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# **SOCIAL JUSTICE AS AN ESSENTIALLY CONTESTED CONCEPT: THEORETICAL AND PRACTICAL IMPLICATIONS FOR “ACCESS TO JUSTICE”**

*By: Richard K. Greenstein\**

## I. INTRODUCTION

In the current hyper-partisan environment, it is tempting to treat those who disagree on social, political, and even legal issues with disdain—as willfully ignorant or irrational or even evil. At the very least, there is an inclination to regard adversaries on issues as profoundly mistaken about the subject matter and what is at stake. This is surely true with respect to debates surrounding the complex issues that constitute the subject matter of this conference: access to justice.

There are, of course, reasons of common courtesy and common sense for avoiding this attitude. But it turns out that there is also an important philosophical reason for treating opponents in our arguments about access to justice with respect.

I have often commented that describing an idea as “philosophical” is rarely meant as a compliment. But my intention in this paper is to illustrate how a seriously philosophical idea can usefully illuminate how we debate issues having to do with access to justice. The philosophical idea in question is W.B. Gallie’s notion of “essentially contested concepts,” which he described in a paper by that name at a 1956 meeting of the Aristotelian Society in London.<sup>1</sup> Essentially contested concepts are those that are subject to multiple, competing, and ultimately unresolvable descriptions, and Gallie’s paper offers three prominent examples: art, democracy, and—important for our purposes—social justice.

My goal, then, is to illustrate how understanding social justice as an essentially contested concept helps us see more clearly what is at stake when we debate issues pertaining to access to justice. And my example of such an issue will be the idea raised by Jona Goldschmidt in his often-cited article, *The Pro Se Litigant’s Struggle for Access to Justice: Meeting the Challenge of Bench and Bar Resistance*.<sup>2</sup> In this piece, Goldschmidt made a set of proposals for what he called “reasonable judicial assistance” of pro se litigants by the judge,<sup>3</sup> including helping

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1. W.B. Gallie, *Essentially Contested Concepts*, 56 PROC. ARISTOTELIAN SOC’Y, NEW SERIES 167 (1956).

2. Jona Goldschmidt, *The Pro Se Litigant’s Struggle for Access to Justice: Meeting the Challenge of Bench and Bar Resistance*, 40 FAM. CT. REV. 36 (2002).

3. *Id.* at 43.

pro se litigants with presenting claims and defenses;<sup>4</sup> facilitating their introduction of evidence<sup>5</sup> and relaxing the rules of evidence;<sup>6</sup> and asking questions, calling witnesses, and conducting limited independent investigations on behalf of pro se litigants.<sup>7</sup>

Goldschmidt identified as a “challenge” to his call for these reforms in the behavior of judges “a set of sociological and institutional constraints inhibiting the possibility of modifying judges’ traditionally passive role.”<sup>8</sup> That passive role, Goldschmidt contended, stems from “our traditional, adversarial system, in which the judge’s role is the passive umpire of the fight between what the justice system (and adversary theory) assumes are two represented parties.”<sup>9</sup> And that view of the judge’s role is reinforced by professional socialization,<sup>10</sup> precedential constraints,<sup>11</sup> and ethical constraints. Regarding the last of these, Goldschmidt notes that “judicial canons of ethics . . . also legally authorize judges to remain passive and justify their refusal to provide assistance to pro se litigants.”<sup>12</sup>

These canons demand that the judge “avoid impropriety and the appearance of impropriety” and act “in a manner that promotes public confidence in the integrity and impartiality of the judiciary.”<sup>13</sup> And “the test for appearance of impropriety . . . is whether the conduct would create in reasonable minds a perception that the judge’s ability to carry out judicial responsibilities with integrity, impartiality and competence is impaired.”<sup>14</sup> From all this, Goldschmidt formulates the following as the chief opposing argument to his call for active assistance of pro se litigants by the judge: “Avoidance of the appearance of impropriety includes remaining impartial. If a judge assists a pro se, he or she may be perceived as not being impartial. Therefore, judges must avoid assisting the pro se litigant.”<sup>15</sup>

For Goldschmidt that opposing argument stems from two mistaken views about the meaning of impartiality: it confuses impartiality with

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4. *Id.* at 46–47.

