liberty has been equality before the law."[15] Yet the equality to which classical liberalism is committed is only equality before the law. No individual or category of persons is to be regarded as above the law; nor is anyone without the right to the protection that the law affords. The basis for this attitude is the commitment to liberty: taking liberty seriously means not denying it to anyone. It does not, however, mean a commitment to making people more equal in any respect; nor does it mean assuming that they are equal. On the contrary, the classical liberal view rests on the assumption that individuals are different (and, so, unequal in all sorts of ways), but maintains that these differences provide no grounds for treating them differently.[16] Much of this, of course, classical liberalism shares with egalitarian liberalism; but the two traditions differ inasmuch as the latter evinces a positive concern to secure a substantive equality of persons—whether that be an equality of income, or wealth, or welfare, or resources, or capabilities, to name just a few of the important egalitarian ideals. Classical liberalism is not interested in substantive equality.

Equality figures in classical liberal thinking, then, only insofar as formal equality is implicit in the liberal commitment to liberty. But one other implication also needs to be recognized. Classical liberalism upholds the liberty of people as *individuals*. What this means, however, needs fuller explication. It would not be true to suggest that individuals are all that exist in society, for society is made up not only of individuals but also of other sorts of entities, from collectivities such as crowds to agents or

institutions such as corporations. All of these have not only their own places in society and social life but also, to varying degrees, *interests* of their own. Liberalism is not committed in any way to denying the existence of such entities, nor to asserting that individuals are all that are to be found in society. Liberalism is committed, however, to the view that it is the interests only of individuals that matter. Even though groups or institutions may have interests, they do not matter—except insofar as the fates of such entities may bear on the interests of individuals (both those within and those beyond those groups or institutions).

In summary, then, the principles of classical liberalism suggest that the good society is one in which individuals are free to pursue their own ends—and ends, here, are no more than desires—in concert with others or alone. In such a society, the purpose of law, and authority, is to make possible a peaceful coexistence among human beings who will, inevitably, exercise their freedom to live differently and find themselves in conflict with others who might covet the same goods, or seek to take an interest in the beliefs and activities of their fellows. The function of law and government is to adjudicate—to act as umpire in—any disputes that might arise; but not to direct any to better or more popular ends.[17] In this society, the capacity of any authority to amass the power to push society in a particular direction would be constrained by a division and separation of powers. To put it in another way, the model of sovereignty that describes such a society would a Humean rather than a Hobbesian one: sovereign power would not rest in the hands of a single person or body but be dispersed into the hands of different authorities. In such a society there is no ultimate authority but numerous authorities, each superior to some and subordinate to others.

The centrality of the metaphor of the umpire to the classical liberal outlook is worth noting. An umpire is someone to whom players turn when there is a dispute. That dispute may be over the application of a rule, or the interpretation of a rule, or the question of whether a rule exists at all. But it is not the existence of the rules or the fact that there is a game that is critical for understanding this metaphor. What is important about the umpire is that he is a third party to whom the disputants turn for a *ruling*—and a ruling that is *authoritative*. The umpire's ruling is decisive not because the umpire is smarter, or better informed, or more just but because he is *authorized* (either tacitly or explicitly) to make it. He is taken to be, in principle, both an *un*interested party and a *dis*interested one. (If he is taken to have an interest in the outcome of his decision, or to be partial to one of the disputants, his authority is likely to wither, as one or more of the disputants cease to regard his rulings as authoritative.) In the context of society, the umpire or ruler adjudicates disputes over justice. Because people hold to different views about justice, and

endorse different standards of social justice, ruling authorities settle matters by determining what standard(s) should prevail.

On this understanding there is nothing about the nature of the *state* as umpire that makes it uniquely capable of discovering or determining what is indeed just. But the point of the state is not to create a just social order—its purpose is not the establishment of social justice. The purpose of the state is to preserve order by averting conflict so that people might live freely; and it does this by exercising its authority to resolve conflict among beings who cannot help but disagree with one another. This understanding of the state stands in contrast to that of egalitarian liberalism, which views the state as having a larger purpose: to create and uphold a socially just political order.

Social Regulation

The question now is, should the power of the state ever be invoked to protect, ban, or otherwise regulate ethically based differences—and, if so, where and how? Most societies exhibit such differences to some degree or another, to the extent that they contain individuals who belong to different religious or cultural traditions, or hold to different moral and political principles. In modern societies such differences are given expression in disagreements over many things, from the defensibility of particular customs, to the duties of parents to their children, to the permissibility of pornography, to the right of some political parties to participate in the political process. Does the state have some role to play here in addressing these differences of opinion or outlook?

