

# William & Mary Law Review

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Volume 40 (1998-1999)  
Issue 3 *Institute of Bill of Rights Symposium:  
Reconstructing Liberalism*

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Article 10

March 1999

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# RESPONSE

## RECONSTRUCTING GALSTON'S CONCEPTION OF STATE NEUTRALITY

GEORGE W. HARRIS\*

### I.

Any conception of political morality applying to modern western societies will reflect a conception of state neutrality, whether that morality be liberal, utilitarian, or perfectionist. Articulating a conception of state neutrality becomes especially crucial to liberalism, however, because, according to liberalism, the problem of a well-ordered society for western states is the problem of what principles of social cooperation are rational for a society in which central kinds of conflicts involve a plurality of competing conceptions of how it is best to live.<sup>1</sup> Different versions of liberalism, then, can be distinguished from each other in terms of the different conceptions of state neutrality they reflect. My purpose here is to contrast the conception of state neutrality reflected in William Galston's recent work<sup>2</sup> with one of its major competitors. The result will be a clarification of Galston's reconstruction of state neutrality.

Before turning to that task, I first want to clarify the notion of neutrality I wish to discuss. Much has been written about the structure of liberal arguments for particular conceptions of polit-

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1. See CHARLES E. LARMORE, *PATTERNS OF MORAL COMPLEXITY* 69-70 (1987).

2. See William A. Galston, *Expressive Liberty, Moral Pluralism, Political Pluralism: Three Sources of Liberal Theory*, 40 WM. & MARY L. REV. 869 (1999).

ical morality as to whether theory should begin with the "right" or the "good."<sup>3</sup> Some have argued that to begin with the right is to construct a political morality in a way that is neutral regarding any conception of what makes a life good.<sup>4</sup> Others, including Galston, have argued that political theory must begin with a conception of the good and derive a conception of liberalism from it.<sup>5</sup> I believe that Galston is correct on this issue, but this is not the issue I wish to discuss. The issue of the neutrality of philosophical theory is different from the issue of how neutral the state should be regarding the different conceptions of the good life its citizens pursue. Whatever structure political theory takes, the political morality it produces will reflect a normative conception of state neutrality, a conception of how the state is morally restricted from taking sides on competing conceptions of the good life.<sup>6</sup> For my purposes, it does not matter how the conception of state neutrality is derived from its theoretical base, from the right or from the good; all that matters is what it is. I simply am interested in getting a grip on how competing conceptions of liberalism differ in terms of their conceptions of state neutrality. Were we able to isolate all the major liberal competitors in these terms, we would improve our understanding of the philosophical options before us, as we would by isolating the nonliberal competitors for our assent. No view that fails to recognize the facts of pluralism is a real competitor, which means that any plausible political morality must require some normative notion of state neutrality. Until a conception is refined to bring its version of state neutrality into focus, the option it represents will not be entirely clear to us.

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3. See John Rawls, *John Rawls: The Right and the Good Contrasted*, in *LIBERALISM AND ITS CRITICS* 37-59 (Michael J. Sandel ed., 1984).

4. See, e.g., WILL KYMLICKA, *LIBERALISM, COMMUNITY AND CULTURE* 21-43 (1989); LARMORE, *supra* note 1, at 69-70; Rawls, *supra* note 3, at 37-59.

5. See, e.g., WILLIAM A. GALSTON, *LIBERAL PURPOSES: GOODS, VIRTUES, AND DIVERSITY IN THE LIBERAL STATE* (1991); STEPHEN MACEDO, *LIBERAL VIRTUES: CITIZENSHIP, VIRTUE, AND COMMUNITY IN LIBERAL CONSTITUTIONALISM* (1990); JOSEPH RAZ, *THE MORALITY OF FREEDOM* (1986).

6. See, e.g., RAZ, *supra* note 5, at 110-11.

## II.

Consider two liberal competitors. The first has a Kantian lineage, and the second a lineage to Isaiah Berlin. The idea is to understand how beginning with fundamentally different conceptions of the foundations of morality can yield fundamentally different conceptions of liberalism and state neutrality.

