

# *Liberal Neutrality*

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## **Introduction**

The second part of this work shifts the focus away from questions of metaethics and ethics to ones of political theory. In the previous chapter, I argued that relativism could contribute to a distinctive liberal defence of toleration. This part examines the relevance of relativism for contemporary liberal defences of state *neutrality*. In my initial survey of liberal ideas of state neutrality, I will postpone questions about the relevance of relativism until chapter seven. This chapter analyses the idea of liberal neutrality between differing conceptions of the good. I shall begin by considering the nature of liberal neutrality, and setting out the terms that I use in my analysis. I then move on to examine liberal defences of neutrality. I will argue here that such defences can be divided into two types, neutral and non-neutral. Neutral justifications of neutrality are those providing a justification which all could accept without disregarding their own cultures or ways of life. Non-neutral justifications are based on controversial ethical premises, which may limit their appeal.<sup>1</sup> I take Mill's justification of state neutrality as an example of a non-neutral justification. On the other hand, theorists such as John Rawls and Charles Larmore have attempted to provide neutral justifications of neutrality.

The central contention of this chapter is that these defences are all problematic, though some more than others. In particular I want to contend that they fail to deliver a *neutral* justification of neutrality, and that whilst denying the presence of controversial

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[1] By controversial, I mean that they are contingently viewed as such by people. On this definition, whenever a justification is not controversial, it is neutral.

metaethical foundations, all in fact have controversial and confused metaethical positions at their base. The focus of my analysis is on the metaethical foundations of these approaches and the character of the *neutral justification* of neutrality they offer. All the defences of neutrality examined here are rich and complex, and to consider them in their entirety lies beyond my scope. I will concentrate here on these metaethical issues, the discussion of which provides the crucial first stage of my argument (concluded in chapter seven) that relativism can provide a plausible set of metaethical foundations for political liberal arguments.

### *The Idea of Neutrality Between Conceptions of the Good*

I am concerned in this chapter with the idea of neutrality as a lack of bias applied to the arena of state policy. Work on neutrality by thinkers such as Raz (1986), Arneson (1990), Kymlicka (1989b, 1990 199–207), Rawls (1993), Waldron (1989) and Dworkin (1985) draws distinctions between kinds of neutrality. I want to invoke a distinction, common to most of these analyses, between neutrality of *outcome*<sup>2</sup> and neutrality of *aim* or justification.<sup>3</sup> According to the former, a state policy is neutral if it has the same impact on all people or conceptions of the good. This neutrality of effect contrasts with what has been termed neutrality of justification or aim. According to this latter idea of neutrality, a state policy is neutral if it does not draw its justification or purpose from any particular controversial conception of the good. It is entirely possible that a policy neutral in aim — not intended to further a particular idea of the good — nevertheless impacts differentially on different ideas of the good. For example, suppose that a democratic government institutes a rule that bladed weapons should be banned for reasons of public safety. Though not justified by reference to a particular conception of the good, nevertheless it will disproportionately affect the ways of life of martial artists and followers of some religious traditions — for example, druidism. Like all the liberal neutralists and their critics whom I cited above, my primary concern here is with neutrality of aim.

[2] We can distinguish between various meanings of ‘outcome’ here. For example, equal outcome can refer to an equal effect on the welfare of those affected, or equal success, in the sense that the proposal works equally well in respect of those affected.

[3] A further distinction between ideas of neutrality of *justification* and *aim* could be introduced. However, for my purposes I assume that the aim of a project ought to constitute a large portion of its justification. I should also make clear that I will not discuss here neutrality of *procedure*, which requires that the process determining state policy should be agreed-upon by all.

The focus for neutrality, as it is used by most egalitarian liberals, is the conceptions of the good held by citizens. A conception of the good is a set of commitments that a person values — what Waldron refers to as their ‘tastes, aims, and ideas’ (Waldron, 1989, 76). It can be thought of in terms of preferences, as in Dworkin’s case of ‘the television-watching, beer-drinking citizen who is fond of saying ‘This is the life’ (Dworkin, 1985, 191). However, the language of commitments should, I believe, be preferred for doing less injustice to people — religious or secular — for whom preference might not capture the strength of their feeling about their way of life. It should be noted that Rawls prefers the term ‘comprehensive doctrine’ to describe such a more or less consistent and persistent set of beliefs and ideas about the world, and I use the terms more or less interchangeably here.<sup>4</sup>

#### *Neutral and Non-Neutral Justifications of Neutrality*

Having explained what the kind of neutrality I am concerned with here involves, I want to invoke a distinction, most recently used by Colin Bird, between different *justifications* for neutrality (taken as the position that the state policy should not rest on a particular controversial conception of the good). Some possible justifications, says Bird, are themselves *non-neutral*. That is, they justify neutrality of procedure on grounds that are controversial, or perhaps potentially controversial. Bird suggests we should strive for a *neutral* justification of neutrality; a neutral justification being one ‘which displays a certain kind of neutrality toward individuals’ controversial conceptions of the good; just as the neutral state must not rank or favor particular moral ideals, a neutral justification must not involve such controversial moral ideals’ (Bird, 1996, 63).