In the simplest terms, the answer is: yes, the state cannot help but have a role to play. But to understand why this is so, and to go on to see the proper nature and extent of this role, it is necessary to gain a better appreciation of the nature of the state in classical liberalism. The best classical liberal statement of the purpose or point of the state is offered by Spinoza, who writes in his *Theologico-Political Treatise*: "the ultimate aim of government is not to rule, or restrain, by fear, nor to exact obedience, but contrariwise, to free every man from fear, that he may live in all possible security; in other words, to strengthen his natural right to exist and work without injury to himself or others . . . the object of government is not to change men from rational beings into beasts or puppets. . . . In fact, the true aim of government is liberty."[18] In other words, the purpose of the state is to provide that security which would not be available to people in the absence of the order made real by the exercise of the authority of the state. That security is the security that enables people to pursue their goals or ends in safety—without fear. And that security is the security that is consonant with liberty.

If this is the point of the state, the basis of or justification for any action it takes to regulate differences in society rests on the necessity for it to act to preserve the ongoing order of such a society. The state may—for it must—act to preserve the safety and security of its citizens; and to prevent the disintegration of the state into lawlessness or civil war. And if the state is understood as an umpire, it is also responsible for determining when the society is in danger, and what action ought to be taken. It has to decide when and what action has to be taken to protect a person or group, or ban a practice, or regulate a form of behavior.

But because the purpose of the state is liberty, it is also the case that it has no cause to protect or ban or regulate for any other purpose. It is not for the state to regulate to improve society: to make it healthier, or more noble, or more equal, or simply right-thinking. It is not for the state to ensure that some ways of life survive or that others die out; that some are saved or others damned; that one tradition prevail or another sink into oblivion. Indeed, the state has to recognize that human desires or purposes are innumerable, and that even traditions of thought about what are the proper ends humans ought to pursue are numerous and varied. The point of the state is not to settle what disagreements there might be among these different ways of thinking but to preserve an order in which such disagreement does not lead into disorder. To put it another way, the point of the state is to preserve an order in which the exercise of liberty does not lead to disorder—which is to say that the point is to preserve liberty.

By this understanding of the nature and function of the state, the state should regulate, when necessary, so as to preserve an order in which different traditions or practices can continue to operate. It should regulate to preserve an order of toleration rather than to reshape society according to the lights of any one particular tradition—including the majority tradition. This means that, to the extent that it should regulate, it should regulate to make possible, rather than to stifle, *dissent* from the majority view.

In practical terms, this means regulating, when necessary, to ensure that those who adhere to different ethical beliefs are free to try to live by those beliefs, even if they run counter to the attitudes of other groups or traditions. For a free society will be one in which those who dissent are not forced to assimilate into the tradition of the dominant majority but are able to find niches for themselves—spaces within which they might live differently.

To the extent that dissenting practices differ only trivially from the ways of the mainstream of society, of course, the problem dissent poses is also trivial (though, like the Lilliputians, humans are more than capable of turning trivial differences into occasions for violent conflict). But according to the classical liberal view, the freedom to practice dissent should

also be upheld even when differences are substantial. It should even be upheld for those who dissent from the principles of classical liberalism—and, so, from the principle of toleration of dissent.

Given that the state cannot but be involved in social regulation—since even to do nothing is to sanction some kinds of activity that may be controversial—the question is, How should the principle of toleration be given practical expression? This question is better addressed through some concrete issues rather than in the abstract, so it may be worth considering social regulation of some particular ethically based disagreements. Two topics might usefully be addressed: sexuality and life-and-death decisions.

Human Sexuality

Human sexual practices, and attitudes toward them, have been as changeable as they are diverse. And from the earliest times to the modern day societies have sought to regulate, as well as to regularize, sexual conduct. The description and evaluation of sexual behavior has undoubtedly been the subject of contention; but it has also been the object of legal sanction. The legal regulation of sexuality addresses a range of issues, from the permissibility of marriage (e.g., in same-sex unions); to the acceptable age of consent to sexual activity; to the allowability of some forms of sexual relationships (such as homosexuality) or sexual conduct (such as sodomy). Yet while the legal regulation of sexuality may appear, on the face of it, to be essentially a formalizing of sanctions reflecting established public attitudes, it needs to be recognized that the law is also implicated in a larger story about the cultural construction of identity, and sexual identity in particular.[19]

Given the history of disputation about sexual conduct and sexual identity, what is the attitude of classical liberalism to the handling of ethically based disagreements in this area? The first point that has to be made is that, because classical liberalism suggests that individuals should be left free to pursue their own purposes, and that differences should be tolerated, it also advocates a principled tolerance of different attitudes toward sexuality and different traditions of marriage. In its terms, a society is a liberal social order if it is one which will tolerate differences of attitude and practice within that order. Indeed, the state has no principled interest in matters of marriage or sexuality. It is not part of its purpose to sanction one form of marriage or another, or to promote any form or understanding of sexuality as more appropriate (or, for that matter, to define any forms as deviant).

