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NATURAL LAW AND PUBLIC REASONS

KENT GREENAWALT*

I. INTRODUCTION

IN this Lecture I shall discuss the reasons that officials and citizens should rely upon in American politics. In recent years, various theorists have claimed that people in liberal democracies should rely in politics on “public reasons,” reasons that are accessible to all citizens.¹ Others have objected that such a counsel is unreasonable, if not incomprehensible.² I shall concentrate on two facets of this issue. First, does the law exemplify a structure of public reasons—that is, do judges deciding cases draw on a stock of public reasons that is narrower than all the reasons one might give for a particular result? My second inquiry concerns the status of natural law—long claimed by adherents to be a source of reasons of universal power, reasons whose persuasiveness does not depend on theological judgments. Are natural law arguments exemplars of public reasons or not? These two inquiries help us to understand the dimensions of claims about public reasons, and to evaluate their comprehensibility and persuasiveness. They also raise the question whether many reasons are not better seen as lying along a spectrum of publicness rather than as being public or not.

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1. See, e.g., JOHN RAWLS, *POLITICAL LIBERALISM* 212-54 (1993) (developing idea of public reasons); Stephen Macedo, *In Defense of Liberal Public Reason: Are Slavery and Abortion Hard Cases?*, in *NATURAL LAW AND PUBLIC REASON* 11, 11-45 (Robert P. George & Christopher Wolfe eds., 2000) (building on Rawls’s theory of public reasons).

2. See, e.g., John Finnis, *Abortion, Natural Law, and Public Reason*, in *NATURAL LAW AND PUBLIC REASON*, *supra* note 1, at 75, 84 (criticizing Rawls’s idea of public reason as being “particularly unreasonable”); Robert P. George & Christopher Wolfe, *Natural Law and Public Reason*, in *NATURAL LAW AND PUBLIC REASON*, *supra* note 1, at 50, 63-67 (accusing proponents of public reason theory of using lack of public accessibility to dismiss difficult natural law arguments).

My position is that various recommendations to rely on public reasons are comprehensible, but on examination, they are far more complex than they may first appear. The law is a domain of public reasons, but that point is also less obvious than a first glance suggests. A counsel to rely on public reasons is persuasive for what officials, and would-be officials, express about particular political issues; it is not persuasive for citizens or for all the reasons that motivate officials. Natural law arguments fit uncomfortably with modern ideas about public reasons; some natural law arguments are public in the required sense, but others are not. Our examination of natural law arguments suggests that, in respect to many reasons for decisions, it may be wiser to talk of degrees of publicness, rather than public or not.

II. AN ILLUSTRATION: THE STEM CELL DEBATE

As you know, one crucial political issue during this first year of the Bush Administration has been whether the federal government should continue to fund research with embryonic stem cells.³ Before the President's decision to allow funding only to existing lines of stem cells, *The Wall Street Journal* carried a debate that sharply poses many of the more abstract issues I will explore in this Lecture.⁴ The two debaters were David Baltimore, a doctor, Nobel laureate scientist, and president of the California Institute of Technology, and Robert George, a political and legal philosopher who teaches at Princeton.

Dr. Baltimore argues strongly in favor of federal funding. Adult stem cells are not now a viable alternative to embryonic stem cells, which have "the potential to become every part of the human body" and "could be used to make up for the deficits in brain and pancreas cells that cause Parkinson's disease or diabetes."⁵ For these stem cells to become practically effective in curing human diseases, scientists must carry forward work of many types. The "publicly funded American academic research effort is far and away the most effective . . . in the world. To refuse to allow it to participate in this exciting research would be an affront to the American people, especially those who suffer from diseases that could one day be reversed by these miraculous cells."⁶ About the concern that the embryos deserve protection, Baltimore has this to say: "To me, a tiny mass of cells

3. See Sheryl Gay Stolberg, *Transition in Washington: Research and Morality*, N.Y. TIMES, Jan. 20, 2001, at A17 (reporting debate over what President Bush should do regarding federal funding of stem cell research). Note that if the federal government were to ban all funding, no building supported by federal funding could be used for such work; so a ban would create greater obstacles to research than simply necessitating a shift to private funding.

4. Compare David Baltimore, *Stem Cell Research: A Debate—Don't Impede Medical Progress*, WALL ST. J., July 30, 2001, at A18, with Robert P. George, *Stem Cell Research: A Debate—Don't Destroy Human Life*, WALL ST. J., July 30, 2001, at A18.

5. See Baltimore, *supra* note 4, at A18 (explaining unique characteristics of embryonic cells).

6. See *id.*

that has never been in a uterus is hardly a human being. . . . By treating the use of stem cells as akin to murder, we would lose a great deal.”⁷

That is the issue to which Professor George devotes his full attention. He does not discuss the likely medical benefits of stem cell research because these are irrelevant, in his view. His position is simply that it is wrong to harvest organs from human beings without their consent. “[K]illing for the purpose of harvesting body parts . . . is inconsistent with the inherent dignity of all human beings.”⁸ A human being, George claims, is a whole, living member of the species *Homo sapiens*. Unlike a sperm cell or an ovum, or skin cells, human embryos, “[m]odern science shows[,] . . . are whole living members of the human species, who are capable of directing from within their own integral organic functioning and development into and through the fetal, infant, child and adolescent stages of life and ultimately into adulthood.”⁹ It is not that a human embryo has the potential to be a human being, he or she “is already a living human being.”¹⁰ George eschews relying on controversial religious premises such as “ensoulment”; he says “the science will do just fine” and would be pleased if opponents would agree that “the scientific facts about when new human beings begin” should be determinative.¹¹ Given the status of embryos as human beings, compromises, such as using stem cells from embryos created by in-vitro fertilization that would be discarded in any event, are unacceptable.¹²

Do Baltimore’s and George’s arguments count as ones of public reason? To answer that question we need a sense of the basis of public reasons philosophies and the possible scope of their coverage.

III. PUBLIC REASONS

In the last few decades, a number of political philosophers have suggested that citizens of liberal democracies should rely upon public reasons in politics.¹³ Although these theorists differ about precisely which reasons are not public and about the situations in which people should rely on public reasons, the basic idea is that political questions should be decided on grounds that have force for all citizens, not on the basis of considera-

7. *See id.*

8. George, *supra* note 4, at A18.

9. *See id.* (explaining differences between embryos and other types of cells).