Non-neutral justifications rely on a conception of the good that some dispute. Their justificatory force is limited to those who accept or can accept the controversial conception. However, many recent defences of liberal neutrality have claimed to provide *neutral* justifications. In this chapter I will discuss defences by Rawls, Larmore, and Bird. Other thinkers who aim to provide such a neutral justification include Dworkin (1985), Arneson (1990), Feinberg (1973), and Ackerman (1980, 1989). Later in this chapter I discuss these justifications to see if they attain a suffi-

[4] Rawls lays down quite a strict idea of what constitutes a fully or partially comprehensive doctrine (Rawls, 1993, 13). I see this as one liberal theorist’s working out of the idea of a conception of the good. Whilst it might differ from other liberals’ interpretations in various ways, I do not believe this difference is important to the central thrust of this chapter.

cient degree of neutrality.<sup>5</sup> First, as an exemplar of a non-neutral justification of neutrality, I will briefly set out Mill's argument for a kind of neutrality.

### *J.S. Mill's Non-Neutral Justification of Neutrality*

As an example of what a non-neutral justification looks like, we need look no further than J.S. Mill's *On Liberty*. There Mill argues that state and public toleration of different ways of life should be based on the supremely important good of individuality. Mill writes,

free development of individuality is one of the leading essentials of well-being. . . it is not only a co-ordinate element with all that is designated by the terms civilisation, instruction, education, culture, but is itself a necessary part and condition of all those things (Mill, 1991, 63).

Individuality, for Mill, has 'intrinsic worth', and this explains why society should allow the freest possible expression of different ways of living. Like almost any interpretation of a thinker, this view of Mill is controversial. Mill does think there is a case for the government to have a role in 'giving advice and promulgating information' (Mill, 1891, 603). However, 'laissez faire should be the general practice: every departure from it, unless justified by some great good, is a certain evil' (Mill, 1891, 609).<sup>6</sup>

For those who do not share Mill's commitment to the value of individuality, his assumptions of the possibility and desirability of autonomy make the proposal problematic. Such critics include those who endorse what Larmore has termed the 'romantic' critique of individualism (Larmore, 1996, 129). Communitarians such as MacIntyre and Sandel will find much to argue with, asserting instead the primacy of social roles in character and belief formation, and of a society based on a 'politics of a common good' (Kymlicka, 1990, 216).<sup>7</sup>

### **Charles Larmore's Neutralist Proposal**

By contrast with Mill's approach, many contemporary liberals — Rawls and Larmore for example — aim to provide a justification

[5] I assume here that as well as being entirely neutral or non-neutral, we can distinguish *degrees* of neutrality.

[6] Support for my interpretation of Mill comes, for example, from Joseph Raz who characterises Mill's harm principle as a defence of toleration by the state (Raz, 1994, 158).

[7] Whilst I do not think communitarians would endorse Mill's characterisation of individuality as necessarily primary and intrinsically valuable, this is not to say that they could not advocate policies which mirrored those of Mill.

of neutrality which is itself neutral between conceptions of the good life. In *Patterns of Moral Complexity* and *The Morals of Modernity*, Larmore offers a powerful argument for building the state on neutral principles. 'Neutral principles' writes Larmore, 'are ones we can justify without assuming the validity of those views of the good on which people reasonably disagree' (Larmore, 1996, 126). Furthermore, Larmore is concerned to offer a neutral justification of this ideal, in the sense that

we must look to a core morality that is, as much as possible, common ground. It may be too hopeful to expect that this moral basis will escape every element of controversy. But it must certainly be neutral enough to accommodate people who value belonging and custom (Larmore, 1996, 133).

In this section, I intend to present, and then criticise, Larmore's justification for neutrality. I argue that it is problematic, primarily because it is itself predicated on a contentious view of the good. It thereby fails the criterion for a 'neutral' justification in exactly the way that Larmore says it should fulfil it.

#### *Rational Dialogue and Equal Respect*

Larmore's justification of liberal neutrality relies on two moral 'norms' which he believes command wide assent and thus do not violate the requirements of a neutral justification; it is, in that sense, a 'minimal' justification. The norm of rational dialogue says that if people face disagreement on a particular issues, they

should respond by retreating to neutral ground, to the beliefs they still share, in order either to (a) resolve the disagreement . . . by means of arguments that proceed from this common ground, or (b) bypass the disagreement and seek a solution of the problem on the basis simply of this common ground (Larmore, 1996, 135).

