

What is the "Social" in "Social Coherence?" Commentary on Nelson Tebbe's Religious Freedom in an Egalitarian Age

Patricia Marino

Follow this and additional works at: <https://scholarship.law.stjohns.edu/jcred>



Part of the [Law and Society Commons](#), and the [Legal History Commons](#)

This Article is brought to you for free and open access by the Journals at St. John's Law Scholarship Repository. It has been accepted for inclusion in Journal of Civil Rights and Economic Development by an authorized editor of St. John's Law Scholarship Repository. For more information, please contact selbyc@stjohns.edu.

**WHAT IS THE “SOCIAL” IN “SOCIAL
COHERENCE?” COMMENTARY ON NELSON
TEBBE’S *RELIGIOUS FREEDOM IN AN
EGALITARIAN AGE***

BY PATRICIA MARINO

It is my pleasure to comment on Nelson Tebbe’s deep and engaging book. In addition to its careful legal analysis, *Religious Freedom in an Egalitarian Age*¹ bears on important philosophical issues concerning values, moral reasoning and the justification of evaluative beliefs. I find these issues especially interesting because I’ve engaged with some of them myself. Methodologically, *Religious Freedom in an Egalitarian Age*² makes use of a concept of social coherence, and my work also considers questions of how coherence functions in evaluative contexts. What does it mean for our value judgments to fit together in an appropriate way? How can we use coherence to discover and justify evaluative beliefs? How is coherence related to agreement and disagreement, and what are the limits of coherence approaches? In my recent book, I consider these questions from a point of view that focuses specifically on moral judgments, and I argue for a perspective on “moral coherence” that has much in common with the “social coherence” model Professor Tebbe outlines.³ In this comment, I want to explore the ways in which that perspective both does and does not fit with the one Professor Tebbe develops throughout his legal analysis.

In framing my approach, I start from the idea that we value pluralistically, endorsing multiple values like benevolence, justice, liberty, and fidelity which can conflict and cause moral dilemmas. Coherence, in my view, does not require rejecting value pluralism

¹ NELSON TEBBE, *RELIGIOUS FREEDOM IN AN EGALITARIAN AGE* (2017).

² *Id.*

³ PATRICIA MARINO, *MORAL REASONING IN A PLURALISTIC WORLD* (2015).

or aiming toward single-principle theories like utilitarianism, in which the right action is always the one that brings about the most overall happiness or well-being. Instead, coherence requires finding principled compromises among conflicting values, and being “case consistent” -- which means judging morally similar cases similarly when there are no morally significant differences between them. Moral conflicts and difficult judgment calls are to be expected, and are not a sign of bad reasoning. I call my view of principled compromises and case consistency “pluralist coherence,” and I think people often appeal to something like it. For example, in the abortion debate, it is common to hear interlocutors accuse one another of being “inconsistent”: of not treating similar cases that are like one another in morally relevant features.

There are important points of agreement between our approaches, and I find many of Professor Tebbe’s particular claims to be important, justified, and under-appreciated. For example, too often in evaluative domains the idea of “coherence” is interpreted in a way that favors the pursuit of single principle theories -- the implication being, as Professor Tebbe says, that in the absence of moral absolutes, what we end up with is hopelessly arbitrary.⁴ I think Professor Tebbe is absolutely right to say that value conflicts, dilemmas, and uncertainty are compatible with appropriate forms of reasoning and justification, and that we do not need absolutism to say there are reasons in favor of one outcome over another. Also, Professor Tebbe is correct to emphasize the way that our judgments can be socially influenced yet still form apt starting points for evaluative reflection.⁵ This is because understanding what matters and why always requires an appeal to judgments, and those judgments are always formed in a social environment. That we must appeal to our judgment in deciding how to balance conflicting values does not make those decisions unjustified or ad hoc, since appealing to judgment is how we generally move forward in ethical thinking.

So there are obviously many opinions that Professor Tebbe and I share. But there are important differences between my “pluralist coherence” and Professor Tebbe’s “social coherence.” My

⁴ NELSON TEBBE, *RELIGIOUS FREEDOM IN AN EGALITARIAN AGE* (2017).