Two problems that flow from this stance, however, need to be addressed. The first is that it is not possible to ignore the fact that the modern

state is already implicated in the regulation of these matters, and in ways that make it almost impossible for it to withdraw. The existence of welfare benefits, or tax concessions, which vary according to marital status, for example, means that the definition of marriage is already a state interest. Short of reforming—or reconstructing—the entire edifice of political society, what should be done? Classical liberalism's answer to the question of social regulation needs to be offered in this context. The second problem is that, even while the state is to be discouraged from pronouncing on marriage and sexuality, the reality is that not only the state as central authority is responsible for regulation on such matters. Within many, if not most, states a number of different jurisdictions may have chosen to regulate differently. Thus, for example, laws about sexual conduct, marriage, and divorce vary from state to state in the United States, as they do in different states in Australia. How these differences should be addressed is also an issue for classical liberalism.

A part of what must be said in response to the first problem is that the state has to regulate, when it must, in ways that avoid presuming the correctness of one ethical stance as against another on matters of marriage and sexuality. But the reality is that this is possible only to a limited extent when the state acts as more than merely an umpire but becomes involved in substantive enterprises: assisting families (and upholding or promoting "the family"); improving community (or "national") health standards; or providing a system of education. To the extent that the state is implicated or involved in such enterprises, it will not be able to avoid adopting substantive ethical positions. It will have to say what does *not* count as a family; what kinds of conduct are not consistent with safe sexual lifestyles; and what it is appropriate for children to be taught about sexuality and sexual conduct. In liberal societies this creates a problem because the stance of ethical neutrality cannot plausibly be regarded as anything but a substantive position by those whose ethical perspectives differ. Taxpayers whose idea of the family envisages only husband and wife, and their children, may not condone public definitions that include same-sex, polygamous, or incestuous relationships.

To the extent that it is possible, however, the classical liberal reaction to ethical differences here would be to say that a good society would be one that left people with different ethical views the opportunity to distance themselves from the ethical position of the state—to disengage from "mainstream" society. Thus, in such a society, even if the state exercises its interest in defining marriage to advance its own purposes, there will be the freedom for those who dissent from this ethical view to live by their own, alternative standards or definitions. There will be an opportunity for dissenters to exit, and to reconstruct communities of their own. For those, for example, who wish to live in same-sex unions, there would be the

opportunity not so much to have such unions recognized as a form of marriage as to reject the salience or necessity of such recognition altogether. In the free society according to classical liberalism, the dissenters are free to leave, even if acceptance or recognition of their dissenting stance(s) is not possible.

There is, however, a troubling aspect to this position, which egalitarian liberals in particular will notice. Dissenters are given no substantial rights or entitlements to pursue or defend their beliefs or practices. Classical liberalism argues that they should be offered the freedom to establish or live within alternative jurisdictions; but not that they should have a fixed set of entitlements regardless of the jurisdiction. The reason for this here has much to do with the classical liberal conviction that in the good society power or authority is not concentrated but dispersed. For this reason, alternative regimes or communities would be accepted as capable of exercising authority over their members—even if those communities are themselves not liberal in their attitudes.

A useful example is supplied here by the case of *Rodney Croome & Another v. The State of Tasmania*, brought before the High Court of Australia in November 1995. The aim of the plaintiffs in this case was to reform the Tasmanian Criminal Code, which provided (in sections 122[a] and [c] and 123) that any person who has sexual intercourse with any person "against the order of nature" or engages in acts of "gross indecency" be deemed guilty either of unnatural sexual intercourse or indecent practice between male persons. In their Statement of Claim the plaintiffs asked the High Court to find these sections inconsistent with the Human Rights (Sexual Conduct) Act 1994, by virtue of being an arbitrary interference with the right to privacy, and that the Tasmanian laws were therefore invalid (by virtue of their inconsistency with federal law, which takes precedence over state law under section 109 of the Australian Constitution). The solicitor general for Tasmania submitted that, because no proceedings had been brought or threatened against the plaintiffs in respect of the conduct pleaded in their statement of claim, there was no "matter" within the meaning of that term in section 76 of the Constitution (and section 30 of the Judiciary Act 1903 [Cth]) that can be judicially determined in proceedings between plaintiffs and defendant and, consequently, that there can be *no federal jurisdiction* to entertain the action commenced.