For example, consider a hypothetical debate concerning pornography. Two people can disagree about whether pornography ought to be prohibited, but still agree on some common reasoning. For example, they might agree that individuals had rights to self-expression, or that one duty of the state was to protect people from pernicious material. This common ground could constitute the kind of idiom within which one person could justify her position in terms the other could understand (indeed, Larmore thinks justification necessarily involves common ground (Larmore, 1996, 135)), or constitute the basis for a compromise solution weighing these two considerations.

As Larmore says, 'If the people still wish to solve the given problem, and if they are committed to solving it through rational discussion, then they have no choice but to find the solution on

the basis of beliefs they both share' (Larmore, 1996, 135). The above norm only tells us what to do if we are committed to finding reasonable agreement. What we need is a reason to adopt this commitment. For Larmore, this reason is the norm of equal respect for persons. This is expressed by the Kantian formula of treating people never as means, but rather as ends in themselves. Larmore writes:

What is prohibited by the norm of equal respect is resting compliance only on force. For the distinctive feature of persons is that they are beings capable of thinking and acting on the basis of reasons. If we try to bring about conformity to a political principles simply by threat, we will be treating people solely as means, as objects of coercion (Larmore, 1996, 137).

Coercion is a clear case of treating people as means. Thus, Larmore is able to draw unequivocal support for equal respect from the Kantian position. However, he does not intend it to be the *only* source of justification for equal respect. Indeed, his proposal claims to be neutral precisely because communitarian critics of Kantianism can also assent to it.

Before setting out my criticisms of this position, two further elements must be added to complete my account of Larmore's argument. First, Larmore maintains that the people involved have to be interested in forming a political community; otherwise, their first response to diversity could be 'disband, or to switch their allegiance elsewhere' (Larmore, 1996, 143). Second, Larmore's position presupposes that citizens reflecting on questions of political organisation are required to put the norms of equal respect and rational dialogue above their other commitments; these two ideas take priority. Part of the reason why these ideas take priority is that Larmore also insists the two norms are valid and correct, not simply taken as such (Larmore, 1996, 146). I think this contention is significant, and will return to it below.

I believe that the status and content of these two norms are sufficiently controversial for reasonable people not to agree on them, and certainly not on the priority they are given. 'Reasonable people' says Larmore, 'are those who think and converse in good faith and apply, as best they can, the general capacities of reason that belong to every domain of enquiry' (Larmore, 1996, 169). The first question to be asked is whether the retreat to neutral ground really does constitute a 'norm' of rational dialogue for reasonable people. One way to approach this might be to ask whether Larmore's reasonable disagreements do in fact possess a significant amount of neutral ground. It is not always easy to divine in arguments exactly what is common to two opposing positions;

this is because often what varies in positions is the weighting attached to different values. I want to discuss and criticise two potential aspects of the idea of 'neutral ground'.

One aspect concerns the substance of the disagreement. Larmore might argue that positions share the same views on some meaningful, substantive propositions — as in the pornography case above. In response, my first claim might be put like this: in many persistent, reasonable disagreements, there is in fact very little neutral ground to retreat *to*, and that is exactly why these disagreements are reasonable and persistent. Thus, we can interpret the above case of pornography legislation as a situation where, whilst both positions share the same considerations, the different *weightings* produce the different views. For there to be substantive neutral ground, what is required is agreement in weighting or ranking of considerations; otherwise, the neutral ground is illusory. In chapter three, I discussed this issue with regard to contingent universalism, but noted that universalists need not be committed to equal weighting, merely a certain common set of principles. The problem for Larmore is more pressing, since substantive neutral ground is more demanding than an unranked list of common moral values. For that neutral ground to be substantive, it has to consist not only of agreement that some issues are relevant, but also agreement on the weighting attached to those issues. If weightings are not considered important then what we count as neutral ground will actually disguise a fundamental aspect of the disagreement. Such a foundation would not be an adequate one on which to reach agreement. Conversely, we will be unlikely to find a disagreement characterised by general agreement on issues and their weighting, because in such a case we would not expect a persistent disagreement.<sup>8</sup>

Furthermore, the idea that 'facts' would constitute common ground has limited applicability for disagreements where the 'facts' themselves are the subject of the dispute. For example, different sides of the abortion debate will regard the idea that an embryo constitutes a person after a certain time as either a true fact, or seriously mistaken.<sup>9</sup> Opposing sides would also weigh the

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[8] These comments foreshadow what I say in chapter seven, where I discuss how we understand this kind of disagreement.