5. *Id.* at 48–49.

6. *Id.* at 51–53.

7. *Id.* at 49–51.

8. *Id.* at 42.

9. *Id.* at 37.

10. *Id.* at 42 (“[J]udges . . . are law trained and, as lawyers, philosophically devoted to the adversary system. This stems, of course, from their loyalty to and socialization by the legal professions. They naturally equate judicial impartiality with judicial passivity, a notion deeply ingrained in all lawyers and judges.”).

11. *Id.* at 43 (“[J]udges operate within the framework of appellate court precedents that authorize judges to be passive.”).

12. *Id.* (“[J]udicial canons of ethics that also legally authorize judges to remain passive and justify their refusal to provide assistance to pro se litigants.”).

13. *Id.* (quoting MODEL CODE OF JUDICIAL CONDUCT, Canon 2, Canon 2 § A (AM. BAR ASS’N 1990)).

14. *Id.* (quoting MODEL CODE OF JUDICIAL CONDUCT, *supra* note 13, at Canon 2 § A cmt.).

15. *Id.*

passivity, and it assumes that pro se litigants are represented.<sup>16</sup> I want to argue that the problem is deeper—that the debate between Goldschmidt and his opponents stems from the fact that impartiality is itself an essentially contested concept and is, accordingly, dependent on multiple, competing, and ultimately unresolvable conceptions of impartiality. That, in turn, derives from the fact that our understanding of judicial impartiality is anchored in multiple, competing, and ultimately unresolvable conceptions of social justice.

In making this argument, I will supplement Gallie's account of essentially contested concepts with an explanation of how we rationally argue using concepts that intrinsically resist universal agreement about their meaning and proper deployment. And an illustration of the payoff of this explanation, I will suggest, is a clarification of Jona Goldschmidt's call for active assistance of pro se litigants by judges.

## II. ESSENTIALLY CONTESTED CONCEPTS

At this point I want to offer a brief account of Gallie's idea of essentially contested concepts. Gallie begins by observing that it is not unusual for the use of a concept to be disputed and that some of these disputes seem to go on and on without resolution.

When this kind of situation persists in practical life we are usually wise to regard it as a head-on conflict of interests or tastes or attitudes, which no amount of discussion can possibly dispel; we are consequently inclined to dismiss the so-called rational defences of the contending parties as at best unconscious rationalizations and at worst sophistical special pleadings. On the other hand, when this kind of situation persists in philosophy . . . we are inclined to attribute it to some deep-seated and profoundly interesting intellectual tendency, whose presence is 'metaphysical'—something to be exorcised with skill or observed with fascination according to our philosophical temperament.<sup>17</sup>

But Gallie then asserts

that there are apparently endless disputes for which neither of these explanations *need* be the correct one. Further, I shall try to show that there are disputes, centred on the concepts which I have just mentioned, which are perfectly genuine: which, although not resolvable by argument of any kind, are nevertheless sustained by perfectly respectable arguments and evidence. This is what I mean by saying that there are concepts which are essentially contested, concepts the proper use of which inevitably involves endless disputes about their proper uses on the part of their users.<sup>18</sup>

Gallie identifies five conditions that define a concept that is essentially contested:

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16. *See id.* at 42.

17. Gallie, *supra* note 1, at 169.

18. *Id.*

1. “[I]t must be *appraisive* in the sense that it signifies or accredits some kind of valued achievement.”<sup>19</sup>
2. “This achievement must be of an internally complex character, for all that its worth is attributed to it as a whole.”<sup>20</sup>
3. “[T]he accredited achievement is *initially* variously describable.”<sup>21</sup> Gallie goes on to explain that “[a]ny explanation of its worth must therefore include reference to the respective contributions of its various parts or features; yet prior to experimentation there is nothing absurd or contradictory in any one of a number of possible rival descriptions of its total worth, one such description setting its component parts or features in one order of importance, a second setting them in a second order, and so on.”<sup>22</sup>
4. “The accredited achievement must be of a kind that admits of considerable modification in the light of changing circumstances . . . .”<sup>23</sup> Regarding this condition, Gallie says that “such modification cannot be prescribed or predicted in advance.” He calls this the concept’s “open” character.<sup>24</sup>
5. “[E]ach party recognizes the fact that its own use of it is contested by those of other parties, and that each party must have at least some appreciation of the different criteria in the light of which the other parties claim to be applying the concept in question.”<sup>25</sup> In other words, “to use an essentially contested concept means to use it against other uses and to recognize that one’s own use of it has to be maintained against these other uses,” i.e., “to use an essentially contested concept means to use it both aggressively and defensively.”<sup>26</sup>