The decision of the High Court on 26 February 1997 to hear the case, recognizing that the plaintiffs had a legitimate interest in the matter even though they had not been prosecuted under the laws in question, placed the Tasmanian government at risk of losing a case fought on the defensibility of the state's laws on sexual conduct. Yet the importance of the case was sufficiently well recognized that the government of Western Australia

announced that it would intervene with a submission in support of the Tasmanian government's position. (Its concern was that a successful outcome for the plaintiffs would provide a precedent for the invalidation of Western Australia's own age of consent laws, which discriminated against homosexuals.) In these circumstances, the Tasmanian government decided to repeal the laws in question, and this was effected on 1 May 1998. This also effectively brought the High Court case to a close.

From a classical liberal point of view, this particular outcome appears as a mixed blessing. On the one hand, the repeal of laws criminalizing sexual activity between consenting males can only be welcomed, because the freedom to dissent, not only in word but in deed, is properly upheld. And the propriety of a state's sanctioning or promoting particular views about sexuality is rightly repudiated. On the other hand, the independence of a separate jurisdiction—the state of Tasmania—was weakened insofar as it decided to change its laws in order to avoid having them declared invalid by a central authority. If classical liberalism is a doctrine that looks to deal with ethically based disagreement by ensuring that authority on ethical matters is not centralized and concentrated, it must also view the success of the Tasmanian Gay and Lesbian Rights Group as a victory that has come at a troubling price.[20] Indeed, it ought to be noted plainly that there is a certain tension in place here. A classical liberal in Tasmania would be bound to argue for law reform. But a classical liberal looking to answer a question about the best institutional arrangements would want to protect the autonomy or independence of states and preserve a federal structure as one best suited to allowing ethical differences to coexist.

The significance of this tension ought not to be underestimated, for it reveals that classical liberals can be forced to defend outcomes they dislike or even find repellent on some of their own principles (though it also displays a distinctive characteristic that marks all liberalisms: a willingness to defend the rights or freedoms of those for whom liberals have no sympathy). What it does not suggest, however, is any concession to majoritarianism because the majority view in the state appears to be allowed to trump the right answer. On the contrary, what must be resisted here, from the classical liberal point of view, is the temptation to use the greater (majority) power of the federal government to crush the weaker authority. Tasmania would be wrong to exert its power to uphold majority values and deny homosexuals the right to dissent from majority thinking and practice. Australia would equally be wrong to assert its power over the dissenting authority of Tasmania. In the end it is not majoritarianism that must be allowed to trump the right answer; rather, it is certain principles that must prevail: those political principles which govern human relations when "the right answer" is in dispute.

Life-and-Death Decisions

Just as there are differences among ethical traditions over sexuality, so are there equally profound disagreements among them over matters of life and death. The importance of these disagreements stems from the fact that they reflect fundamental differences in belief about the nature of persons, and about what is the nature and source of value. Attitudes to abortion and infanticide, or to various forms of euthanasia, or to a range of medical procedures from blood transfusions to organ transplant, or indeed to the very definition of death (which can affect the timing of decisions to remove organs from "deceased" donors) reflect the diversity of religious and cultural traditions extant in society. And this diversity of traditions makes some of these issues peculiarly difficult—if not altogether intractable.

Once again, there are two dimensions to the classical liberal response to dealing with ethically based conflict over such matters. In the first instance, in view of its commitment to the coexistence of different ethical perspectives, classical liberalism sees it as no part of the state's purpose to promote or uphold particular ethical views about abortion or euthanasia or blood transfusions.[21] Within society there are different traditions with different attitudes to life and death; the purpose of the state is to make it possible for these to coexist rather than to ensure that one or the other dominates. The problem (once again), however, is that the modern state is already implicated in the assessment of some of these questions inasmuch as it has been a party to the development of laws and institutions that cannot but take positions on these questions. To the extent that the state is not only a provider of health insurance but a supplier of medical care, it has to make some decisions about what kinds of treatment it may—or is morally bound to—offer. Thus, in many societies, the site of ethical disagreement is government health policy. In this situation, however, because some particular ethical perspective has to be adopted, those from dissenting ethical perspectives will have to condone—and maybe subsidize—ethical practices with which they disagree, or, on occasion, which they find unconscionable.