The Kantian lineage I have in mind begins with the thought that what is important about political principles is how they apply to persons in terms of what is most important about persons.<sup>7</sup> Persons have a certain kind of value, and it is this particular kind of value that is the foundation for morality, even political morality. We first need to understand the kind of value persons are supposed to have on this view and, second, what it is about persons that gives them this kind of value.

The kind of value in question is the special value that attaches to dignity. What is it to value something as possessing dignity? Barbara Herman, a contemporary Kantian, put it this way in the context of explaining the value of our rational nature:

Rational nature as value is both absolute and nonscalar. It is absolute in the sense that there is no other kind of value or goodness for whose sake rational nature can count as a means. It is nonscalar in the sense that (1) it is not the highest value on a single inclusive scale of value, and (2) it is not additive: more instantiations of rational nature do not enhance the value content of the world, and more instances of respect for rational nature do not move anything or anyone along a scale of dignity. There is no such scale.<sup>8</sup>

Thomas Hill expressed a similar thought when he wrote, "[D]ignity cannot morally or reasonably be exchanged for anything of greater value, whether the value is dignity or price. One cannot then, trade off the dignity of humanity in one person in order to honor a greater dignity in two, ten, or a thousand persons."<sup>9</sup>

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7. See IMMANUEL KANT, *GROUNDWORK OF THE METAPHYSIC OF MORALS* 96 (H.J. Paton trans., Harper & Row 1964) (1785) (discussing persons as objective ends); JOHN RAWLS, *A THEORY OF JUSTICE* 179-83 (1971) (discussing the principle of utility as treating persons as both ends and means).

8. BARBARA HERMAN, *THE PRACTICE OF MORAL JUDGMENT* 238 (1993).

9. THOMAS E. HILL, JR., *DIGNITY AND PRACTICAL REASON IN KANT'S MORAL THEORY*

To think of something as having the kind of value worthy of dignity is to think of it as a qualitatively different kind of value from all other values. The fundamental Kantian thought is that whatever possesses dignity is recognized as having a value that cannot be calculated in terms of its benefits.<sup>10</sup> To recognize dignity in terms of its benefits would imply one of three possibilities, all of which fail to grasp—according to the Kantian account—the particular kind of value dignity has.<sup>11</sup> The first possibility is that dignity is an instrumental value to the production of some intrinsic value, perhaps the intrinsic value of happiness. The value of dignity, however, is not to be found in its instrumental properties to produce happiness in us or to produce anything else. To think this is simply to fail to recognize that dignity is an intrinsic value. The second possibility is that although dignity is an intrinsic value, there is some greater intrinsic value in terms of which the intrinsic value of dignity can be traded off. Again, however, to think of dignity in this way is to misunderstand the kind of value dignity retains. Dignity is the most fundamental kind of intrinsic value. That we would not sacrifice the dignity of one person for the happiness of many is evidence of this, as is the value we place on human beings as opposed to lower animals. We might care deeply and intrinsically about the well-being of both human beings and lower animals, but the reason the concern for human well-being is more fundamental than the concern for the well-being of lower animals is that we have a dignity that lower animals do not.<sup>12</sup> From these first two points, then, we can see that dignity is neither a means to happiness nor a kind of intrinsic value that can be traded off for other intrinsic values, especially the intrinsic value of happiness—our own or that of others. Finally, if dignity could be calculated in terms of its benefits, this might allow one to trade off some dignity for the benefit of more dignity. The comments of both Herman and Hill suggest that if we think of dignity as allowing

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49 (1992).