⁵ *Id.*

approach is what Professor Tebbe calls “individualistic”: a person begins from a set of moral judgments and uses pluralist coherence to improve them.⁶ Whether those judgments are widely shared or socially accepted is not directly relevant to this process, since an individual’s views can be internally coherent, even if their moral beliefs differ radically from those shared by their community. In fact, from the point of view of pluralist coherence, there can be multiple sets of moral beliefs that are internally coherent yet disagree with one another.⁷

In my view, an important aspect of why there is so much moral disagreement and diversity has to do the fact that the way people value is pluralistic in two senses. First, there are the elements of “value pluralism” that I sketched above: we hold multiple, sometimes-conflicting values, ones that are not reducible to a single overarching value or a super-value.⁸ We value respect for individual persons and the collective good; we respect fidelity and honesty; we care about liberty, equality, and justice. These not only conflict in particular circumstances, but also seem to represent different kinds of goods and resist expression in terms of a single unifying value.⁹ Second, while we often share values, different people direct their cares at different objects and prioritize amongst them in different ways.¹⁰ For example, with respect to prioritization, some people may prize justice and fairness above all, overriding considerations related to the common good, while others who prioritize differently, allowing that in some cases, the collective good is most important. Overall, Americans are famous for valuing and prioritizing autonomy, even when the demands of respecting individual autonomy seem to conflict with other values such as benevolence.

As I see it, these pluralisms help explain some diversity in moral judgments. For example, in deciding whether it is appropriate to lie to protect a friend, a person who values honesty most may say no, while one who values loyalty most may say yes. And in the abortion debate, it is possible for people to value the potential life of a developing fetus, and also to value a woman’s

⁶ *Id.*

⁷ *Id.*

⁸ PATRICIA MARINO, MORAL REASONING IN A PLURALISTIC WORLD (2015).

⁹ *Id.*

¹⁰ *Id.*

autonomy rights to control her body, yet completely disagree about abortion, because those who prioritize the latter will be pro-choice and those who prioritize the former will not. This connection between diversity and conflict explains why so much moral disagreement seems to arise in the contexts of dilemmas, in which there is more than one value at stake, and as an individual we feel pulled in different directions.

From this framing, it follows that moral disagreements can arise in two different ways. Sometimes people roughly share values and prioritizations, but one person is failing to be case consistent -- that is, to judge the same way those cases they themselves would see as similar in significant ways. This can occur, for example, because of the well-known phenomenon of framing effects, where we judge differently cases that are identical in all the facts, only because of the way the cases are presented and described. For instance, sometimes when a given tax policy is described in terms of exemptions, it is judged to be unfair, but when described in terms of benefits, it is judged to be fair -- and this is because of framing effects. Where our judgments are distorted by emotions, self-interest, and contextual influences, we fail to judge cases consistently, and this lead to the kinds of disagreements where one person is mistaken.¹¹ In these cases, coherence reasoning can help us reach a consensus, by showing us how genuinely consistent moral theorizing would support some particular conclusion.

But in my view, disagreement can also arise for more fundamental reasons, arising from the way people direct and prioritize values differently on a deeper level.¹² In the latter kind of situation, disagreement can be entrenched: even when both sides are reasoning consistently and well, deep differences in value prioritization means that they will never agree. For the person who prioritizes honesty over fidelity and the one who prioritizes fidelity over honesty, and for the people who prioritize autonomy rights and the value of a developing fetus differently, coherence will not lead to consensus or agreement. This is because, as we've seen, when people direct and prioritize values differently, there can be multiple internally coherent moral sets of beliefs. When

¹¹ *Id.*

¹² *Id.*

disagreements are due to deep differences in values and priorities, I think that arguments and reasoning run out: in these cases moral change happens through social and cultural changes, helped along through means like personal activism, art, and literature.¹³

As Professor Tebbe notes, from this kind of "individualistic" point of view, even morally abhorrent systems can be internally coherent:¹⁴ such systems, I argue, ought to be criticized on moral grounds rather than through charges of incoherence and irrationality. For example, defenders of slavery in the pre-Civil War American South may have been internally consistent; the problem is that their moral beliefs reflect a profoundly mistaken sense of what is just, right, and so on. In contrast, Professor Tebbe's model of "social coherence" is meant to point us toward consensus.¹⁵ Social coherence tries to avoid the individualistic perspective on coherence, and emphasizes the possibility of shared reasoning, even in the face of entrenched disagreement. The idea, I take it, is that in the context of legal reasoning, we can find and appeal to a shared initial perspective to generate conclusions that we all must recognize as justified. Thus, the problem of multiple internally coherent systems that disagree with one another does not arise.