10. *See id.*

11. *See id.* Professor George notes in passing that the Catholic Church has no official position on the “eternal destiny” of embryos. *See id.*

12. *See id.* Professor George does not comment on President Bush’s actual compromise of allowing research on lines from embryos already destroyed. *See id.* George also does not address the possibility that stem cells might be harvested from unfertilized eggs. *See* Nicholas Wade, *New Stem Cell Source Called Possible*, N.Y. TIMES, Feb. 1, 2002, at A23.

13. For my consideration of a number of these claims and discussion of their major differences, see generally KENT GREENAWALT, *PRIVATE CONSCIENCES AND PUBLIC REASONS* (1995).

tions that only some citizens find persuasive.¹⁴ Whatever the exact range of public reasons, they do not include reasons drawn from biblical revelation or church authority. Within a liberal society, people will disagree about such fundamental matters as the existence and nature of God and the quality of a good life. If citizens adhere to public reasons, they respect each other as free and equal citizens, they take intractable moral and religious questions off the political agenda, and they contribute to social stability.

A typical public reason is that citizens' opportunities should not depend on their race, gender or religion. This is a central tenet of the modern political theory of liberal democracy; to embrace it, one need not reach to controversial moral theories or religious perspectives.¹⁵ David Baltimore's contention that use of stem cells can produce important medical benefits is a public reason; everyone agrees that cure of disease and disability is good. On the other hand, the claim that biblical passages tell us that God abhors homosexual acts is not a public reason; it relies on a text that does not carry authority for all reasonable citizens.¹⁶ If Robert George's argument against stem cell research depended on a belief about ensoulment, derived from church doctrine, it would not be a public reason.

We need to be clear at the outset that no one recommends laws forbidding officials and citizens from relying on nonpublic reasons. Certainly the First Amendment's Free Speech Clause protects arguments that are made in terms of nonpublic reasons.¹⁷ In practical terms, a theory of public reasons is mainly a counsel of self-restraint.¹⁸

Theorists disagree about who should constrain themselves to rely on public reasons and when. Does the constraint apply in the same way to officials and ordinary citizens? Should public reasons underlie all laws and policies, or all coercive laws, or, as John Rawls proposes, constitutional essentials and basic matters of justice?¹⁹ Does a constraint of public rea-

14. This dichotomy omits situations in which it is appropriate to vote one's own self-interest (including getting re-elected) or that of constituents. The discussion assumes that one is dealing with an issue as to which one should aim for the measure that is most just or desirable.

15. Whether one can arrive at positions on more discrete controversial issues about nondiscrimination without reaching to one's deepest moral and religious assumptions is debatable.

16. For this purpose, it does not matter whether the interpretation itself is controversial.

17. U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.").

18. If a theory of public reasons were widely accepted, people might be dismissive of nonpublic reasons and judges might hold laws to be invalid if they were dominantly based on nonpublic reasons. These could be "the sanctions" for relying on nonpublic reasons.

19. See generally RAWLS, *supra* note 1.

sons concern the underlying grounds on which people decide, the explanations and arguments they put forward on behalf of their positions, or both of these?

Theorists also disagree over exactly what makes reasons nonpublic. Among the candidates that have been suggested are ideas of the good (or controversial ideas of the good), nonrational grounds, reasons that are not widely accepted and comprehensive views.

I shall sketch my views about these topics before assessing the status of natural law arguments and reasons within law. The notion that coercive laws, in particular, should be based on public reasons is that people should not be compelled on the basis of reasons that are not persuasive for them. If the government is not coercing people, its reasons matter less. Our stem cell example presses hard on that distinction. We know that the government would fund this research were it not for concern about embryos. If it refuses to fund, many scientists will not do stem cell research and, much more important, sufferers of diseases like Parkinson's and Alzheimer's may not receive critical medical benefits that might otherwise have been available.²⁰ Baltimore says a refusal to fund would be an "affront to the American people, especially those who suffer from diseases that could one day be reversed by these miraculous cells."²¹ Can it be that the government needs public reasons if it is to *coerce* people not to hunt endangered species, but that it can curtail potential life-saving medical assistance on the basis of nonpublic reasons? That would be paradoxical.

The stem cell illustration also helps to show why we should not draw a sharp distinction between ordinary political issues and constitutional essentials and basic questions of justice. As Rawls applies these terms, a right to abortion falls within constitutional essentials;²² funding of stem cell research is an ordinary issue. For both abortion and stem cell research, the central question is whether conception gives rise to a human being (or potential human being) deserving protection. Can it be that we should rely only on public reasons to determine the legal treatment of abortion but may rely on nonpublic reasons in respect to stem cell research? Not only is this conclusion odd from a theoretical point of view, but also the task of convincing people that the status of an embryo may be determined in one way for one political issue and must be determined in another way for a related issue would be very difficult. I conclude that, insofar as public reasons are concerned, no sharp line should be drawn between coer-

20. For this point, it does not matter that the research may not yield the hoped-for benefits, or that a limited number of stem cell lines may suffice, or that research losses may be made up in other countries.

21. Baltimore, *supra* note 4, at A18.

22. See RAWLS, *supra* note 1, at 243 n.32 (discussing balance of political values concerning human life, reproduction and equality of women).

cive and noncoercive laws or between ordinary issues, on the one hand, and constitutional essentials and questions of basic justice on the other.²³

Most proponents of public reasons have assumed that any constraint applies in the same manner to officials and citizens.²⁴ I hold a different view. Officials are used to sifting through reasons to discern ones appropriate to their public roles. Most citizens, who lack such training and experience, will believe they should be able to bring to bear what they regard as the best reasons for political outcomes, whether these reasons are public or not. I think a counsel to rely on public reasons applies especially to officials. Asking people to rely on public reasons is asking them to disregard what they believe may be the strongest reasons for a political outcome. Even though the constraint is self-constraint, it is a kind of restraint on liberty, religious liberty for the religious person. Asking ordinary citizens to exercise this constraint is unreasonable.

If it is working, a constraint of public reasons is reciprocal. One person foregoes his nonpublic grounds in return for a similar restraint by others. Monitoring what other people say is much easier than monitoring their underlying motivations. And a person who wants to observe a constraint of public reasons will find it much easier to state public reasons than to excise the internal influence of nonpublic reasons. Therefore, any constraint to rely on public reasons in politics should apply mainly to what officials say, not to what citizens say and think, and not to all that motivates officials.

A final word on these matters. Although much that is said about public reasons applies to liberal democracies in general, a sound resolution depends on the culture and history of a particular society. Thus, my own recommendations are for early in the twenty-first century in the United States.