10. See KANT, *supra* note 7, at 102-03.

11. See *id.*

12. See IMMANUEL KANT, LECTURES ON ETHICS 239-41 (Louis Infield trans., Harper & Row 1963) (1930).

quantitative tradeoffs within dignity, we have not yet understood the special kind of intrinsic value dignity retains.<sup>13</sup>

What is it about persons, according to the Kantian tradition, that gives them their dignity? This is where the concept of autonomy enters both the moral and the political arena. Dignity is conferred upon persons by their higher order capacities, capacities that distinguish persons as autonomous agents who are rational choosers, from other animals.<sup>14</sup> To recognize the dignity of persons, then, is to respond with respect for their autonomy. We can understand autonomy by understanding what the higher order capacities of persons are said to be, in terms of which respect is the proper evaluative attitude toward beings who have dignity. First, we, as persons, have the higher order capacity to set ends for ourselves in a way that reflects our own distinctive conception of a good life.<sup>15</sup> Second, we have the higher order capacity to take responsibility for our lives and our own happiness in a way that is inconsistent with merely being passive recipients of happiness as a benefit bestowed upon us by the agency of others.<sup>16</sup> Finally, we have the higher order capacity to set our ends in a way that recognizes the equal worth of others to set their ends in accordance with their higher order capacities.<sup>17</sup> To respect others for their dignity, then, when it is for their higher order capacities, is to see oneself as restricted in a certain way from interfering with the exercise of their higher order capacities. It also is, according to Kant, to see oneself as committed to promoting the conditions under which it is possible for oneself and others to exercise these higher order capacities.<sup>18</sup>

What has all this to do with state neutrality? The first feature of our higher order capacities is possible only when there is a plurality of ways in which we can set our ends as constituting

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13. See HERMAN, *supra* note 8, at 125, 237-38; HILL, *supra* note 9, at 10.

14. See KANT, *supra* note 7, at 98, 103 (discussing Kant's formula of autonomy).

15. See *id.* at 98-99.

16. See *id.* at 98-102.

17. See *id.*

18. See *id.* at 100-02 (describing the formula of the Kingdom of Ends, which is defined as "a systematic union of rational beings under common objective laws . . . [which are] directed precisely to the relation of such beings to one another as ends and means").

ways of life in which we might invest meaning and purpose.<sup>19</sup> Without plurality in this sense, this particular higher order capacity would be neither possible nor necessary. Thus, without plurality of possible sets of ends in which we can invest meaning, there is no dignity because without plurality in this sense, the value of our lives could not be a matter of choice. If the state is to be organized in a way that recognizes the dignity of persons, it must be neutral regarding the sets of ends that can provide meaning and purpose to the lives of its citizens. Moreover, this neutrality must be quite broad because, on this view, a way of life has its moral standing by virtue of its being the object of autonomous choice,<sup>20</sup> the product of a being who has this first higher order capacity. A way of life has no prior moral value. If, in the name of some independent value, the state violates neutrality regarding the kinds of ends that persons with this first higher order capacity can choose, it interferes with the higher order capacities of persons and hence does not show respect for their dignity.

The second higher order capacity places restrictions on paternalism.<sup>21</sup> To act for the good of an adult against her own choices is to treat her as though she does not have the higher order capacity of taking responsibility for the consequences of setting her own ends. On the other hand, we are justified in treating children paternalistically only to the extent to which doing so is necessary to develop the child's higher order capacities. In the first case, to stand as a buffer between the adult's choices and the consequences of her choices is to interfere with the exercise of her higher order capacities. It is to treat her as though she is incapable of calculating the costs of her choices. Not to act paternalistically for the sake of the child's autonomy is to fail to promote the conditions under which the child's higher order capacities and dignity are possible. Where, then, a conception of state neutrality is designed to track this dignity-conferring

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19. *See id.* at 101.

20. *See id.* (noting that the making of laws must be able to spring from the will of every rational being).

21. *See* IMMANUEL KANT, *THE METAPHYSICS OF MORALS* 156-57 (Mary Gregor trans., Cambridge Univ. Press 1996) (1797).

capacity, the state must remain neutral regarding the good of its individual (adult) citizens when they have been irresponsible concerning their own good. To respect adult persons for their possession of the second higher order capacity is to be neutral not between different good lives individuals might choose, but between whether their lives are good or bad. Otherwise, dignity is not properly recognized and respected. Our respect for people's agency must regulate our sympathy for them in this regard or we will not value their dignity.