My main question here is how, exactly, this shared perspective should be understood. Who, exactly, is the "we" who shares it? At some points, Professor Tebbe uses phrases like "constitutional understandings"¹⁶ and "precedents and principles that are authoritative among contemporary American jurists."¹⁷ This suggests what I would consider a more "formal" approach: social coherence means coherence with a set of specific texts and previous decisions. In other places, though, Professor Tebbe seems to move away from the formal approach, saying that we can appeal to "shared understandings,"¹⁸ and "[m]eanings that are deeply rooted and sufficiently widespread."¹⁹ Giving the example of

¹³ PATRICIA MARINO, *MORAL REASONING IN A PLURALISTIC WORLD* (2015).

¹⁴ NELSON TEBBE, *RELIGIOUS FREEDOM IN AN EGALITARIAN AGE* (2017).

¹⁵ *Id.*

¹⁶ *Id.* at 44.

¹⁷ *Id.* at 43.

¹⁸ *Id.* at 38.

¹⁹ NELSON TEBBE, *RELIGIOUS FREEDOM IN AN EGALITARIAN AGE*, 44 (2017).

marriage equality, he describes how we can change our system by “engaging in critique.”²⁰

From the point of view of legal theory and practice, there is obviously much to be said for this kind of formal approach as a practical system for moving things forward. But from a broader evaluative point of view, it faces various well-known limitations -- some of which seem to make change and critique impossible. In its talk of specific texts and precedent, the formal approach risks inflexibility, conflating “coherence” with “consistency through time.” How could change happen? Furthermore, the formal approach makes the possibility of moral critique obscure. If opinions that are out of step with a set of texts and judicial decisions are simply “incoherent,” then how could changing values inform our legal decision making?

Consider the example of LGBTQ+ rights. Until very recently, in US culture the idea of acceptance for gays and lesbians was outside the scope of majority views. It seems to me that the change in perspective regarding these rights is particularly difficult to account for as an example of social coherence reasoning under the more formal approach. The formal interpretation would suggest that we came to see discrimination against LGBTQ+ people as inconsistent with longstanding principles, and homophobia as rationally incoherent with existing doctrine.

Is this interpretation, in terms of inconsistency with longstanding principles, apt? Let me suggest a different interpretation of that history -- one that, I’ll argue, is a better fit with the more individualistic understanding of coherence. In this alternative, it’s not that American homophobia was somehow rationally incoherent: it existed in a certain widely -- though obviously not universally -- shared culture and value system surrounding sexuality in general, one in which sex was only for married heterosexual people, and one that was informed by the idea that a woman’s sexuality fell under the purview of a man -- her father, husband, or some other man. But over time sexual values changed. As a result of complex social and cultural factors, sex came to be understood more through the lens of personal autonomy, and LGBTQ+ people engaged in highly effective activism that undercut homophobic sentiments and beliefs.

²⁰ *Id.*

Legal theorist Rebecca Ryan’s 1995 essay on the history of the marital rape exception recounts a narrative that supports this kind of interpretation.²¹ Historically, marriage was thought to subsume the women’s will under that of her husband, but complex cultural value shifts put pressure on this idea.²² The rise of individualism more generally made dependency relations awkward to theorize, and once women were not seen as on a par with servants, it became impossible to deny that women have autonomy rights of their own. Forced sex came to be seen as a violation of those autonomy rights rather than as a mere violation of chastity.²³ Once the norms shifted, the idea that marital rape is impossible did come to seem “incoherent”: it was inconsistent with the values expressed in other laws and social norms. Only then could feminists fight to have the contradiction resolved through a legal recognition that marital rape is rape.