One part of the classical liberal response to this situation is to recommend that the state not concern itself with matters like health care. It is not possible to be concerned with such things and not take some stance on a range of questions that it is no part of the state's purpose to settle: questions about what constitutes a good life, or what is required for a good death. This would not, however, resolve the problem entirely, because ethical disagreement results not only in resentment on the part of some that they are forced to be accessories to practices they find ethically dubious, but also in outrage on the part of others that such things are

condoned anywhere at all. Private abortion clinics are as much targets as public hospitals.

Given this problem, another part of the classical liberal response to disagreement is to say that, in the absence of any basis on which ethical disputes on fundamentals can be settled, ethical priority must be given to the freedom to dissent from the dominant view. (To put it differently, no special weight should be given to any ethical stance simply because it is a majority stance or a position taken by the stronger.) The reality, however, is that this approach favors those who take particular sides on certain life-and-death issues. For example, it favors those who wish to see abortion accepted as a legitimate medical procedure, because the principle of freedom to dissent offers no additional support to those who view abortion as immoral; after all, the pro-abortion (or pro-choice) lobby was never likely to challenge the freedom of antiabortionists to exercise their own dissenting choices.

Nonetheless, given that the problem is how to find a settlement to ethically based disagreement, some form of compromise is necessary. Is there within classical liberalism anything to suggest how compromise ought to be reached? In political life, compromises will be made along all sorts of dimensions when disputes can only be settled, not resolved. In the abortion case, compromises are made by restricting the opportunities for termination without disallowing it altogether—say, by specifying procedures that have to be followed, disallowing intervention after the second trimester, and making counseling mandatory. Such compromises do not so much reflect any classical liberal commitment as reveal the variety of forms compromise might take.

What is, perhaps, more distinctive to classical liberalism, however, is the suggestion that compromise might be effected by accepting that different rules can apply in different places—in different jurisdictions. The purpose of the state is not to establish the truth, or to enforce its implications, when disputes arise because ethical standpoints differ. Its purpose is simply to preserve the order in which people can be secure in their freedom. In such an order, there is no necessity that all people fall under the one jurisdiction in all matters. States can be—and typically are—made up of many, often but not always, overlapping jurisdictions; and laws generally differ from one to another. In a federal republic, for example, political authority is dispersed among a number of states or provinces; and laws, including criminal codes, will often vary from one to the next. This is one form of compromise that has evolved and which classical liberalism endorses as an important method of addressing and settling moral conflict, as well as checking central power.

It ought to be noted, however, that this method is not without its critics, and liberal critics in particular. The federal solution is what Ronald Dwor-

kin has described as a "checkerboard" solution.[22] And to Dworkin, checkerboard laws are only acceptable when relatively unimportant matters are at stake: differences in zoning laws from one place to the next really do not matter. But not when those matters are matters of principle. It may seem, he notes, that "we have no reason of justice for rejecting the checkerboard strategy in advance, and strong reasons of fairness for endorsing it. Yet our instincts condemn it."[23] So hostile is Dworkin to checkerboard solutions that he says that, if there existed two alternative solutions, A and B, such that he thought that A was right in principle and B wrong in principle, he "would rank the checkerboard solution not intermediate between the other two but third, below both, and so would many other people."[24]

The reason Dworkin gives for taking this strong position is that he believes the only way in which we can make sense of "our" political ideals of justice and fairness is by recognizing another principle that stands directly in opposition to checkerboard solutions: "integrity." "Our instincts about internal compromise suggest another political ideal standing beside justice and fairness. Integrity. . . . The most natural explanation of why we oppose checkerboard statutes appeals to that ideal: we say that a state that adopts these internal compromises is acting in an unprincipled way, even though no single official who voted for or enforces the compromise has done anything which, judging his individual actions by the ordinary standards of personal morality, he ought not to have done."[25] Checkerboard solutions uphold "inconsistency in principle"; and this, integrity must condemn.[26]

From a classical liberal point of view, however, Dworkin's position is mistaken. There is nothing unprincipled about the kind of compromise implicit in checkerboard solutions. It only appears unprincipled if one adopts the starting point Dworkin does: one that claims that "we" need to work out what "we" think or feel or can in good conscience affirm. But, Dworkin's blithe references to "our" instincts nothwithstanding, the problem is that "we" disagree—and, on occasion, in fundamental ways. In such a situation, one principled solution is to agree to differ, and to allow different substantive solutions to prevail in different regions.

Indeed, we should go further and recognize that "integrity" is not the ideal that should guide our reflections if what it points to is an aspiration to bring about a kind of social unity that is altogether beyond reach in an ethically plural society. We might be able to agree to differ; but it looks much less likely that we will ever be able to agree *not* to differ.