Now, we come to the crucial task of distinguishing public reasons from nonpublic reasons. A general degree of acceptance cannot alone be the test of what reasons are public. Were that the only standard, Christians could rely on the New Testament in a country that was mainly Christian; Muslims could rely on the Koran in a Muslim society. This evident inequality for what happen to be minority perspectives conflicts with the ideals of liberal democracy. General acceptance might play some role in whether reasons are relevantly public, but it cannot be the exclusive or primary standard.²⁵

23. One might think, however, that a constraint to follow public reasons is especially important as laws and policies impinge on members of society in more important ways.

24. For a discussion of various arguments about how public reasons apply to citizens, see Paul J. Weithman, *Citizenship and Public Reason*, in NATURAL LAW AND PUBLIC REASON, *supra* note 1, at 125.

25. For one claim about general acceptance, see Mario M. Cuomo, *Religious Belief and Public Morality: A Catholic Governor's Perspective*, 1 NOTRE DAME J.L. ETHICS & PUB. POL'Y 13, 18 (1984).

Sometimes it is suggested that particular ideas of the good, or controversial ideas of the good, are what are excluded by public reasons.²⁶ People have various convictions about what makes life good, and they should be able to pursue these within a framework of just social relations and mutual respect.²⁷ This position, to be clear, is not that the government should avoid all moral questions, but that it should limit itself to moral questions that concern justice and mutual respect, not resolving moral questions about how people should live.²⁸

This constraint alone leaves untouched a good deal that proponents of public reasons believe should be excluded. Most notably, it does not exclude much that religions have to say about just social relations.²⁹ Again, our stem cell illustration is illuminating. Whether embryonic stem cells should be used for medical purposes is *not* an issue about the good life; it is an issue of justice and respect for the embryo that may be a human being. If the only public reasons constraint concerned claims about the good life, an argument that a papal encyclical condemns stem cell research as murder would be within the realm of public reasons. But that sort of argument is just the kind the public-reasons filter is designed to exclude. So a constraint of public reasons cannot be limited to questions of the good life.

Should it at least include such questions, whatever else it may also contain? I shall be brief here. We expect public schools to educate children about desirable ways to live, about the importance of physical and mental health, about the dangers of addictions, about the benefits of culture and about the value of activity as contrasted with indolence. All these aspects of what schools do cannot be summarized fully as helping to make children good citizens and aiding them to realize whatever goals they set for themselves. State support of arts and literature and high taxes on alcohol and cigarettes show that the government's involvement in questions of the good life extends to adults. Laws against the use of drugs are highly controversial, but few object to laws that forbid human beings from having sex with animals. These cannot be defended as consistent with neutrality about the good life, unless one regards them as mainly protecting animals who would be potential sexual partners.

It is at least a plausible position that the state should not coerce people in respect to *controversial* judgments about the good life;³⁰ but the basis

26. See generally CHARLES E. LARMORE, *PATTERNS OF MORAL COMPLEXITY* (1987).

27. See *id.* at 118-35.

28. See *id.* at 133 (stating that "the ideal of neutrality must always take precedence over disputed ideals of the good life").

29. More precisely, it does not exclude religious conclusions about just relations that do not depend on claims about what is a good life.

30. See Jeffrey Reiman, *Abortion, Natural Law, and Liberal Discourse: A Response to John Finnis*, in *NATURAL LAW AND PUBLIC REASON*, *supra* note 1, at 107, 109-10 ("What is ruled out is forcing people to live this way or that, beyond what is needed to protect every sane adult's chances of living as he or she sees fit.").

for such a position seems to be more a judgment that individuals should have autonomy in this realm than a judgment that the reasons for coercion could not be sufficiently public.

Another possibility for grounds that do not qualify as public is reasons that do not rest on rational grounds. Here, roughly, the idea is that people should be able to rely on reasoned arguments that other people can understand and accept, not on faith or intuition that others do not share.³¹ Remember how careful Professor George was to say that his argument against stem cell research did not depend on controversial religious premises but on “the scientific facts.” One difficulty with the “rational grounds” approach is deciding how to draw the line between rational grounds and nonrational bases for judgment. In much of what we believe, rational understanding, however that is conceived, intertwines with other assumptions.

Insofar as a constraint conceived in terms of rational grounds privileges one particular way of understanding, some people object that it unfairly discriminates against other modes of apprehension;³² but a more troubling practical worry arises out of divergent opinions about what can be established rationally. A good many people believe that the existence of a beneficent God can be established rationally. Years ago, one of my sons had me read a book that claimed that by proof of miracles and accurate prophecies, the Bible established itself as the infallible word of God and showed that Jesus was the Son of God. Remember, any constraint of public reasons is to operate as a self-restraint. If people agreed that they should rely only on rational grounds, they would still disagree vigorously about what rational grounds could establish. The author who thought that he could rationally establish the infallibility of the Bible would feel free to rely on biblical passages; others who believed that the recognition of biblical truth depends on faith could not rely on the same passages, though they might be no less certain the passages represent God’s true word.

The most appealing single category of claims that do not count as ones of public reason are those based on comprehensive views, overarching philosophies of life. According to Rawls, people resolving constitutional essentials and basic questions of justice should rely neither on religious perspectives nor on secular philosophies, such as utilitarianism or the view that human autonomy is the most fundamental good.³³

31. See Thomas Nagel, *Moral Conflict and Political Legitimacy*, 16 PHIL. & PUB. AFF. 215, 230 (1987) (referring to grounds of decision that “can be shown to be justifiable from a more impersonal standpoint”).

32. See George & Wolfe, *supra* note 2, at 69 (arguing that religion, at least in some forms, is as publicly accessible as Rawlsian liberalism).

33. See RAWLS, *supra* note 1, at 62 (“There is no reason . . . why any citizen, or association of citizens, should have the right to use the state’s police power to decide constitutional essentials or basic questions of justice as that person’s, or that association’s, comprehensive doctrine directs.”).

We need to recognize that what people will sacrifice if they forego reliance on comprehensive views will be uneven. A utilitarian will give up less than a Christian fundamentalist, because the specific arguments a utilitarian makes do not depend on his utilitarian premises in the way that would be true for the fundamentalist. Thus, David Baltimore's argument about the great potential medical benefits of stem cell research lies within premises that are shared in the society. It is also the kind of argument a utilitarian makes. Of course, a utilitarian has a particular device for weighing reasons—the greatest happiness principle (or some similar principle)—and he has a basis for excluding some possible grounds; but all the reasons a utilitarian will be likely to suggest for or against a policy are likely to fall within the domain of arguments that people accept independent of their comprehensive view. That certainly is not true for much a religious fundamentalist holds true. But this inequality of sacrifice is, nonetheless, acceptable if we have good reasons to exclude comprehensive views from the domain of politics.