Finally, we are justified in interfering with the choices that are the products of the first two higher order capacities of those who refuse to exercise the third higher order capacity—the failure to set ends in a way that is consistent with the exercise of others' higher order capacities. First, we may ignore their ends as having no moral relevance to how the state should be ordered. The state need not be neutral regarding ways of life that are not the product of all three higher order capacities, because they are not the proper objects of autonomous choice. Second, under certain circumstances, we must punish persons who have, but do not exercise, the third capacity in order to recognize and pay proper tribute to their dignity. This is the sense in which punishment is to be understood as retribution rather than a deterrent. Punishment is not a benefit conferred upon victims of crimes as revenge or upon potential victims of crimes as a deterrent, but the benefit of proper respect for the dignity of criminals.<sup>22</sup> In its retributive function,<sup>23</sup> the state is to be neutral regarding the good of criminals and their victims; otherwise, dignity becomes scalar and quantifiable. This, of course, is neutrality with a vengeance. Lastly, in its distributive function,<sup>24</sup> the state is justified in restricting its support for optional ways of life to those that are compatible with the equal recognition of the worth of the higher order capacities of all persons. Otherwise, the state is to be neutral in its distributive role. To do otherwise is to fail to recognize the equal intrinsic worth of persons in terms of their higher order capacities. It is to treat dignity as though it is scalar and quantifiable.

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22. *See id.* at 104-05.

23. *See id.* at 105-09.

24. *See id.* at 100-02.



This is the more or less pure story. The state is to be neutral in its protective function<sup>25</sup> regarding all ways of life that are the objects of autonomous choice when all three higher order capacities are operative in the choice. In its promotional function,<sup>26</sup> the state can favor ways of life that are the objects of choice in which all three higher order capacities are operative over those that are not, but it cannot favor one of these over the other. Paternalistic legislation will be restricted severely, which reflects a certain kind of neutrality between good and bad lives; and criminal legislation in its assignment of punishment will be neutral regarding the dignity of criminals and their victims. All this is a conception of neutrality required by a certain view of the worth of persons and their dignity.

Of course, few contemporary liberals accept the entire story. Rawls's rejection of merit in favor of entitlement goes deeply against the grain of tying dignity to the second higher order capacity.<sup>27</sup> Unlike Kant, Rawls seems to reduce moral personality to luck. Whether we are responsible agents in the second sense is, according to Rawls, a matter of factors that are arbitrary from the moral point of view.<sup>28</sup> Rawls seems to think, however, that the third higher order capacity is in place.<sup>29</sup> That is, he seems to think that although our capacity for effort is the result of factors that are arbitrary from the moral point of view,<sup>30</sup> our capacity for adjusting our ends to accommodate the ends of others is not.<sup>31</sup> This is a tension not only within Rawls's view, but also a tension he has with the tradition he is trying to revise. Similar tensions within the attempt to construct a conception of liberalism out of the Kantian lineage appear in theories of punishment, as well as in theories regarding paternalism and minority rights.<sup>32</sup> Almost no one accepts the pure story intact.

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25. See KANT, *supra* note 7, at 100-02.

26. See *id.*

27. See RAWLS, *supra* note 7, at 310-15.

28. See *id.*

29. See *id.*

30. See *id.* at 311-12 (arguing that the idea of rewarding moral desert is impracticable).

31. See *id.*

32. See, e.g., KYMLICKA, *supra* note 4, at 206-19 (discussing minority rights and

What survives is an attempt to tie liberalism to the concern for the worth of persons, spelled out in terms of the special value of dignity. Any such view is going to entail a rather expansive notion of state neutrality.

### III.

We get a much different conception of liberalism and state neutrality if we begin with the conception of morality and its foundations as found in the thought of Isaiah Berlin.<sup>33</sup> Berlin was both a liberal and a moral pluralist. If what I have said thus far is correct, his liberalism informed by his moral pluralism will yield a conception of state neutrality different from the conception of state neutrality reflected in the Kantian tradition, which emphasizes human dignity. Galstonian liberalism is to be understood as a variant of Berlin's liberalism.