In this respect, one kind of solution to the issue of physician-assisted suicide that would be endorsed by classical liberalism is one of the sort that might have arisen in 1995 with the passing in the Northern Territory of the Rights of the Terminally Ill Act, permitting assisted suicide under

prescribed conditions. This act, which came into operation on 1 July 1996, made the Northern Territory the first jurisdiction in the world to permit a doctor to end the life of a terminally ill patient at the patient's request. The law survived an attempt at repeal in the Territory Parliament in August 1996 and a legal challenge in the Northern Territory Supreme Court, before leave was sought to challenge the act in the High Court of Australia. In September 1996, however, a Private Member's Bill designed to override the act was introduced in the Federal Parliament, and the passage of the Euthanasia Laws Bill by the Australian Senate on 25 March 1997 brought the experiment to an end. In the public and parliamentary debates surrounding the bill, it became clear that, while the majority of Australians favored permitting physician-assisted suicide, there were important (though not unexpected) divisions between different groups. The Doctors Reform Society and HIV/AIDS support groups favored the Northern Territory legislation, while the Australian Medical Association, many Aboriginal groups, and the churches opposed it. From a classical liberal point of view, however, the Rights of the Terminally Ill Act could be defended in at least one respect: that there is no reason why all jurisdictions have to conform to a single ethical standard, particularly when the ethical issue is one over which people are deeply divided.

Ironically, the Northern Territory legislation was overturned precisely because the classical liberal perspective on this matter was rejected. Had the legislation been enacted by any state in the Australian federation, the Commonwealth Parliament would have been powerless to intervene. The Northern Territory, however, is not a state but a territory; and although self-governing (with its own parliament and chief minister), it remains within the control of the Commonwealth. On this occasion, the Commonwealth chose to exercise its capacity to override—persuaded, perhaps, that integrity was too important to allow a black square to turn up on the checkerboard. Perversely, in this instance, the pursuit of integrity allowed a minority viewpoint to triumph, and to close off debate and the possibility of reform for the foreseeable future. One lesson, at least, that might be drawn from this episode is that there is little reason to assume that the pursuit of "integrity" need get us any closer to what "we" think about anything—let alone about justice.

Citizenship

A question that obviously arises now is, What are we to make of citizenship in a classical liberal regime? After all, if a doctrine has so little sympathy with social unity and legal and political integrity, can it really take citizenship seriously? Moreover, can it sensibly handle disagreements or disputes about the rights and duties of citizenship—disputes

that might include questions about the obligation to undertake national service, or about the rights of women to take part in or shape fundamental institutions; or the right (or duty) of the state to educate children for citizenship?

The truth is that citizenship is not something that classical liberalism holds in especially high esteem. There are a number of reasons why. One, which has not been much mentioned thus far, is that as a political doctrine classical liberalism is fundamentally an internationalist creed. Because its interest is fundamentally in individual liberty, it has little commitment to states or nations, which are regarded only as agglomerations of individuals, or of associations of individuals. While the breakdown of states may be an evil because of the destruction that may bring, the existence, survival, or perpetuation of particular states is of no special ethical significance.

Because it takes this attitude, classical liberalism does not place especial importance on citizenship because it does not see any virtue in building up institutions that would make for a stronger or deeper form of social unity. An emphasis on citizenship generally comes out of a concern to build a political society in which the divisions that mark that society are overcome. The freedom that is emphasized in such a conception of the good society is the freedom that comes with the development of a virtuous citizenry, committed to a shared understanding of the common good. Citizenship is for republicans and, to some extent, for nationalists.[27] Classical liberals are more likely to favor open borders, or at least freedom of movement to a degree that might compromise efforts to build a sense of nationhood.[28]

For this reason, classical liberalism places more importance on the capacity or freedom of people to exit or dissent or withdraw from public institutions than on their duty to participate in them. Thus, for example, it does not put any emphasis on education for citizenship: it is not the purpose of education—public or otherwise—to create a virtuous citizenry that shares particular values or commitments to a national agenda, or a common understanding of the good of the state, or a shared view of democratic legitimacy. Every type of regime *will* produce its own kind of person(s), to be sure; and classical liberal regimes are no different. But however much that may be the case, classical liberalism values most the importance of freedom to dissent. It is, in a way, at one with Benjamin Constant in favoring not ancient liberty but modern liberty—a form of liberty that values freedom from politics as much as freedom in politics.