If someone's comprehensive view reflects his overarching approach to life, how can he possibly be expected not to rely on it? The answer to this question is a two-level approach. People with a variety of comprehensive views will coalesce around the premise that liberal democracy is a desirable form of government. A feature of liberal democracy is resolving political questions in a way that is detached from people's comprehensive views. Thus, a person's comprehensive view calls on him to accept a political arrangement in which issues are resolved without direct reference to comprehensive views. There is nothing illogical about this arrangement, as we can see clearly if we imagine people of different religious convictions who agree upon principles of religious liberty and separation of church and state, including a principle that officials will not resolve issues based on their own understanding of religious truth.

To recapitulate, what are not public reasons? We have looked at grounds that are not widely accepted, conceptions of the good, grounds that are not rational, and comprehensive views. We should be open to the possibility that more than one of these criteria may count for whether a reason is public. We should also be open to the possibility that some reasons may be more or less public, rather than public or not.

IV. NATURAL LAW AND PUBLIC REASON

Should we think of natural law arguments as those based on public reasons or not? My answer to this question is neither simple nor confident. A lot depends on what the particular argument claims and on the version of natural law that supports it. Professor George's argument that the embryo is a human being, familiar in debates about the morality of abortion and about laws restricting abortion, is a natural law argument. The abstract question whether natural law arguments are ones of public

reason is sharpened by reference to George's particular argument about the status of the embryo.

We may start with this thought by Robert George and Christopher Wolfe:

On the one hand, if "public reason" is interpreted broadly . . . , then natural law theorists believe that natural law theory is nothing more or less than the philosophy of public reason. . . . On the other hand, if "public reason" is interpreted in the narrower sense . . . [which] generally excludes reliance on "comprehensive" moral, philosophical, and religious doctrines—then natural law theorists reject the idea³⁴

Although this sentence captures a large measure of truth, I think we can delve more deeply into which aspects of natural law reasoning might qualify as public reasons, under various approaches to public reason.

John Courtney Murray, the most widely read American theorist of natural law in the twentieth century, and a drafter of the Second Vatican Council's statement on religious liberty, claimed in his book *We Hold These Truths*³⁵ that American traditions and natural law understanding coalesce. He urged that the American political community is based on a tradition of natural law and natural rights, resting on a belief that "the people as a whole are inwardly governed by the recognized imperatives of the universal moral law."³⁶ The American consensus implies "that there are truths that we hold in common, and a natural law that makes known to all of us the structure of the moral universe"³⁷ Natural law reasoning best articulates the principles of this consensus, although they can be fully understood only by the wise. According to Murray, therefore, a natural law approach provides the best reasoned foundation for the public philosophy of our society, and its government.

Rather than analyzing how Murray's understanding would look in light of more recent theorizing about public reason, I want to suggest a number of distinctions regarding natural law theories, trying to discern how far claims of natural law might fall within a domain of public reason. For this exercise, I am assuming that claims *might* be disqualified as public reasons because they do not rest on rational grounds, because they are based on controversial ideas of the good, or because they are aspects of comprehensive views. We need to remember that if important natural law claims are "disqualified," that does not necessarily mean that they do not

34. Robert P. George & Christopher Wolfe, *Introduction*, in NATURAL LAW AND PUBLIC REASON, *supra* note 1, at 1, 2.

35. JOHN COURTNEY MURRAY, *WE HOLD THESE TRUTHS: CATHOLIC REFLECTIONS ON THE AMERICAN PROPOSITION* (1960).

36. *Id.* at 36 (contrasting this belief with highly voluntaristic accounts of natural rights).

37. *Id.* at 40.

belong in politics. Perhaps prevailing modern notions of public reason are too narrow or completely misguided.

The distinctions that seem important are: (1) nonreligious understandings of natural law principles contrasted with religious understandings; (2) theoretical premises of natural law approaches contrasted with practical ways to resolve moral problems; (3) teleological understandings of morality contrasted with the idea that basic moral premises are self-evident; (4) the rational derivation of moral conclusions contrasted with judgments based on the fruits of experience; (5) moral claims that are dependent on ideas of the good life contrasted with those that are independent of those ideas; (6) conclusions susceptible to universal understanding contrasted with those that only the wise can grasp; (7) understanding that is independent of time and place contrasted with understanding that develops according to time and culture. These distinctions can contribute to analytical clarity, but I definitely do not mean to suggest that every version of natural law theory or every particular moral claim comes down neatly on one side or the other of the dichotomies.³⁸

A. *Religious Understanding or Not*

Although the close association between Roman Catholicism and the natural law tradition leads some outsiders to suppose that natural law is an essentially religious view about law and morality, that, as you well know, is contrary to what most natural law theorists claim. They contend that, in some sense, morality is universal and that fundamental moral norms can be grasped by people whatever their religious traditions and opinions.³⁹

Natural lawyers within the Christian tradition have believed that Scripture and church teachings complement what we can discern by natural reason, and some believe that a relatively few moral duties are discoverable only from religious sources, but these views alone do not disqualify natural law arguments from being ones of public reason.⁴⁰ Various Prot-

38. For example, insofar as we can differentiate between rational derivation from basic premises and reliance on the fruits of experience, a theorist might believe both are highly relevant to drawing sound moral conclusions.

39. See JEAN PORTER, *NATURAL AND DIVINE LAW: RECLAIMING THE TRADITION FOR CHRISTIAN ETHICS* 29-30 (1999) (describing Catholic version of natural law: "Because moral norms are grounded in human nature, which is the same everywhere, they are accessible to all reasonable men and women without the necessity of revelation."); YVES R. SIMON, *THE TRADITION OF NATURAL LAW: A PHILOSOPHER'S REFLECTIONS* 125-36 (Vukan Kuic ed., 1965) (explaining that natural laws are premises that all societies grasp, but from which they may draw different moral conclusions); George & Wolfe, *supra* note 2, at 56 (describing view held by natural law theorists: "basic moral norms are widely known, though in some cases they or their more specific applications may be obscured by wayward passions or corrupt customs or habits").