According to Berlin, there are plural and conflicting moral values.<sup>34</sup> This thesis involves the following four claims: (i) there is a plurality of moral values; (ii) ultimate moral values can conflict, all things considered; (iii) there is no moral scale indexed to some highest moral value in terms of which all moral conflicts can be resolved, which, together with (ii), means that ultimate moral values are incommensurable; and (iv) the realization of any ultimate moral value comes at the loss of some other ultimate moral value.<sup>35</sup>

The most important thing to note about these claims regarding moral value is that they all conflict with the Kantian tradition. First, the source of moral value on the Kantian tradition is singular, not plural: moral value is conferred by choice, the exercise of the higher order capacities of agency, and by nothing else.<sup>36</sup> Second, whatever conflicts with the dignity conferring

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the liberal tradition).

33. See, e.g., ISAIAH BERLIN, *THE CROOKED TIMBER OF HUMANITY* (Henry Hardy ed., Alfred A. Knoph 1991) (1990) [hereinafter BERLIN, *CROOKED TIMBER*]; ISAIAH BERLIN, *FOUR ESSAYS ON LIBERTY* (1969).

34. See Isaiah Berlin, *The Pursuit of the Ideal*, in BERLIN, *CROOKED TIMBER*, *supra* note 33, at 1, 11-12.

35. See *id.* at 11-17.

36. See KANT, *supra* note 7, at 102-03.

higher order capacities for choice involves a conflict between the moral and the nonmoral; it is not a conflict between moral values.<sup>37</sup> Third, human dignity, with its foundation in our higher order capacities for agency, provides a moral scale in terms of which we can resolve conflicts with all nonmoral values.<sup>38</sup> On the fourth point, there is some ambiguity regarding the Kantian contrast. One possibility is that because human dignity is both nonscalar and nonquantifiable, the realization of moral value seems to be all or nothing: if more instances of human dignity do not add to the value of a world, fewer instances do not lessen its value. Another possibility is that there is moral loss that can come in degrees, but the loss is to be understood as the loss of choice or the capacity for choice and nothing else.

If Berlin is correct, the realization of the capacity for choice in some things, or an increase in the capacity for a greater range of choices, can come at the moral cost of something else—for example, close personal ties, community, religion, or excellence—all of which are independent moral values in his view.<sup>39</sup> If Berlin is correct about moral pluralism, the Kantian account of human dignity simply is exaggerated and false to the nature of moral value, even the moral value of human dignity. It cannot possibly serve as the foundation for either personal or political morality. What should be clear is that one cannot be both Kantian and a moral pluralist.

#### IV

How does all this factor into Galston's version of liberalism? The answer lies in an understanding of how the conception of state neutrality is a function of four variables: expressive liberty, moral pluralism, political pluralism, and the need for public order.<sup>40</sup> What are the ways in which these variables can produce a conception of state neutrality different from the conception that is traced to what we now can call Kantian liberalism?

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37. See KANT, *supra* note 21, at 16-17.

38. See *id.*

39. See Berlin, *supra* note 34, at 12 (discussing clashing values within a single individual, between individuals, and between groups).

40. Cf. Galston, *supra* note 2, at 876-84 (discussing expressive liberty, moral pluralism, and political pluralism).

The first way in which neutrality can be limited on grounds inconsistent with the Kantian account of human dignity is a purely practical one, and it involves the relationship between expressive liberty and the need for public order. Expressive liberty claims that a citizen has to pursue a way of life that best expresses his or her most fundamental values, values that give purpose and meaning to his or her life.<sup>41</sup> Implementing the program of Kantian liberalism forces too many people to live against their deepest values, thereby restricting their expressive liberty and compromising the need for public order. The very possibility of society requires a basic level of public order; therefore, there are practical reasons that serve as a rational basis for compromising on dignity as understood by the Kantian tradition. This suggests that whatever our considered conception of human dignity is, it is one that allows for some tradeoffs involving more dignity rather than less. Surely it is rational to maintain basic public order in the name of autonomy itself, where the greater autonomy is preferable rationally to the lesser autonomy, at least in the extremes. One might not think that marginal tradeoffs in autonomy are rational, but here we are talking about more than marginal differences. It is one thing to say that we should maximize the opportunities for choice, but it is another to say that we should secure the conditions for the kinds of choice that make a society possible in actual historical circumstances.