[9] As I noted in chapter four, for the relativist there might easily be disagreements about 'the facts', because of the possibility of these apparent truths being generated by different frameworks of norms; for example, by empirical scientific methodologies or metaphysical claims about the world. What is needed is at least a shared set of norms upon which to decide what constitutes a fact.

rights of the potential mother and the rights of any potential child differently. It is far from clear, however, that disagreements between different people will also involve areas of agreement. Otherwise, there might be no persistent disagreement to begin with. For Larmore's idea of neutral ground to constitute a 'norm' there has to be a number of cases where there is meaningful common ground, but not so much that in fact the disagreement is minor, or has been already resolved.

Larmore may instead be thinking of a deeper (and initially more promising) kind of neutral ground. Both parties in a dispute might share a common idea of what counted as a reason — perhaps in the sense of the second account of objectivity I gave in chapter four — and what kinds of reasons should be produced in any given case. This might work especially well in abstract reasoning about the basis of political association. From this core of reasons, a solution could be produced which *incidentally* reflected either, both or neither of the positions, yet could be justified by the common and correct sorts of reasons and considerations. If both parties consent to the reasoning process, then whatever the resulting agreement, it would be justified by that consent. It would be, in this way, a kind of procedural justice.

The problem for such an interpretation concerns the question of whether reasons that were common to two different positions could determine a single correct outcome. If they sufficed to determine such a solution then the disagreement would not exist, unless both sides had a different understanding of the reasons that were or were not applicable to this particular situation. This second interpretation of the idea of neutral ground turns out to be vulnerable to similar objections to the first. If both sides share common reasons and a commitment to a neutral procedure, then where does the disagreement come from? Alternatively, if there is scope for people to understand these common reasons differently or weight them differently, then the neutral ground is illusory. People can misapply a common conception of a reason, resulting in disagreement, but then this disagreement is amenable to resolution, at least in principle. As I will go on to examine in chapter seven, it is not at all clear that this kind of mistaken disagreement is the kind which Larmore needs for his argument to go through. If this idea of 'common reasons' were the common ground to which Larmore is referring, it is difficult to see how it could provide an outcome, yet not speak on issues upon which Larmore wants to remain silent. For example, he wants to say nothing about the source of people's reasons (Larmore, 1996, 139), nor

does he argue that public standards of reasoning should be higher than those endorsed in private life.

Another problem with Larmore's account arises from his claim that we *ought* to retreat to neutral grounds. There might be two components to this; the first that it is prudentially correct, the second that it is the most fair or reasonable approach.<sup>10</sup> The 'prudential ought' fails to provide a reason and also fails to give an adequate interpretation of the moral element in Larmore's argument. The first thing to note about the claim that it is in our best prudential interests to retreat to neutral ground, is that the calculation would depend on the interests to be weighed. The prudential interest in co-operation (or less likely a desire for co-operation for its own sake) has to outweigh that of holding out for my point of view. People have to be prepared to value agreement, even when it does not endorse their position, more than the stubborn endorsement of their position. In the real world, it would appear that this norm seldom dominates the thinking of parties in political disagreement. In negotiation, maintaining one's position without compromise or concession on what are seen as crucial questions is a common strategy; for example, the situations in Northern Ireland or the Middle East. It is simply not the case, in public or private life, that agreement should be at any cost; and it is equally the case that maintaining one's position and refusing to compromise can produce significant concessions in any resulting settlement. Strategic considerations could plausibly outweigh a prudential 'ought' claim by Larmore.

This leaves the second alternative, that the retreat to neutral ground is justified on the basis that it is the fair response to disagreement. That the norm of rational dialogue is thought to be legitimate or fair is made clear by its backing from the explicitly moral idea of equal respect. According to people respect means not using coercive state power without justification. This idea provides a strong reason to seek their assent. In fact, if we are aiming to provide justification then this *must* involve engaging with the views of others to produce an argument to which we can expect people to assent.<sup>11</sup> With intolerance or repression apparently

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[10] Larmore, as I will discuss shortly, sees his two norms as moral judgments which 'trump' other considerations of value. If this is assumed, then they will constitute a 'best interest' to co-operate. I will go on below to explain why such an assumption is problematic.

[11] There is some small room left here for repression. For a justification of coercive state action need not work — the people who it affects may not find it compelling. I mentioned in chapter five that Larmore thinks a counterfactual justification 'were these people reasonable, then they

ruled out, neutrality is our only option. However, we must also seek people's assent to the idea of a retreat to neutral ground. If we fail to convince people of the authority of neutral ground, then we will fail to respect them when using coercive state power in accordance with the result of any neutral deliberation. Successful justifications must appeal to neutral ground. But we must have secured people's prior assent to the idea of neutral ground in order for our conclusions to bind.