40. There are some perplexing problems concerning people whose certainty about resolution of a moral issue is increased because of religious sources or whose sense of the validity of a natural law conclusion is based on religious sources, but I will leave aside these nuances here.

estant theologians and a few Roman Catholic ones have challenged this universalist natural law view as failing to be distinctly Christian; for them, a Christian ethic should depend on Christian sources and a Christian world view.⁴¹ Jean Porter's illuminating study of scholastic philosophers and theologians shows that they drew a less sharp distinction between natural reason and religious sources of insight than modern natural lawyers tend to do.⁴² The scholastics used Scripture to determine which aspects of nature to treat as normative, and they used their understanding of nature and reason to interpret Scripture.⁴³ Rather than forming two complementary tracks to moral understanding, religious interpretation and natural reason interpenetrated each other. Porter suggests that the scholastic approach has much to teach us about ethical understanding.⁴⁴

Whatever the intrinsic soundness of the approach Porter reports and recommends, reasoning and conclusions that depend on specifically Christian sources do not satisfy requirements of public reason, as elaborated by modern theorists. Although Porter does not quite address that question, she is well aware of the negative implications that her approach carries for universalist moral reasoning.⁴⁵ Insofar as the specific moral reasoning in a natural law approach relies on particular religious ideas and sources, it is not consonant with public reason.⁴⁶

B. *Overall Theory or Ways of Reasoning About Moral and Political Problems*

Most natural law theorists have provided accounts of human good and moral duty within an overall perspective about fundamental reality.⁴⁷ Typically, the theorists have connected human existence to the rest of the physical universe, in which all objects, or all living objects, have a natural inclination to fulfill their essential purposes.⁴⁸ In this teleological view of

41. See JEAN PORTER, *NATURAL AND DIVINE LAW: RECLAIMING THE TRADITION FOR CHRISTIAN ETHICS* 30–34 (1999) (reviewing criticisms of natural law raised by Reinhold Niebuhr, Stanley Hauerwas, Karl Rahner, Bernard Lonergan and James Gustafson, among others); *id.* at 168–72 (discussing criticisms of natural law raised by Karl Barth, who is described as believing that “an adequate account of morality must be not only theological but specifically and distinctively Christological”).

42. See *id.* at 129–40.

43. See *id.* (asserting that natural law and Scripture are “closely connected in scholastic thought”).

44. See *id.* at 303–17 (suggesting that moral reflection is theological yet “remains open to the best insights of the natural and social sciences”).

45. See *id.* at 313.

46. Can we then say that anyone who adopts Porter's view of natural law acknowledges that natural law reasoning does not qualify as within the bounds of public reason? Not quite, I believe. Insofar as one could disentangle the threads of religious and nonreligious sources, one *might* be able to say that some conclusions can be substantially supported by nonreligious sources alone. These might qualify as within a realm of public reasons.

47. See generally LLOYD L. WEINREB, *NATURAL LAW AND JUSTICE* 55–60 (1987).

48. See PORTER, *supra* note 41, at 70 (quoting “highly influential definition” of natural law made by Ulpian, one of Roman jurists: “The law of nature is that which nature teaches all animals. For that law is not proper to the human race, but it is

life, human beings share some purposes with animals, and perhaps some even with plants and stones, but they have a higher purpose than all other earthly beings.⁴⁹ That purpose is to realize their rational nature.⁵⁰ In many versions, God is a crucial element in this structure of being.⁵¹

When natural law claims rest directly upon assertions about God, or upon a complete theory of natural reality, they are based on a comprehensive view in Rawls's sense. But that need not disqualify every moral and political argument made by natural lawyers from being consonant with public reason.

The complete relation between full natural law theories and their bases of moral reasoning is complex, but here is how moral claims might escape depending on a comprehensive view. Most natural law accounts claim that people do (descriptively) reach common judgments about basic moral issues and that these judgments are sound.⁵² So long as a theorist believes that people can reason to sound moral judgments *without* understanding or accepting any overall theory that explains how these judgments fit with physical reality or God's purposes, then the moral arguments the theorist presents might qualify as public reasons, even though his complete theory definitely does not.⁵³

Notice, in this respect, that Professor George makes his appeal regarding stem cell research without explicitly relying on any comprehensive natural law theory. If his contention about the status of an embryo can be detached from such a theory, it could be a public reason not to engage in stem cell research. However, when a natural law theorist advances a moral claim, it may be very difficult to decide just how far the claim can fairly be detached from his overall theory.

C. *Teleology or Self-Evidence*

The traditional understanding of natural law is built on a purposive sense of nature; as an acorn develops into an oak, things have a tendency

common to all animals which are born on the earth and in the sea, and to the birds also.”).

49. See *id.* at 86-87 (explaining how different standards of behavior apply to human beings and non-rational animals).

50. See *id.* at 87 (“[R]ationality is considered to be the human characteristic *par excellence*.”).

51. See, e.g., WEINREB, *supra* note 47, at 53-63 (describing natural law theory of Aquinas).

52. There is substantial variation in how much common reason reaches. Compare PORTER, *supra* note 41, at 29-30 (describing Catholic version of natural law, which holds that the same moral norms are accessible to all persons), with SIMON, *supra* note 39, at 3-5, 23-26, 66, 146-48 (expressing skeptical view about how much is really shared in common).

53. See SIMON, *supra* note 39, at 62 (speaking of acquaintance with natural law as being logically antecedent to knowledge of God's existence, although understanding of natural law is preserved only by recognizing God as its ultimate foundation).

to fulfill their essential purposes. Human beings live good lives if they fulfill their true purposes; the norms that they should observe help them realize their essential nature. To take a practical example, we might discern that the essential purpose of human sexuality is procreation. We could proceed to condemn masturbation, homosexual relations, and the use of artificial contraceptives as unnatural deviations from appropriate sexual acts. This theoretical approach has been challenged by Germain Grisez and John Finnis,⁵⁴ and by Robert George, although their own conclusions about practical moral issues differ little from those whose teleological approach they reject. Their account, which they claim represents the best reading of Aquinas as well as being normatively persuasive, unties moral understanding from any theory of physical reality.⁵⁵ Rather, human beings are capable of identifying certain goods as self-evidently valuable.⁵⁶ From this identification of basic goods for human beings and from the recognition that none has priority over others, we can ascertain what actions are morally right or morally wrong.⁵⁷

Our question is whether either of these approaches is intrinsically more susceptible of providing public reasons than the other. Insofar as the teleological theory rests on broad claims about purpose in nature, it certainly amounts to a comprehensive view in Rawls's sense.⁵⁸ No doubt, the Grisez-Finnis approach is also a comprehensive view, but it does not follow that every moral claim made from that perspective must rest on the comprehensive view. George, for example, might argue that his particular claim about the embryos is self-evidently correct, and can be seen to be so by people who need not accept the idea that self-evident truths lie at the core of moral understanding. Rawls has talked about people relying on practices of common sense and science;⁵⁹ such a reliance does not stray from public reason. George talks about his conclusion as based on science, but the scientific evidence alone does not tell us how the embryo

54. The explication with which I am most conversant is JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* (1980), which I reviewed in 10 *POL. THEORY* 133 (1981). In a book that is critical of their approach, Russell Hittinger examines their major claims in detail and refers to many of their writings. See generally RUSSELL HITTINGER, *A CRITIQUE OF THE NEW NATURAL LAW THEORY* (1987).