Stated this way, the concession to Kantian state neutrality is made on merely practical grounds. Galston, however, wants to claim that his view is morally as well as practically superior to Kantian liberalism.<sup>42</sup> The basis for his claim is found in his endorsement of moral pluralism.<sup>43</sup> According to Galston, moral pluralism is reflected in plural and conflicting ways of life that have moral value.<sup>44</sup> Moreover, the autonomous way of life is only one among a plurality of ways of life that have moral value.<sup>45</sup> It follows from this that some ways of life have moral value that are

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41. *See id.* at 876.

42. *See id.* at 885-90.

43. *See id.* at 878-80.

44. *See id.*

45. *See id.* at 888-90.

not the objects of autonomous choice. If the state has a prima facie obligation to be neutral between all morally legitimate ways of life, there will be a significant difference between Galstonian liberalism and Kantian liberalism in this regard. Both forms of liberalism will assert that the state has a prima facie obligation to remain neutral between all morally legitimate ways of life, but they will construe morally legitimate ways of life differently.<sup>46</sup> On the Kantian side, prior to choice, all ways of life are nonmoral.<sup>47</sup> Neutrality, then, will be between nonmoral ways of life that can be chosen autonomously as a function of the operation of all three higher order capacities. For the moral pluralist, however, in some cases liberalism will require neutrality between ways of life that can be chosen autonomously and others that cannot—or at least are not—chosen autonomously, all of which are moral ways of life.<sup>48</sup> From one perspective, this means that Galstonian liberalism is more expansive in its version of neutrality than Kantian liberalism. Galstonian liberalism is more expansive in its vision of what counts as a moral way of life. From another perspective, however, it is considerably less expansive: to make room for morally legitimate ways of life that are not the objects of autonomous choice, there must be less room for individualistic conceptions of autonomous choice. This, I take it, is among the lessons to be learned from *Meyer v. Nebraska*,<sup>49</sup> *Pierce v. Society of Sisters*,<sup>50</sup> and *Wisconsin v. Yoder*.<sup>51</sup>

The differences between these two conceptions of moral neutrality, the Kantian and the Galstonian, yield differences on two other concepts: the concept of the value of diversity and the concept of what comprises the problem of a well-ordered society. As

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46. See KANT, *supra* note 7, at 100-02; Galston, *supra* note 2, at 878-79.

47. See KANT, *supra* note 7, at 107-08.

48. See Galston, *supra* note 2, at 877-78.

49. 262 U.S. 390 (1923) (declaring unconstitutional a Nebraska statute prohibiting the teaching of any school subject in a language other than English until a student reached the ninth grade).

50. 268 U.S. 510 (1925) (declaring an Oregon statute requiring children between ages 8 and 16 to attend public schools unconstitutional as a violation of Fourteenth Amendment rights).

51. 406 U.S. 205 (1972) (holding that a state law compelling Amish children who have completed the eighth grade to attend high school was inconsistent with the First and Fourteenth Amendments).

to the value of diversity, the Kantian scheme values a diversity of nonmoral ways of life as candidates for autonomous choice;<sup>52</sup> the Galstonian scheme, on the other hand, values a diversity of moral ways of life, some of which are incommensurable and not all of which are candidates for autonomous choice.<sup>53</sup> As to how each interprets the problem of what a well-ordered society is, the Kantian scheme interprets the problem to be about how rationally to resolve conflicts between advocates of different nonmoral ways of life;<sup>54</sup> the Galstonian scheme, on the other hand, interprets the problem to be about how to reconcile conflicts concerning moral ways of life.<sup>55</sup> On the latter view, to interpret conflicts between religious persons and secular Kantians to be about autonomy is to insist on a view of those conflicts that is not true to what is actually going on from the perspective of those involved. Here again, the cases mentioned in the previous paragraph are supposed to be telling in favor of Galston's version of liberalism.<sup>56</sup>