### III. JUDICIAL IMPARTIALITY AS AN ESSENTIALLY CONTESTED CONCEPT

In this Part, I will argue that judicial impartiality—the concept that Goldschmidt saw as central to bench and bar resistance to his proposal—is an essentially contested concept and that one fundamental reason why that is the case is that the concept of judicial impartiality is derived from the idea of social justice which, as Gallie asserted in his paper, is itself an essentially contested concept. I will suggest (in Parts V and VI) that beneficial consequences flow from working out the implications of that argument.

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19. *Id.* at 171.

20. *Id.* at 171–72.

21. *Id.* at 172.

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.*

Typical of essentially contested concepts, judicial impartiality is “appraisive,” “internally complex,” “variously describable,” “open” in Gallie’s sense,<sup>27</sup> and the subject of public debate in which the debaters recognize the contest of competing descriptions. For purposes of this discussion, I will focus on its internal complexity and susceptibility to multiple, distinct descriptions.

Charles Gardner Geyh has recently identified three distinct “dimensions” of impartiality: “a procedural dimension, in which impartiality affords parties a fair hearing; a political dimension, in which impartiality promotes public confidence in the courts; and an ethical dimension, in which impartiality is a standard of good conduct . . . .”<sup>28</sup> Furthermore, in 2002 the Supreme Court of the United States, in *Republican Party of Minnesota v. White*, identified three distinct “meanings” of judicial impartiality.<sup>29</sup> *White* involved a First Amendment challenge to a canon of judicial conduct adopted by the State of Minnesota that “prohibit[ed] candidates for judicial election in that State from announcing their views on disputed legal and political issues”<sup>30</sup> (the Court referred to this as the “announce clause”).<sup>31</sup> In the course of its analysis sustaining the constitutional challenge, Justice Scalia, writing for the Court, identified the three meanings of impartiality:

1. *Party neutrality*, which the Court defined as a “lack of bias for or against either party to the proceeding.”<sup>32</sup>
2. *Open-mindedness*, which the Court defined as a “willing[ness] to consider views that oppose his preconceptions, and remain open to persuasion, when the issues arise in a pending case.”<sup>33</sup>
3. *Issue neutrality*, which the Court defined as a “lack of preconception in favor of or against a particular legal view.”<sup>34</sup>

The relationship among these different understandings of impartiality is complex. On the one hand, it is clear that these different descriptions are not components of a single understanding of what it means for a judge to be impartial. Rather, they are competing understandings. Moreover, each of Geyh’s three dimensions of impartiality and each of Justice Scalia’s three meanings of impartiality are widely recognized as important and competing aspects of the concept. For that reason, as Geyh’s analysis makes clear, emphasizing different dimensions of impartiality pushes the regulation of judicial impartiality in

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27. *Id.* at 172–73.

28. Charles Gardner Geyh, *The Dimensions of Judicial Impartiality*, 65 FLA. L. REV. 493, 493 (2013).

29. *Republican Party of Minn. v. White*, 536 U.S. 765, 775–78 (2002).

30. *Id.* at 768.

31. *Id.*

32. *See id.* at 775.

33. *Id.* at 778.

34. *See id.* at 777.

different directions. Similarly, the question whether Minnesota's announce clause was unconstitutional turned on which understanding of impartiality—party neutrality, issue neutrality, or open-mindedness—was given primary emphasis. But despite all this competition it is also clear that Geyh's dimensions and the *White Court's* meanings are about a single concept: judicial impartiality.