A final question concerns the status of these two norms. Much of my discussion might seem to be rendered academic by Larmore's supposition that 'citizens are required to rank the norms of rational dialogue and equal respect above their other commitments' (Larmore, 1996, 141). Given that Larmore says, 'the constitutive ideals of the good life belong to our very sense of what is valuable, to the basis of our choices' (Larmore, 1996, 139), what kind of status do these norms have to 'trump' the very source of value? They are, Larmore asserts, 'true' and 'correct'. For Larmore, our moral perspectives remain as correct as before; his project, like Rawls' (as I will examine shortly) claims not to have sceptical implications (Larmore, 1996, 171-2). Larmore accepts that his proposals are limited in scope primarily to those who accept the two norms, and the status they are allotted. He writes 'with those who reject the norm of equal respect or rank their conception of the good life above it, we will usually be unable to converge on any political principles that are as justifiable to them as to ourselves' (Larmore, 1996, 142).

My argument above has been intended to show that the idea that we should always seek neutral ground in disagreement is problematic. There may be little neutral ground to seek, or our view may be in fact sufficiently important to us for us not to want to stand back from it in order to reach agreement. Furthermore, I have contended that we can only justify coercing people on the basis of neutral grounds to those people who *accept* the idea of neutral grounds. If, as I have argued, people can reasonably reject the importance and validity of neutral grounds, the population of people who value the norm of equal respect or rational dialogue might be smaller than we think. Larmore's proposal appeals to a limited constituency. Either we are 'all liberals now', in that we think we should resolve disagreement by reference to neutral procedure, and should respect other people too much to coerce

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would find the justification compelling' might suffice. As I noted there, I think such an argument is unsatisfactory.

them without gaining their consent, or we are not. If not, then Larmore's proposal does very little to speak to us.<sup>12</sup>

This might be thought to indicate a challenge to the internal coherence of my argument. After all, in chapter five I argued that there are similar limits to the appeal of the justification principle. Isn't the coherence relativist principle left open to exactly the objection I press against Larmore's argument here? In response, three things should be noted about the position of Larmore and the coherence relativist. First, whilst the coherence relativist can attempt to justify the norm of equal respect to others, she recognises serious potential limitations: Larmore appears much less concerned with the limitations to his proposal. Second, the coherence relativist is in no way claiming that her account constitutes a neutral justification for toleration. Larmore, by contrast, is presenting his account of a neutral justification for neutrality. Third, Larmore's formulation of a justification principle based on equal respect is only one interpretation of this idea. As I indicated in chapter five, I think commitment to some version of the justification principle, perhaps for different reasons to the ones Larmore gives, is more widespread.

The limits of the community who would accept the primacy of equal respect and rational dialogue illustrates how controversial that primacy is. I have argued, then, that Larmore's proposal is controversial, and confused in its account of the neutral ground from which justifications can be given. Larmore's theory possesses additional shortcomings that I will discuss in chapter seven. Notably, what is missing from my discussion here is an account of the reasonable disagreement to which Larmore's proposal is a response. I want to save my account of this aspect of Larmore's theory for later, since this takes us into murkier realms than norms of respect or dialogue. Larmore separates his account of political liberalism from his account of reasonable disagreement. I follow his lead for now, though I will argue that the two are ultimately connected. Of course, Larmore is not the only political liberal to provide an account of how we arrive at a neutral justification of neutrality. Perhaps the most prominent account has been provided by John Rawls. I turn now to Rawls' defence of liberal neutrality.

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[12] It must be said that Larmore perhaps does not intend his theory to be entirely neutral. He takes the main focus for neutrality of justification to be the debate between individualist and romantic communitarian ideas (Larmore, 1996, 127–32).

### Rawls' Priority of Right<sup>13</sup>

Rawls terms his neutralist proposal 'the priority of right over the good' (e.g. Rawls, 1993, 173) because he feels the term neutrality to be potentially misleading. His proposal in *Political Liberalism* is nevertheless straightforwardly neutralist. The political conception 'seeks common ground — neutral ground — given the fact of pluralism' (Rawls, 1993, 192). The priority of right is defined in terms of the neutralist idea that the state 'is not to be designed to favor any particular comprehensive doctrine' (Rawls, 1993, 194). It relies on an ostensibly neutral justification which aims to avoid philosophical disagreement.

To understand Rawls' argument, it is necessary to examine the context in which the demand for neutrality, and his justification for it, arises. For Rawls, this is a condition of 'reasonable pluralism'. He writes,

The diversity of reasonable comprehensive religious, philosophical and moral doctrines found in democratic societies is not a mere historical condition that may soon pass away; it is a permanent feature of the public culture of democracy ... a diversity of conflicting and irreconcilable — and what's more, reasonable — comprehensive doctrines will come about and persist (Rawls, 1993, 36).