In such a regime, then, there would always be opportunity for conscientious objection. In any polity, the state will always pursue its interests; and it will take what measures it needs to in order to achieve its ends: this

is a part of the logic of the state. In a classical liberal order, however, there will be opportunities for individuals or groups to avoid the domination of the state—to avoid being drawn into its projects. Thus, for example, it will be possible for individuals to object to national service; or to decline to be involved in the welfare system (as do the Amish people); or even to opt for different systems of punishment than that offered by the state.[29] In a classical liberal regime, it will be possible to a considerable degree for people to live untouched by the state, which will take no interest in their interests, and demand that they take no greater interest in its own concerns than they wish.

In this regard, the classical liberal view cares less about citizenship and ensuring that people are brought into the political fold so that they might be a part of a cohesive whole, than it does about leaving them free to exit from arrangements they find uncongenial, if not altogether intolerable or unconscionable. The difficulties this issue poses are brought out in a particularly clear way in current discussions of multiculturalism and the politics of cultural diversity. For someone like Will Kymlicka, who is the most significant thinker today writing on these issues, multiculturalism poses an important challenge because it appears at odds with the requirements of citizenship and an obstacle to social unity. If cultural communities, such as those formed by indigenous peoples and other ethnic minorities, may assert collective rights in virtue of their particular memberships, how can there be any commitment to citizenship of a modern state?[30] His own solution to this dilemma is to develop a theory of "differentiated citizenship" explaining how, "In a society which recognizes group-differentiated rights, the members of certain groups are incorporated into the political community not only as individuals, but also through the group,"[31] although he also concedes that, at least to date, liberal (egalitarian) theory has not been able to explain how social unity can be made consistent with the other ideals of the democratic multination state.[32]

From a classical liberal point of view, however, social unity is not so important except to the extent that it might be necessary for the preservation of order. And citizenship is not a substantial good or ideal of which too much can be made. It favors the freedom of people to come and go: to exit one community and enter another, or to form new associations altogether. But it takes no especial interest in any particular association, and attaches no great value to the quality of belonging in any of them.

One consequence of this aspect of the classical liberal outlook is that it is, in some ways, not very good at handling issues that involve questions of the quality of citizenship, and the duties of citizens. It does not, for example, have a theory of education for citizenship. Yet this is a weakness only to the extent that society and the modern state persist in taking an interest in matters classical liberals think beyond the scope of political

authority. The state takes an interest in education because it has an interest in producing citizens who will accept the legitimacy of the state. For classical liberals the state has no legitimate role in education. That it will arrogate to itself the power to shape citizens and the citizenry is something not to be denied, but not either to be applauded.

Notes

1. "Of Parties in General," in David Hume, *Political Writings*, ed. S. Warner and D. Livingston (Indianapolis: Hackett, 1994), pp. 161–62.
2. For recent treatments of the idea of classical liberalism, see Norman Barry, *On Classical Liberalism and Libertarianism* (London: Macmillan, 1986); David Conway, *Classical Liberalism: The Unvanquished Ideal* (New York: St Martin's Press, 1995); Charles K. Rowley, ed., *Classical Liberalism and Civil Society* (Cheltenham: Edward Elgar, 1997), especially the essay by Douglas B. Rasmussen and Douglas J. Den Uyl, "Liberalism Defended: The Challenge of Post-Modernity."
3. Modern exponents of the classical liberal tradition include, at one end of the spectrum, libertarian anarchists such as Murray Rothbard and David Friedman, and, at the other end, minimal-welfare-state liberals such as F. A. Hayek and Milton Friedman, as well as minimal-state libertarians such as Robert Nozick and constitutional contractarians such as James Buchanan. Moreover, in ethics, classical liberals have appeared in a variety of stripes: utilitarians, Kantians, Lockean natural rights theorists, Hobbesians, conservatives, and skeptics.
4. See, for example, David Boaz, ed., *The Libertarian Reader: Classic and Contemporary Writings from Lao-Tzu to Milton Friedman* (New York: Free Press, 1998).
5. 6 For example: John Locke, Adam Smith, James Madison, Montesquieu, Edmund Burke, Benjamin Constant, and John Stuart Mill.
6. Among their number the most important would include, after Montesquieu: David Hume, Adam Smith, Anne Robert, Jacques Turgot, James Madison, Alexis de Tocqueville, and, in modern times, F. A. Hayek.
7. Tom Paine, *Common Sense*, in Michael Foot and Isaac Kramnick, eds., *The Thomas Paine Reader* (Harmondsworth: Penguin, 1987), p. 67.
8. Acton, "Nationality," in *Selected Writings of Lord Acton*, vol. 1: *Essays in the History of Liberty*, ed. J. Rufus Fears (Indianapolis: Liberty Classics, 1986), p. 425.
9. Ibid., p. 432.
10. I have discussed federalism at greater length in C. Kukathas, D. Lovell and W. Maley, *The Theory of Politics* (Melbourne: Longman, 1990), chap. 2.
11. See Isaiah Berlin, "Two Concepts of Liberty," in his *Four Essays on Liberty* (Oxford: Oxford University Press, 1979).
12. On "perfectionism," see Steven Wall, *Liberalism, Perfectionism and Restraint* (Cambridge: Cambridge University Press, 1998).
13. Pierre Bayle, *A Philosophical Commentary on The Words of the Gospel, Luke XIV. 23: Compel them to come in, that my House may be full*, translator unknown (London: J. Darby and J. Morphew, 1708).