Like the Kantian alternative, the state need not be neutral regarding immoral ways of life, but this lack of neutrality is not to be understood in the same way as in the Kantian scheme. Morally legitimate ways of life are not determined simply by the criteria of autonomous choice. Rather, ways of life that do not pass a certain baseline are to be understood as immoral ways of life.<sup>57</sup> The baseline, as I understand it, involves two criteria requiring the valuing of humanity. The first criterion is that ways of life that do not value the perpetuation of human life are immoral ways of life. Ways of life that value human sacrifice are therefore immoral, and the state is not to be neutral regarding them. The second criterion is that ways of life that are not committed to the development of basic human capacities also are immoral. Here, Galston is influenced by the work of Nussbaum and Sen.<sup>58</sup> The idea is that there is a notion of basic human ca-

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52. See KANT, *supra* note 7, at 104-07.

53. See Galston, *supra* note 2, at 889.

54. See KANT, *supra* note 7, at 100-01 (discussing the resolution of these conflicts).

55. See Galston, *supra* note 2, at 875.

56. See *supra* notes 49-51 and accompanying text.

57. See Galston, *supra* note 2 at 883.

58. See Martha Nussbaum & Amartya Sen, *Introduction* to THE QUALITY OF LIFE 1

capacities and their development that falls short of the development of the higher order capacities involved in Kantian autonomy.<sup>59</sup> If some religious ways of life cannot be chosen autonomously, and yet have moral value and require a significant development of human capacities, there must be some level of the development of human capacities that marks a moral baseline short of the Kantian standard. Non-neutrality for Galstonian liberalism regarding the immoral will be much different than for Kantian liberalism.

The issue of moral pluralism and its bearing on state neutrality is even more complicated. The reason is that Galstonian liberalism is not committed to the view that the state is to be neutral between all morally legitimate ways of life.<sup>60</sup> The reason for this is that there can be conflicts between morally legitimate ways of life such that it is not possible to combine those ways of life within a well-ordered society—that is, in a way that preserves public order. When this is the case, the state is justified in discriminating against some morally legitimate ways of life in the service of public order. Such cases mark a kind of tragic choice a society might have to make.

To this point, then, we have four elements of state neutrality on the Galstonian model that we can understand in terms of when the state is justified in being non-neutral. First, the state can be non-neutral regarding any way of life that poses a sufficient threat to public order in terms of the purely practical consideration of expressive liberty.<sup>61</sup> Second, the state is justified in being non-neutral regarding some ways of life that can be chosen autonomously on the grounds that they do not make sufficient place for the expressive liberty of those who have morally legitimate ways of life that are not the objects of autonomous choice.<sup>62</sup> Third, the state is justified in being non-neutral regarding morally legitimate ways of life and those that are immoral, when the moral baseline for the latter is not defined in

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(Martha Nussbaum & Amartya Sen eds., 1993).

59. See *id.* at 3 (introducing the functionings and capabilities of individuals).

60. See Galston, *supra* note 2, at 883-84.

61. See *id.* at 876-78.

62. See *id.* at 875-76.

terms of the capacities for Kantian autonomy but in terms of something short of that.<sup>63</sup> Fourth, the state is justified in being non-neutral regarding some conflicts between morally legitimate ways of life when it is not possible to combine those ways of life within a well-ordered society.<sup>64</sup> Barring these kinds of justified non-neutrality, the state is to be neutral regarding all morally legitimate ways of life.