He argues that oppressive state action is the wrong answer to this diversity. Instead, we should look to the support of reasonable people, who want to live in a 'fair system of co-operation'. Such reasonable people are willing to accept that different conceptions of the good are reasonable, and that it would thus be unreasonable to use the power of the state to insist on their own beliefs.<sup>14</sup> This diversity of reasonable beliefs arises from what Rawls calls the 'burdens of judgement', which I discuss in more detail later. These include elements such as differences in the evaluation of conflicting evidence and weighting, and the existence of a number of conflicting normative considerations which

[13] I will not discuss here the international dimension to Rawls' approach that he sets out in *The Law of Peoples*. As Rawls regards the Law of Peoples as the extension of his liberal conception of political justice (Rawls, 1999b, 3–4,) it might be expected that much of what I say here is applicable. Nevertheless, there are (to my mind at least) significant disjunctures. Notably, *The Law of Peoples* is not concerned with state neutrality and its justification but rather with tolerance and a much more limited moral-political conception of justice at an inter-state level.

[14] The notion of reasonableness is a complex one. In chapter seven I distinguish between an epistemic and moral component to the idea. Here, following Rawls, I rely on an intuitive idea to carry me through the sketching of his argument. Detailed discussions of reasonableness are undertaken by Caney (1995) and Wenar (1995).

are difficult to assess (Rawls, 1993, 56–7). Crucial here is a test of reasonableness. This allows Rawls to set aside questions about the truth of particular doctrines. Everyone will of course believe that their beliefs are true; but it may not be reasonable to act on those beliefs. He argues

reasonable persons see the burdens of judgement set limits on what can be reasonably justified to others, and so they endorse some form of liberty of conscience and freedom of thought. It is unreasonable of us to use political power, should we possess it, or share it with others, to repress comprehensive views that are not unreasonable (Rawls, 1993, 61).

Reasonableness, says Rawls, requires neutrality. Rawls terms his approach political liberalism, because it aims to be purely political; it is restricted to the public or political realm. Within that realm, rather than have a divisive debate about the truth and falsehood of conflicting ideas of the good, Rawls aims to employ substitute notions which command widespread consent without getting embroiled in controversial philosophical questions.

Notably, debates about what Rawls terms ‘constitutional essentials’ and ‘basic justice’ are conducted on the basis of public reason (Rawls, 1999b, 133). This is a core of common reasoning for the public political realm that comes about when people agree on a conception of justice. Public reason is much like Larmore’s neutral ground. Because everyone should talk the language of public reason when they engage in political debate, proposals can be publicly justified in terms of this common reasoning. For Rawls, this expresses an ‘idea of political legitimacy’ by holding that ‘our exercise of political power is proper only when we sincerely believe that the reasons we would offer for our political actions . . . are sufficient, and we also reasonably think that other citizens might also reasonably accept those reasons’ (Rawls, 1999b, 137). Rawls introduces public reason partly in an effort to replace ‘the whole truth’ with ‘reasons that might be shared by all’, because insistence on truth is ‘incompatible with democratic citizenship’ (Rawls, 1999b, 138).<sup>15</sup> This is one important kind of neutrality which Rawls’ proposal aims for. As we shall see here and in chapter seven, this kind of public reason may be hard to come by.

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[15] Of course, this is only a sketch of some of the key features of public reason. As Rawls indicates, public reason will require different things from holders of different positions in the state. Furthermore, there can be a family of political liberalisms, each with a slightly different conception of public reason. Rawls discusses these aspects in more detail in Rawls, 1999b, 132–80.

Rawls' approach aims to legitimise liberal principles by founding them on people's consent. In particular, Rawls refers to the consent of reasonable people as an 'overlapping consensus'. Rawls' emphasis on the paramount importance of consent generates several problems for his theory. Some of these I will indicate here; others must await a fuller explanation of the role of reasonable disagreement in his theory, which I provide in chapter seven. As Rawls is perhaps the most prominent modern liberal egalitarian theorist, his account has already attracted a large amount of scholarship, much of it critical. My purpose here is to bring out two particular respects in which Rawls' apparent stance is objectionable. These are concerned with the burdens of judgement and the Rawlsian conception of objectivity. In addition, these are problems of a particular kind; they both involve Rawls in questions of metaethics.

#### *The Burdens of Judgement and Scepticism*

According to Rawls, all reasonable persons assent to the burdens of judgement. They explain why, for Rawls, reasonable people should be tolerant people who institute a neutral state. The consequence of us not being able to justify our view to the general public is that we should not impose it on them. The burdens of judgement tell us why we are not to expect agreement on many contentious political and philosophical questions. Those explicitly listed by Rawls are:-

- (a) The evidence bearing on a case is conflicting and complex, and thus hard to assess.
- (b) Considerations of weighting can cause disagreement even if the evidence is agreed upon.
- (c) All our concepts are vague and subject to hard cases. Indeterminacy means we must rely on judgement and interpretation.
- (d) People's different 'life experiences' shape the way in which they weigh moral and political values.
- (e) Different normative considerations of different force on both sides of an issue can produce difficulty in making an overall assessment.
- (f) No system of social institutions can incorporate the full range of moral and political values.<sup>16</sup>

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[16] Summarised from Rawls, 1993, 56-7.