55. See FINNIS, *supra* note 54, at 34 ("Aquinas considers that practical reasoning begins not by understanding this nature from the outside, as it were, by way of psychological, anthropological, or metaphysical observations and judgments defining human nature, but by experiencing one's nature, so to speak, from the inside, in the form of one's inclinations.").

56. See *id.*

57. See *id.*

58. See RAWLS, *supra* note 1, at 175 (stating that "[a] doctrine is fully comprehensive when it covers all recognized values and virtues within one precisely articulated scheme of thought, whereas a doctrine is only partially comprehensive when it comprises certain (but not all) nonpolitical values and is rather loosely articulated").

59. See John Rawls, *Kantian Constructivism in Moral Theory*, 77 *J. PHIL.* 515, 539 (1980).

should be valued. If George conceded as much, he might still contend that his conclusion that an entity capable of development through internal organic functioning into a human being *is* a human being is a conclusion of common sense (albeit a kind of rarified common sense). Conceivably, a teleological theorist could advance similar arguments that some claims about basic human purposes, such as preserving life, rest on a shared common sense; but, in general, claims within a teleological perspective seem to rest more directly on a comprehensive view than claims asserted as self-evident.

D. *Rational Derivations or the Fruits of Experience*

How are we to draw correct moral conclusions? Various natural law theorists have emphasized rational derivations from first principles or insights from human experience. I do not want to overstate the dichotomy. Everyone agrees that reflection on experience is a vital aspect of understanding moral truth, and no one rejects rational analysis that moves from general truths to particulars. But, nevertheless, some theorists rely much more heavily on rational derivations than do others. Porter tells us that the scholastics reflected on the mores of various societies and tried to understand how these embodied natural law.⁶⁰ Many modern natural lawyers, both those who maintain a teleological perspective and those who start from self evidence, draw highly controversial conclusions from supposedly irresistible first principles. To take just one example, the natural purposes or self-evident values of human sexuality are said to lead to a conclusion that persons who are powerfully inclined from birth to homosexual rather than heterosexual relations should refrain from sexual acts altogether, rather than engage in the only sexual acts that attract them.⁶¹

In the abstract, rational derivation is fully consonant with public reason. After all, if one begins with a valid first principle and draws from it by rigorous analysis, one's conclusions are rationally compelling. Regrettably, what for some natural law thinkers are unassailable first principles and irrefutable derivations strike many outsiders as uncongenial abstractions that have lost sight of the human condition. If we were focusing exclusively on this feature of claimed rational derivation, the proponent of a position about sexual behavior might think his view falls within the domain of public reasons;⁶² an outsider might find that the position is not only unpersuasive on balance but that it appeals to an esoteric set of assumptions rather than any common reason.

The more modest approach of reliance on human experience may fall more indisputably within the range of public reason, at least if the

60. See PORTER, *supra* note 39, at 77–79.

61. I have criticized this position. See Kent Greenawalt, *How Persuasive Is Natural Law Theory?*, 75 NOTRE DAME L. REV. 1647, 1666–71 (2000).

62. John Finnis urges that the fact of reasonable pluralism does not show that beliefs cannot be established by reason. See Finnis, *supra* note 2, at 79.

reliance on experience is of a certain kind.⁶³ Someone who examines the morality of incest by surveying the norms of various cultures and psychological studies of family relations begins with the evidence of social science. If he concludes that, even apart from genetic hazards and the unacceptability of sexual relations with minors, incestual sexual relations carry very serious risks, and are therefore rightly regarded as immoral, that judgment falls more easily within the domain of science and common sense than the top-down reasoning one finds in some natural law approaches.

E. *Dependent on Ideas of the Good or Not*

Natural law theory has developed notions of morality out of judgments about what are fulfilling lives for human beings.⁶⁴ Were “public reason” to exclude all ideas of the good, it would disqualify most claims of natural law. Undoubtedly, the natural lawyer’s best response is that no sensible version of public reasons should exclude claims about the good life. The natural lawyer *might* acknowledge that controversial claims of the good may be excluded, but say that his claims about the good life are uncontroversial. Faced with the indisputable fact that many natural law claims about good lives *are* controversial, he might claim that he *begins* with uncontroversial claims about the good life and derives his controversial conclusions by a chain of rationally persuasive arguments. In form, this argument has considerable appeal, but if we look at most practical examples, we find either that the initial premises are controversial or that the derivation of conclusions does not seem rationally compelling to outsiders, even ones who are fair and open-minded.⁶⁵

Interestingly, George’s particular argument about stem cell research does not rest on a controversial notion of a good life, or perhaps on any notion of a good life. That participants in a liberal democracy owe respect to each other and to other members of the human community is widely accepted, and that is a matter of justice or right, rather than “the good.” George’s main argument, based on science and what we should reasonably conclude about an entity that can develop into an adult person, is about who counts as a human being. That argument is more about right, the required respect for persons, than it is about what constitutes a good life

63. A reliance on one’s own personal experience is not clearly in the domain of public reason, unless one has a solid basis to suppose that other people react similarly.

64. See MARK C. MURPHY, NATURAL LAW AND PRACTICAL RATIONALITY 46 (2001) (noting that natural law theorists claim that individuals act to increase their well-being). This characterization fits both teleological and self-evidence approaches.

65. This very disagreement about what can be persuasively derived from uncontroversial premises might be cited to bolster the contention that only uncontroversial conclusions about the good life qualify as public reasons, not controversial conclusions supposedly derived from uncontroversial premises.

for human beings.⁶⁶ If George's argument is persuasive, it should have force for people with views about the good life that are diametrically opposed to his. This conclusion should put us on the alert that some moral arguments made by natural lawyers may not depend on contentions about the good life.