This is true, I believe, even when we factor in Galston's final variable, political pluralism. Political pluralism is a thesis regarding the sources of social authority, and it is not easy to articulate.<sup>65</sup> What is needed is a clear contrast with its denial, which Galston identifies with the plenipotentary state.<sup>66</sup> The plenipotentary state is the state in which state authority has a certain supremacy over all other sources of social authority.<sup>67</sup> One form the plenipotentary state might take is in a society in which there are no other sources of social authority other than state authority. Some forms of communism approach this, which is evident in their attempts to eradicate both family structures and religion.<sup>68</sup> Other forms of the plenipotentary state are less radical. They might well recognize other sources of social authority, but arrange these sources hierarchically somewhat in the way that the military orders ranks. There might, for example, be a place for both religious authority and parental authority, but these are subordinate to the political authority of the state such that these authorities can be molded to serve the ends of the state, construed liberally, radically, or conservatively.

However the sources of social authority are related to each other, it is never the case in the plenipotentary state that there are sources of social authority that the state is bound to recognize as being in some respects more authoritative than the State. Political pluralism denies this. It asserts that just as there are domains over which state authority is supreme, there

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63. *See id.* at 883-84.

64. *See id.* at 884 (explaining state power as the key source of order).

65. *See id.* at 880-82.

66. *See id.* at 881.

67. *See id.*

68. *See* WILLIAM LAIRD KLEINE-AHLBRANDT, *EUROPE SINCE 1945: FROM CONFLICT TO COMMUNITY* 131-34, 144-45, 212-13 (1993).



are social domains over which other sources of social authority are to be recognized as supreme by the state.<sup>69</sup> More concretely, political pluralism is the view that an acceptable conception of political authority—state authority—is one that recognizes that state authority both limits and is limited by other sources of social authority, especially religious and parental authorities.<sup>70</sup> On this view, the state must remain neutral regarding these other authorities except in cases where (i) the purely practical need for public order requires intervention, (ii) these other sources of political authority have been employed in the service of immoral ways of life that do not properly value the perpetuation of life and the development of basic human capacities, or (iii) the recognition of these sources in some cases involves morally legitimate ways of life that cannot be combined in one society in a way that preserves basic public order.<sup>71</sup> The sources of social authority that serve as limits on state authority have their foundation in various forms of life that are plural and conflicting but are nonetheless morally legitimate.<sup>72</sup> Morally legitimate ways of life have different authoritative structures, therefore valuing the diversity of morally legitimate ways of life requires the recognition of independent sources of social authority. Political pluralism, then, is a function of moral pluralism. Again, these are among the lessons of the court cases previously cited.<sup>73</sup>

It is difficult to see how to avoid the plenipotentiary state and its conception of political authority when political morality is dictated by the single moral value of human dignity, where human dignity has its sole foundation in respect for the higher order capacities already explained in the Kantian model. To allow for sources of social authority that are restrictions on state authority as construed in the Kantian fashion is to allow tradeoffs between dignity and other values.

We have, then, a fairly clear contrast between the conceptions of state neutrality involved in Kantian liberalism and Galstonian liberalism, with its lineage to Isaiah Berlin. The latter clearly

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69. See Galston, *supra* note 2, at 881.

70. See *id.* at 881-82.

71. See *id.* at 892-95.

72. See *id.* at 901-02.

73. See *supra* notes 49-51 and accompanying text.

argues for what is in popular political terms a form of moderation in politics. It calls for a reconception of the problem of a well-ordered society by asking us to see the conflicts we face as conflicts between different moral outlooks, some of which are incommensurable.<sup>74</sup> It rejects the idea that there is one moral view that should dominate the structure of the state.<sup>75</sup> It is ameliorist rather than utopian or conservative, but it clearly rejects a notion of human dignity that has been dominant in our tradition. The contrasts between the two versions of liberalism seem to better reflect the kinds of intellectual values that are in tension in western societies than do the contrasts in the liberalism/communitarianism debate. For this reason, I think it important that Kantian liberals spend more of their energies coming to grips with Galston and Berlin's liberalism than with continuing debates with communitarians. Moreover, if moral pluralism is true, as I think it is, there is the important task of reconstructing our notion of human dignity.<sup>76</sup>

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74. See Galston, *supra* note 2, at 882-84.

75. See *id.* at 878-80.

76. See GEORGE W. HARRIS, *DIGNITY AND VULNERABILITY: STRENGTH AND QUALITY OF CHARACTER* (1997).