This dual quality of the descriptions of impartiality—that they are distinct and incompatible, on the one hand, and are descriptions of the very same thing, on the other hand—is a defining characteristic of an essentially contested concept. But at the same time it is a quality that has the air of paradox. As we will see shortly, for an essentially contested concept to function as advertised, this paradox must be directly confronted.

But first, I want to finish this account of judicial impartiality by examining its connection to social justice. As Gallie argued, social justice, as an essentially contested concept, is “variously describable.”<sup>35</sup> Gallie himself observed two distinct accounts in contemporary debate:

[T]he first rests on the ideas of merit and commutation: justice consists in the institution and application of those social arrangements whereby the meritorious individual receives his commutative due. The second rests upon, in the sense of presupposing, the ideas (or ideals) of co-operation, to provide the necessities of a worth-while human life, and of distribution of products to assure such a life to all who co-operate.<sup>36</sup>

This paper is specifically concerned with social justice as it relates to the behavior of judges—specifically, as it relates to judicial impartiality. And in this context we also encounter different descriptions of justice anticipated by Goldschmidt's discussion. Consider the two main modes of court-centered dispute resolution used worldwide: adversarial and inquisitorial. The former is process-based; that is, justice is identified as the outcome of the rigorous application of procedures known in advance. By contrast, the inquisitorial system is substance-based; that is, justice is identified as the outcome demanded by the correct application of substantive law to the facts.

The point, of course, is not that the adversarial system is not concerned with substance or that the inquisitorial system is not concerned with procedure. The point, rather, is that justice, as an essentially contested concept, is “of an internally complex character,” and is, therefore, “variously describable.”<sup>37</sup> These various descriptions reflect different orderings and different emphases of the “internally complex character” of justice. Hence, the description of justice that lies at the core of the adversarial system *emphasizes* procedure, while the

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35. Gallie, *supra* note 1, at 172.

36. *Id.* at 187.

37. *Id.* at 171–72.

description of justice that lies at the core of the inquisitorial system *emphasizes* substance.

Returning to Jona Goldschmidt's call for more active assistance of pro se litigants by judges, recall that Goldschmidt regarded resistance to his proposal as reflecting two mistakes. The first he characterized as a confusion of judicial impartiality with judicial passivity.<sup>38</sup> But we can now see that the resistance reflects instead a vision of justice associated with the adversarial system—a vision in which the judge's role is primarily to ensure the strict adherence to procedure, leaving it to the parties to develop and present the substance of their cases. In short, relative passivity on the part of the judge is anchored in the adversarial description of justice.

The second mistake identified by Goldschmidt is the assumption that the parties are represented and, therefore, have expert assistance in presenting their cases.<sup>39</sup> However, the description of justice central to the adversarial system—justice as a rigorous application of procedures, overseen by a neutral judge—does not depend on representation. This, of course, is a major reason that “civil *Gideon*”<sup>40</sup> is still not a reality. The holding of the original *Gideon* flowed from the constitutional right to assistance of counsel “in all criminal prosecutions.”<sup>41</sup> But in civil cases, including the kinds of pro se family court cases that were the focus of Goldschmidt's analysis, the adversarial system of justice is satisfied with a passive judge.

#### IV. PARADOX

I mentioned above that the dual quality of the descriptions of an essentially contested concept—that they are distinct and incompatible, on the one hand, but describe the very same thing, on the other hand—has the air of paradox. Indeed, this dual quality of an essentially contested concept threatens to cause it to devolve into incoherence.

We can see this danger in the case of the concept of judicial impartiality by considering Justice Scalia's three distinct meanings of impar-

38. Goldschmidt, *supra* note 2, at 42; *see also supra* text accompanying note 16.

39. *See* Goldschmidt, *supra* note 2, at 37.

40. As explained by the Philadelphia Bar Association:

The legal community and public often ask, “What does ‘civil Gideon’ mean?” In the landmark United States Supreme Court case of *Gideon v. Wainwright*, 372 U.S. 335 (1963), the Supreme Court decided that indigent defendants have a constitutional right to be represented by an attorney, at no charge, in state criminal cases. The term “civil Gideon” refers to a growing national movement that has developed to explore strategies to provide legal counsel, as a matter of right and at public expense, to low-income persons in *civil* legal proceedings where basic human needs are at stake, such as those involving shelter and child custody.