F. *Universal Understanding or Understanding of the Wise*

Although natural law theorists have claimed that some kind of moral understanding is universal, it has not followed that ordinary people can resolve complex moral questions on their own. How to resolve some difficult problems can be grasped only by the wise. Now, we can imagine a view that ordinary people resolve moral issues just as well as anyone else, but that they are incapable of rationalizing and theorizing their insights as well as the most intelligent and highly trained among us.⁶⁷ But the role of the wise in much natural law theory goes beyond this. That view, which fits well within the notion that reason is the distinctive human characteristic, is that the wise are better capable of resolving moral issues than the less wise.

This role for the wise is not a serious difficulty for "public reason" if the wise can explain their initial conclusions in a way that all the rest of us will understand is convincing, or if the wise are a group conveniently identified by public reason. If all of us understand the conclusions the wise reach, their reasoning is what convinces us, even if we lacked the insight to reach those conclusions by ourselves. But our understanding might not be essential. For many matters, notably scientific ones, most people depend on the judgments of experts, and they are not able to evaluate why the experts are right.⁶⁸ So long as the experts can be identified in some objective way, relying on what they say is consonant with a reliance on public reason.

If reliance on scientific experts fits with public reason, why should not the same be true for reliance on "the wise" for moral and political judgments? We can see two related possible objections. One is that in deciding what is right morally and politically (insofar as that does not depend on scientific understanding about what is true descriptively), people should rely on their own judgments, not those of experts. On this account, a moral argument that is so complicated that only the wise can

66. This is not to deny that for George all arguments about right may derive from, or be closely related to, ideas of the good; but his particular claim here does not seem to depend on that association.

67. See SIMON, *supra* note 39, at 126–33 (suggesting that many judgments are by inclination and one might suppose that the wise can see the rational grounds for judgments others reach by inclination).

68. Typically, the experts can explain their conclusions in a way that the rest of us can comprehend to a degree; but we would not be in a position to evaluate the persuasiveness of a conclusion of most experts against the arguments for some competing theory.

understand it falls outside the domain of public reasons.⁶⁹ A second objection is that we have no confident way to identify the morally wise. This objection seems to me crucial to deciding that conclusions that only the wise may perceive are not within the domain of public reasons. *If* almost everyone could agree on who was “wise,” and the basis for that agreement was itself a matter of public reason, then we would have a good public reason to accept a consensus of the wise. We *might* think that people should make up their own minds, but that would not be because we lacked public reasons to follow the wise.

G. *Understanding Independent of Time and Place or Understanding
Dependent on Time and Place*

To draw a stark contrast, one can imagine a moral understanding that is more or less constant across times and cultures or a moral understanding that develops and recedes in context.⁷⁰ On the second view, explaining how anyone could ever have thought that slavery was consonant with natural law becomes easier; but that view renders one less confident that conclusions reached now have any permanent validity. This distinction, by itself, has little bearing on the issue of natural law and public reason within a particular society,⁷¹ although the developing view fits more comfortably with a sense that the wise have a special role.

If this quick survey of natural law perspectives and arguments and their relation to ideas of public reason suggests a great deal of complexity, that indeed is the point. With a particular argument by a natural lawyer on some political issue, we (and he) might doubt how much the argument depended on religious premises, how closely it was tied to an overall theory that would amount to a comprehensive view, whether it was self-evident in a way that would make it part of the stock of common reasons, whether any claimed derivations from higher premises followed in the way the argument asserted, whether it rested on a controversial idea of the good, whether it could be understood by ordinary people or only the wise. We can imagine that even if a speaker and listener agreed on the standards for determining if reasons are public, they might disagree over whether an argument by the speaker qualified. We can also imagine that many arguments might not seem to be sharply public or sharply nonpublic, but to fall into some gray area of arguably public or more or less pub-

69. For a suggestion that arguments should be discounted if they are extremely difficult to assess and are subject to reasonable disagreement, see Stephen Macedo, *supra* note 1, at 23. For a response from George and Wolfe, see George & Wolfe, *supra* note 2, at 57–58.

70. Simon adopts a strong version of the second view. See SIMON, *supra* note 39, at 161–63 (arguing that our knowledge of natural law develops gradually with progression of human nature).

71. That is, one could believe that natural law arguments are ones of public reason within a culture even if they are substantially conditioned by time and place.

lic. Finally, we can imagine that the problem of classification would become still more difficult if there was uncertainty about what the criteria are for reasons being public; and the first part of this Lecture suggests how much scholars differ on this point. As difficult as it may be to say whether any particular argument is “in” or “out” of the domain of public reasons, generalizing across the wide range of natural law arguments is virtually impossible.

If natural law arguments are this hard to classify, we can expect the same to be true of many other approaches to moral and political questions that do not depend on explicit religious perspectives. We might find that many reasons and arguments seem to be more or less “public” rather than public or not. We might also wonder if the appropriate degree of publicness of arguments depends on the circumstances. What might be insufficiently public for the preamble of a statute may be sufficiently public in a speech by a senator to her constituents.

V. LAW AS AN ILLUSTRATION OF PUBLIC REASONS

We might be drawn to an even more skeptical conclusion: namely, that whatever other virtues it may have, a theory of public reasons founders completely on the impossibility of specifying just what reasons are public. But standing against this skeptical rejection of any ideal of public reasons is the law. Is not the law a domain in which a theory of public reasons is realized? If so, does not that raise the possibility that politics could be a domain of public reason? Rawls talks about the Supreme Court’s work as an exemplar of the use of public reason,⁷² and it is certainly true that some reasons that count outside the law count for less or do not count at all inside the law. I initially supposed that what Rawls says about the law was uncontroversial, that law is an area in which a theory of public reasons applies, and that the difficult question is whether the limited stock of reasons within the law has any bearing on the broader realm of politics. But I have found surprising resistance to the idea that law is a domain of public reasons.

Everyone seems to agree that some reasons that might carry weight outside the law do not count when judges interpret statutes or constitutions or develop the common law. Thus, a Roman Catholic judge would not render a decision on the basis that it accords with the stance taken in a Papal encyclical.⁷³ Within the law, judges are supposed to rely on reasons that have force for other judges, and the reasons need to be accessible, both in the sense of being comprehensible and in the sense of being capable of being grasped on the basis of rational thought, not faith or intuition. So the law limits relevant reasons; it requires that reasons be understood by rational analysis and have a force that is generally under-

72. See RAWLS, *supra* note 1, at 235.

73. However, reference to the encyclical might be made as evidence that all major religious traditions unite in taking a certain view.

stood. These seem to be strong credentials for the law's being a regime of public reasons.