14. See on this Deborah Fitzmaurice, "Autonomy as a Good: Liberalism, Autonomy and Toleration," *Journal of Political Philosophy* 1, 1 (1993): 1–16. Fitzmaurice maintains that, according to liberalism, the conditions of autonomy are necessary for respectful moral relations. In these terms, she argues, the requirement to sustain individual autonomy becomes the moral basis of "our political relations with non-liberal minorities. No independent principle of toleration is required." (p. 16).

15. F. A. Hayek, *The Constitution of Liberty* (London: Routledge and Kegan Paul, 1976), p. 85.

16. "It is neither because it assumes that people are in fact equal nor because it attempts to make them equal that the argument for liberty demands that government treat them equally. This argument not only recognizes that individuals are very different but in a great measure rests on that assumption. It insists that these individual differences provide no justification for government to treat them differently. And it objects to the differences in treatment by the state that would be necessary if persons who are in fact very different were to be assured equal positions in life." Ibid., pp. 85–86.

17. See Gerald F. Gaus, *Justificatory Liberalism: An Essay on Epistemology and Political Theory* (Oxford: Oxford University Press, 1996), esp. pp. 184–91.

18. *Theologico-Political Treatise*, in Benedict de Spinoza, *A Theologico-Political Treatise* and *A Political Treatise*, trans. and introd. R.H.M. Elwes (New York: Dover, 1951), pp. 258–59.

19. See the essays in Martin Duberman, Martha Vicinus, and George Chauncey Jr., eds., *Hidden from History: Reclaiming the Gay and Lesbian Past* (New York: Meridien, 1989). See especially the essay by George Chauncey Jr., "Christian Brotherhood or Sexual Perversion? Homosexual Identities and the Construction of Sexual Boundaries in the World War I Era," pp. 294–317.

20. There is an interesting parallel to be drawn between this judgment and Lord Acton's assessment of the outcome of the American Civil War. On the positive side was the ending of slavery (even though that had been no part of the North's original purpose); on the negative side was the expansion of the power of the national government, and the loss of the power of the states to supply a "check on the absolutism of the sovereign will." See Acton's correspondence with Robert E. Lee, in *Selected Writings of Lord Acton*, vol. 1: *Essays in the History of Liberty*, pp. 361–67, esp. p. 363.

21. The most comprehensive treatment of these issues from a classical liberal perspective is H. Tristram Engelhardt Jr., *The Foundations of Bioethics*, 2d ed. (New York: Oxford University Press, 1996). Although a Christian who holds suicide and abortion to be moral evils, Engelhardt argues that, in the face of ethical diversity, the state can only adopt a secular, post-Christian morality in which what is privileged is not the correct understanding of the good but individual consent.

22. Ronald Dworkin, *Law's Empire* (London: Fontana, 1986), pp. 178–86.

23. Ibid., p. 182.

24. Ibid.

25. Ibid., p. 184.

26. Ibid.

27. See, for example, the argument of David Miller, *On Nationality* (Oxford: Oxford University Press, 1995).

28. Though, to be sure, some liberal egalitarians also advocate open borders. See Joseph H. Carens, "Migration and Morality: A Liberal Egalitarian Perspective," in Brian Barry and Robert E.Goodin, eds., *Free Movement: Ethical Issues in the Transnational Migration of People and of Money* (University Park: Pennsylvania State University Press, 1992), pp. 25–47.

29. A dramatic example of this may be found in the Northern Territory in Australia, where Aboriginal tribal law has coexisted with territory criminal codes. On occasion, judges have allowed Aborigines convicted of serious crimes to return to their communities unpunished so that they might accept the (invariably more severe) punishments to be meted out by their own peoples—including beatings and spearings. An account of this is in Paul Sheehan, *Among the Barbarians: The Dividing of Australia* (Sydney: Random House, 1998), pp. 8–18.

30. See Will Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (Oxford: Oxford University Press, 1995).

31. Ibid., p. 174.

32. Ibid., p. 192.

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