These features, says Rawls, make disagreement reasonable, and reasonably expected. They have the status of what Rawls calls a 'general fact' (Rawls, 1993, 36). I want to suggest, following Scheffler (1994) and Wenar (1995), that the burdens of judgement have, *contra* Rawls, definite sceptical implications, which will make people unlikely to assent to them if they hold certain reasonable world views. In fact, I will raise three problems with Rawls' use of the burdens of judgement.

(a) The burdens of judgement as an obstacle to overlapping consensus

The first problem is that they jeopardise the possibility of an overlapping consensus – i.e. widespread support amongst reasonable people – for Rawls' political doctrine. Wenar argues

religious doctrines typically deny that the burdens of judgement obtain. This, on reflection, should not be surprising. The burdens of judgement are meant to explain (among other pluralisms) why some people believe in one faith, while others believe in other faiths, and still others are agnostics and atheists. The explanation essentially says that questions about religion . . . are hard to think through even under the best of conditions, and that people answer these questions differently because of particular life experiences (Wenar, 1995, 44).

Referring especially to burdens (a)- (d), this is in sharp contrast to the way much religious doctrine presents itself as 'universally accessible to clear minds and open hearts' (Wenar, 1995, 44).<sup>17</sup> Wenar concludes, after citing the example of Catholic doctrine, that there is an incompatibility here between the burdens of judgement and religious claims to know easily and with absolute certitude. The burdens of judgement provide an account of the sources of pluralism which conflict with the account offered by much religious doctrine. Thus religious people might be in the position of endorsing justice as fairness as a political conception, but of 'characteristically' rejecting the grounds – the burdens of judgement – on which it partly stands (Wenar, 1995, 44–5). Thus, at the same time as strengthening the justification for his political liberalism, the burdens of judgement damage the inclusivity of the overlapping consensus. I think this argument can be extended in two further ways, as points (b) and (c) below.

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[17] This is not to claim that all theological positions think that truth is revealed uniquely in their religion. Some theologians will allow the explanation of diversity posited by the burdens of judgement.

## (b) The burdens of judgement and the conditions of scepticism

The first issue above discussed *incompatibility* between political liberalism and some comprehensive doctrines. The second concerns one important reason for this incompatibility — scepticism. Despite Rawls' avowals to the contrary, the burdens of judgement have sceptical implications. Rawls talks about scepticism as 'a philosophical analysis of the conditions of knowledge . . . after examining our ordinary ways of enquiry, they come to the conclusion that we cannot know those objects because one or more of the conditions of knowledge can never be satisfied' (Rawls, 1993, 63). Operating on this account, he denies that the burdens of judgement are sceptical in effect. He writes:

Political liberalism does not question that many political and moral judgements of certain specified kinds are correct and it views many of them as reasonable. Nor does it question the possible truth of affirmations of faith. Above all, it does not argue that we should be hesitant and uncertain, much less sceptical, about our own beliefs (Rawls, 1993, 63).

We must be clear about the nature of Rawls' claim. 'Hesitancy' and 'uncertainty', it might be contended, are psychological rather than philosophical terms; they are attitudes with which we can hold beliefs. The justified and truthful nature of these beliefs, if they are to be termed correct, is a separate issue on this account. Rawls' scepticism is defined in terms of the latter, but I do not believe they can be so sharply divided.<sup>18</sup> Let us consider an example. I believe X to be the case. Furthermore, I believe it without hesitancy or uncertainty. However, I also endorse Rawls' account of 'the many hazards involved in the correct (and conscientious) exercise of our powers of reason and judgement' (Rawls, 1993, 56). If I accept that this is a hard case, should my judgement become less *justified*, because I become more aware of the possibility of error, or should my judgement merely become less *certain*? If certainty is linked to the confidence I have in the justification for my belief, then the two cannot be separated. The first problem I want to raise with Rawls' rejection of sceptical consequences for the burdens of judgement, then, is that the latter are exactly the kind of considerations we appeal to in order to cast doubt on another's position. This is perhaps because a claim of justification is often based on the idea that mine is the only possible explana-

[18] Rawls is operating on what appears to me a specific and rather dense (i.e. closely packed) definition of scepticism. A. J. Ayer, for example, treats philosophical scepticism and certainty as linked issues. Scepticism attacks certainty for 'without a basis of certainty all our claims to knowledge must be suspect' (Ayer, 1971, 41).