Analogously, in this alternative explanation of LGBTQ+ rights, yes: once sexual values are understood in terms of personal autonomy rights, then yes, it does, in fact, become inconsistent to allow heterosexual people to have rights that gay people don’t have. That is, we can then say that legalized discrimination against LGBTQ+ people is “out of step with other fixed features of the constitutional system.”²⁴ But I would say that it is out of step with a set of beliefs informed by a particular moral system, and one that is increasingly, though again not universally, shared. It’s not so much that we suddenly recognized that this form of discrimination was morally incoherent with foundational texts and had always been so, as the formal interpretation of the social coherence model would seem to suggest.

This way of understanding social change would suggest that we need the less formal interpretation of social coherence. In the less formal interpretation, we could appeal to the way that values shifted, to say that what may not have been incoherent in the past is *now* incoherent: to deny LGBTQ+ rights is inconsistent with the now common framing of sex in terms of autonomy rights, individual freedom, and consent. Indeed, there are several places

²¹ REBECCA M. RYAN, A LEGAL HISTORY OF THE MARITAL RAPE EXEMPTION, 941-1001 (1995).

²² *Id.*

²³ *Id.*

²⁴ NELSON TEBBE, RELIGIOUS FREEDOM IN AN EGALITARIAN AGE, 44 (2017).

in the book that seem to support this less formal interpretation, and several arguments that involve appeal to “intuitive” matters like what is harmful, what constitutes a trivial harm and what constitutes a serious one, and so on.²⁵ In this interpretation, it’s not just foundational texts and legal decisions but also “shared” moral beliefs that are currently “deep” or “widespread.”²⁶ This would allow for more of a role for morally shifting perspectives.

But this interpretation raises new and difficult questions. The main question is: what does it mean for a moral belief to be “shared” or “deep” or “widespread,” especially in a highly varied society like the US? This is, of course, a question as old as the hills, but let me draw out two specifically relevant aspects of it here.

First, the framing of the issues in terms of “social coherence” and especially this use of the term “coherence” risks the implication that people with values different from the US mainstream or majority are somehow “incoherent.” This seems to me a regrettable formulation. Many people endorse values that diverge from the mainstream in some way. For example, look at economic values. It’s become a kind of orthodoxy in contemporary United States to favor economic “growth” above all else. But as we are increasingly seeing, economic growth is compatible with skyrocketing inequality, as the rich get richer and everyone else gets poorer. Does this mean the person who favors increased equality is somehow incoherent? Or what about the libertarian, who favors economic liberty whether or not it promotes growth, just on grounds of liberty rights -- is that person “incoherent”? Before the last few decades, there was a widespread belief that same-sex activity was inherently bad, even if it was inherently bad. Does that mean early LGBTQ+ activists were “incoherent”? I would say that to label these people with the term “incoherent” wrongly suggests that they have a set of beliefs that is internally irrational or inconsistent, when in reality they do not. This delegitimizes non-majority views.

A second specific and related point has to do with whose beliefs are thought to matter. Frankly, when I hear talk of “our shared perspective” I often have an instinctive feeling of worry. In the past “our shared perspective” has often been a way of saying

²⁵ *Id.*

²⁶ *Id.*

“the perspective of people who are white, male, and moneyed.” Together with the previous point, we see an especial danger—that views that are not only “minority” views in a statistical sense but also held by people who are relatively disenfranchised will be labeled “incoherent” and thus de-legitimated. Sometimes, as with early LGBTQ+ activists, these are the views that we ought to pay more attention to.

None of this shows that the social coherence model can’t be used for its intended purpose. But it does, in my opinion, highlight certain difficulties with it. First, the “social” in social coherence might be a problem. Evaluative critique often comes from those outside the mainstream, or from those who are disenfranchised, and for “social coherence” to ignore these views or treat them as “incoherent” in the sense of “irrational” or “impossible to understand” would be a mistake. Second, and partly for this reason, social coherence cannot replace, but rather must co-exist with a more individualistic theory of moral reasoning and judgment—one that we must draw on for a full accounting of why, exactly, one decision is better justified than another in cases of complexity and conflict. Finally, if I am right that some entrenched disagreements are ones that are based on deep value conflicts, and that in these cases it is possible to have multiple sets of beliefs that are internally coherent yet disagree with one another, this puts pressure on the question of how, exactly, the agreement of “social coherence” comes about.