*Philadelphia Bar Association's Civil Gideon Corner*, PHILA. BAR ASS'N, <http://www.philadelphiabar.org/page/CivilGideon> [<http://perma.cc/R4SG-3HXY>].

41. U.S. CONST. amend. VI.



ality. Consider the third of the meanings: impartiality as lack of preconception in favor of or against a particular legal view. The Supreme Court expressed skepticism that such impartiality is possible as a practical matter. As the Court pointed out, “it is virtually impossible . . . to find a judge who does not have preconceptions about the law.”<sup>42</sup> More generally, it would be surprising to find any person who upon hearing the description of a social issue would not develop a view on that issue (if she had not already done so).

Consider next the second of the meanings: impartiality as open-mindedness. We can see that this is a weak form of impartiality. As described by the Court, open-mindedness presupposes that the judge has views on the issue in question, but that the judge is nevertheless willing to consider other views.<sup>43</sup> At best, however, this approach presumptively disfavors views opposing those already held by the judge.

Finally, consider the first of the meanings: impartiality as “lack of bias for or against either party to the proceeding.” We can perhaps understand what this means when we consider bias stemming from personal relationships or financial interest. But what of a judge who has views on the issue in question, which, as already noted, is practically inevitable? For such a judge to lack “bias for or against either party to the proceeding” requires the ability to separate one’s bias regarding a particular view of the issue in question from bias regarding the person who acts on that view. This idea is familiar: It is Augustine’s “cum dilectione hominum et odio vitiorum”<sup>44</sup> and Gandhi’s “Hate the sin and not the sinner.”<sup>45</sup> I want to suggest, first of all, that this compartmentalization is phenomenologically implausible. How likely is it that one could already object to a particular point of view but at the same time withhold pre-judgment of the person who acts in accordance with that view? Moreover, what difference does it make? Even if a judge could be impartial with respect to the parties, the judge likely cannot be impartial with respect to the issues, and that bias will likely determine the judge’s ruling.

Geyh asserts, “[P]erfect impartiality—the complete absence of bias or prejudice—is at most an ideal . . . .”<sup>46</sup> But an ideal cannot merely be an unattainable goal, it must conceptually make sense. Yet these competing but also interacting descriptions of impartiality make it difficult to know just what impartiality means. Put another way, it is hard to know what characteristics a person would have to have in order to qualify as impartial under any of these descriptions that tend to tum-

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42. *Republican Party of Minn. v. White*, 536 U.S. 765, 777 (2002).

43. *Id.* at 778.

44. AUGUSTINE OF HIPPO, *OPERA OMNIA*, Vol. II, at 1191 (Paris, Apud Gaume Fratres, 1836), <http://babel.hathitrust.org/cgi/pt?id=njp.32101073247973;view=1up;seq=651>.

45. MOHANDAS K. GANDHI, *AN AUTOBIOGRAPHY: THE STORY OF MY EXPERIMENTS WITH TRUTH* 276 (Mahadev Desai trans., Beacon Press ed. 1993) (1957).

46. Geyh, *supra* note 28, at 493.

ble into and influence one another. If that is correct, then it presents a serious problem for Gallie's project. His idea of an essentially contested concept was designed to argue for the rationality of using in debate concepts that are subject to fundamental and irresolvable dispute.

Gallie's strategy for addressing this problem is to identify two additional conditions that an essentially contested concept must meet, which he believes provide a rational justification for using such a concept in debate despite the fact that the concept comprises multiple, irreconcilable, competing descriptions. These conditions are:

6. that the concept derives "from an original exemplar whose authority is acknowledged by all the contestant users of the concept."<sup>47</sup>
7. that "the claim that the continuous competition for acknowledgment as between the contestant users of the concept, enables the original exemplar's achievement to be sustained and/or developed in optimum fashion" is probable or, at least, plausible.<sup>48</sup>

Gallie argues that the shared project of sustaining or developing the original exemplar's achievement is what unites all who use an essentially contested concept in rational debate.