Just how many reasons lie wholly outside the law for various kinds of legal issues is debatable. But even if the discrepancy between reasons that count in politics and reasons that count in law is not large, particular reasons have different weight within and without the law. An argument that a particular result will be more just or will make people happier *may* have some weight when judges interpret statutes, but it will not carry the day if the language of a statute clearly requires a contrary conclusion. Perhaps the most significant difference between reasoning within the law and reasoning in politics has to do with the special weight that certain reasons have in law, especially reasons concerning textual meaning, legislative intent, and the force of precedents, and the diminished weight accorded other reasons. In any event, we may say that in some imprecise way, leaving room for debate over many specific examples, that some reasons that can carry force outside the law do not carry force for legal interpretation, and that the weight of many other reasons is sharply affected by whether one is talking about personal judgment or legislative policy, as contrasted with legal interpretation.

What might be said against the proposition that the law is a system of public reasons, a system in which people are supposed to rely on reasons that have a general or public force and in which many reasons are disqualified or diminished? Skeptics have put the point something like this: "The law allows all reasons to count that are made relevant by the law. One need not ask about what reasons are public reasons but what reasons the law makes relevant."⁷⁴ So put, the challenge seems a matter of conceptual labeling, but I believe a deeper question lies beneath it. The deeper question is the manner in which one resolves what reasons the law allows. My response to the formal distinction between reasons that the law allows and public reasons is that the distinction itself is indecisive about every important issue. My response to the deeper question is that the manner in which one determines whether the law allows some reasons is very similar to how one might decide what reasons count as public for political life.

On the possible importance of the formal point, we might imagine two contrasting ways in which to resolve which reasons the law admits. One way would be to see the law as a distinctive endeavor that has its own peculiar strategy to identify what reasons count. It is as if we said that the reasons that are relevant to settle disputes in tennis are the reasons supplied by the rule book of tennis. Then we would have a limited stock of reasons, comprehensible reasons of force for every decision-maker, but all this would be a consequence of the narrow coverage of the rule book.⁷⁵ That tennis has a limited stock of comprehensible reasons with force for

74. This is my paraphrase of a position taken by some participants during a May 2001 conference at Catholic University on public reason.

75. In fact, I doubt if tennis or any similar game (I put aside board games) could be completely self-contained in this way; general notions of fairness, for ex-

all decision-makers would tell us hardly anything about public reason in politics, about why people might eschew otherwise persuasive reasons for laws and policies.

An alternative way that one might resolve whether the law admits reasons is to ask whether otherwise persuasive reasons for reaching decisions are (or should be) excluded because they do not meet some requisite degree of publicness. If the answer were yes, if this were how we decided what reasons the law excludes, we would have an example of “public reasons” that could be relevant for politics. In that event, the assertion that the law makes some reasons relevant and other reasons irrelevant would be quite consistent with the conclusion that the law is a regime of public reasons.

Without doubt, the distinctive character of law, and the authoritative sources of law, lead to some reasons counting within the law and others counting little or not at all in many contexts. For example, the practice that misguided precedents are deemed to have force is an aspect of common law jurisprudence. To this extent, the law is not so unlike tennis governed largely according to the rule book. But lawyers may usually argue to judges that, in an otherwise close case, one interpretation of a precedent or a reading of a statute will promote justice or human welfare better than another. In fact, the domain of *relevant* arguments in law is not much narrower than the domain of relevant arguments in politics, although, as I have said, differences in weight are critical. If this is correct,⁷⁶ then the considerations that determine whether reasons are excluded resemble those that have been suggested for political life by proponents of public reason.

The point is easiest to illustrate for determinations that judges must make that do not depend much on authoritative statutes or precedents. In virtually all states, the main standard for determinations of child custody is the “best interests of the child.”⁷⁷ Suppose a judge must decide whether to place a child with her father or with her mother, who is living with another woman in an intimate relationship. The judge should not refuse custody to the mother because the Bible condemns homosexual relations as sinful. Nor should the judge announce the truth of greatest happiness utilitarianism as the basis for resolving what is in the child’s best interest. The basis for excluding these possible reasons is very similar to the arguments put forward by public reasons theorists in respect to politics: the reasons do not have appropriately general force and they rely too heavily on controversial overarching views.

ample, would be bound to affect interpretation; but *most* of the reasons that count in tennis might be derived from the rule book.

76. It is sufficient for my argument that it is correct for common law, even if, contrary to what I believe, reasons of justice and desirability are properly excluded in statutory or constitutional interpretation, or both.

77. See 24A AM. JUR. 2D *Divorce and Separation* § 931 (1998) (reporting best interests of child as general standard for custody decisions).

All this is sufficient to suggest that the law is not only a domain of limited reasons, but that part of the basis for deciding what reasons are included and excluded has to do with determining which reasons are public, public in a sense that could be relevant for politics.

If we ask just what reasons count in law and how much they count, we face difficulties like those that troubled the examination of natural law and public reason. Notably, Supreme Court Justices disagree about the relevance of legislative history in statutory cases, and related to this is an apparent disagreement whether the subjective intentions of legislators matter. One theory of common law development is that judges should very heavily rely on community norms;⁷⁸ another theory is that they should forthrightly interpret in light of their own judgments about justice.⁷⁹ People who agree that certain arguments are relevant may disagree greatly about how much weight these should carry in relation to other arguments. Thus, our law is hardly a model of a regime in which telling arguments are neatly lined up with their appropriate weight. But all this does not deprive it of being a domain of public reasons, in which some arguments are acknowledged not to be valid because these arguments fail to exhibit sufficient publicness, and the force of other arguments may be diminished because they seem less public than alternative arguments.

If the law is a domain of public reasons, then it is at least possible that in politics, people do have, or should have, a sense that reasons should be public, and it is possible that that sense could strengthen and sharpen over time, *or* that it could dissipate in the face of challenges that God should not be removed from the public square. As I have stated, my own sense is that the constraint of public reasons applies primarily to the public expressions of officials. But the main point of this Lecture is that an examination of the status of natural law arguments shows that the boundaries of public reasons are very hard to define.

78. *See generally* MELVIN EISENBERG, *THE NATURE OF THE COMMON LAW* (1988).

79. *See generally* RONALD DWORKIN, *LAW'S EMPIRE* (1986).