Now, there are reasons to doubt the success of this strategy, for if the very thing that makes such concepts essentially contested also makes them incoherent, then it is certainly not probable—and likely not even plausible—that the use of the concept will help us sustain or develop the exemplar's guiding achievement. Moreover, in the specific case of social justice, Gallie is worryingly silent about the identity to the needed exemplar. Indeed, it is hard to imagine what would count as an exemplar acknowledged as such by all who debate issues of social justice.

## V. RESOLUTION

To salvage the idea of essentially contested concepts, it is therefore necessary to resolve the paradox. That is, we must take up the challenge that Gallie, in my view, unsuccessfully confronted and demonstrate how it is possible to rationally use in debate a concept whose essence requires competing, irreconcilable descriptions.

In brief, I want to suggest that the reason essentially contested concepts are internally complex and, therefore, susceptible to competing descriptions is that the various descriptions can be understood and justified in terms of multiple, heterogeneous values or goals served by the concept. Since the debates about a concept are anchored in com-

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47. Gallie, *supra* note 1, at 180.

48. *Id.*

peting preferences among those multiple, heterogeneous values, the debate is, in principle, unresolvable.

But the debate is nonetheless rational. Rational debate is made possible by repeated use of the same set of multiple, heterogeneous values that animate the various uses of the concept. In the case of judicial impartiality these values include (from Geyh) “afford[ing] parties a fair hearing,” “promot[ing] public confidence in the courts,” and satisfying a “standard of [ethical] conduct;”<sup>49</sup> as well as (from *White*) “equal application of the law,” guaranteeing each party “some chance of [winning],” and guaranteeing each party “equal chance to persuade the court on the legal points in their case.”<sup>50</sup> In debates about impartiality, arguments reflecting one or more of these values will make sense to all participants, regardless of the particular conception of impartiality that any one participant adheres to. That is why all participants recognize that they are debating about the same thing. Both Jona Goldschmidt’s call for active assistance of pro se litigants on the part of judges *and* the resistance to that call based on adherence to a traditional understanding of the judge’s role as passive resonate with various values animating the idea of judicial impartiality. That makes the debate over Goldschmidt’s proposal intelligible and rational.

Similarly, social justice is animated by multiple, heterogeneous values that include both receiving what one merits *and* social cooperation in providing necessities and value for the lives of all community members. It is also animated by the values that serve both adversarial and inquisitorial modes of dispute resolution. In debates about social justice, arguments that invoke one or the other of those values will make sense to all participants regardless of one’s adherence to a particular understanding of social justice.

## VI. CONCLUSION

If we understand debates about social justice to be disagreements about the proper ordering of values that we recognize as the things we all care about, then we can make headway in these debates, rather than descend into name-calling and invective.

Goldschmidt regarded resistance to his call for active judicial assistance of pro se litigants as rooted in fundamental mistakes—the confusion of impartiality with passivity and the assumption that parties are represented. As I suggested at the outset, this way of regarding public policy opponents as seriously mistaken is particularly tempting in our times. Again, Gallie recognized this. And he believed that an antidote to this kind of disdain for those who resist our arguments is to recognize that the concepts employed in these debates are essentially contested concepts. That recognition entails an understanding

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49. Geyh, *supra* note 28, at 493.

50. *Republican Party of Minn. v. White*, 536 U.S. 765, 776–78 (2002).

that resistance to one's arguments is not necessarily a mistake, but may rather reflect adherence to a different but legitimate description of the concept being deployed in the debate. I would add that when an essentially contested concept like impartiality or social justice is employed, rational debate is possible and appropriate arguments are recognizable—not because of the internal analytical logic of the concept being debated (that is impossible since it is essentially contested), but by virtue of the reiterative invocation of the heterogeneous values that animate the concept.

If I am correct that what distinguishes the different descriptions of social justice is different emphases among its animating values, then I want to suggest further that those constituent values are also the values that we use to define the good. And if *that* is correct, then debates over the meaning and application of access to justice do not necessarily reflect opponents' rejection of or resistance to access to this social good, but may instead reflect a recognition that there are different, legitimate conceptions about what the good entails. In a democracy—especially one that is constitutionally skeptical about official enforcement of a particular vision of the good—this seems a useful recognition. It is one that used to be more salient in our public discourse about justice and other important matters of public policy.