tion, or an explanation that is much more probable to be correct – the ‘best explanation’.<sup>19</sup> If I were arguing against someone who believed that God was the only explanation of creation of the world, I might point to the existence of other explanations, offered by science. I would probe hard cases (e.g. the existence of evil) and I would examine whether background or upbringing, rather than any claim to objective reasons, were the motivators behind a view that might be thought to lack supporting evidence. I would do all this in the expectation that I could cast doubt upon the reasons she had for holding her belief. Similarly, she could invoke scientific hard cases, the incomplete explanatory power of scientific explanations, or my failure to open my mind to possibility of the truth in an attempt to make me doubt my stance. Surely, it is questionable whether a belief could be held with the same confidence if we took the burdens of judgement into account. Perhaps such a questioning is not feasible. It is hard to compare the ‘presence’ and ‘absence’ of the burdens precisely because the burdens of judgement are taken into account as reasons for being less certain in making some judgements anyway. They already affect the degree of probability attached to our judgements.<sup>20</sup>

The problem is complicated by the relation between reasonable people holding opposing beliefs, and other people *justifiably* (in some sense) holding opposing beliefs, which is discussed below and in chapter seven. At the very least, Rawls’ view needs an account explaining how the burdens of judgement can leave my view that my position is best justified by the evidence intact – and will not even affect the certainty with which I hold it – whilst acknowledging that other people can reasonably come to the conclusion that a different explanation is the best justified. For now, I just want to note that Rawls’ lack of an account of justification and certainty is a significant *lacuna* in his argument; in chapter seven I will discuss the way in which relativism can provide a resolution of this problem.

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[19] The issue of the relationship between scepticism and claims of justification is one I will discuss in greater detail in chapter seven, particularly in my discussion of Barry.

[20] Do the burdens of judgement provide an expectation of reasonable disagreement without indicating that my confidence in my belief is unreasonable? Perhaps I can still believe that my belief offers the best explanation, but without the same degree of certainty as before. Again, this may have damaging consequences for reaching a consensus between the advocates of different conceptions of the good.

## (c) Scepticism prompted by reasonable divergence in belief

The above account began by considering whether the burdens of judgement in themselves are sceptical in content – i.e., if they are ‘reasonable doubt’-provoking when held by someone in conjunction with beliefs. It ended in the muddier ground of whether the *possibility* of other reasonable people holding opposing beliefs is a reason for holding beliefs with less certainty. A slightly different question is whether acknowledging the *presence* of other reasonable conflicting views can cast reasonable doubt on my own. This case can usefully be examined with regard to a courtroom situation. The defence in a courtroom situation aims to establish reasonable doubt – to leave the jury with the view that there is reasonable doubt over whether the crime has been committed. The testimony of experts is one way such reasonable doubt can be established, for example if there is a disagreement between pathologists as to the conclusions to be drawn from forensic evidence. Whilst each expert can be certain of his or her own view, the overall impression left on the jury might well be that the evidence is inconclusive. Will not the presence of other people, as reasonable as ourselves, with conflicting views, lead us to the idea that the evidence is not conclusive? This is presumably the idea behind the need for unanimous verdicts. If the evidence does not convince some ‘reasonable’ people, then there is reasonable doubt. If we take an overview of a problem on which reasonable people differ, the presence of divergent views will lead us to think that the evidence is inconclusive and there is doubt as to the correct solution.<sup>21</sup>

To sum up my position, I have argued for three claims. (1) The burdens of judgement conflict with claims of universal certainty made by religious doctrines. (2) The burdens of judgements are sceptical (in a broad sense)<sup>22</sup> in effect because some of them –

[21] Interestingly, Raz discusses the courtroom case to provide support for Rawls (Raz, 1994, 104). He maintains that a court might find me guilty beyond reasonable doubt despite my innocence, and their judgement should not impinge on my assessment that I am innocent. We might want to characterise such cases as ones which I will discuss in the next chapter as ‘mistaken’ disagreements. For if I am innocent, the jury must have made a mistake in their reasoning or their assessment of the evidence. On the other hand, if I had motive and opportunity, DNA and fingerprinting evidence pointed to me, the murder weapon was found in my house along with my blood-stained clothes, then it seems to me that the jury’s lack of doubt ought to trouble my assessment of my innocence.

[22] As I have already noted, Rawls seems to provide a particularly limited definition of scepticism. I use scepticism here to represent the more general idea that our standards of proof should be subject to doubt. The bur-

particularly (a), (b), (c) and (d) – encourage us to consider the possibility of other better explanations. (3) The consequences of the burdens of judgement, that different reasonable people will believe different answers to the same question, ought (if the analogy with the courtroom is correct) to provide us with a reason to be less certain. These problems mean that Rawls' attempt to avoid controversy at the level of the foundation of his theory fails. The burdens of judgement encourage scepticism, despite Rawls' protestations to the contrary, and such scepticism will be damaging to Rawls' attempt to provide a legitimising consensus behind his proposal. This consensus will be undermined precisely because the burdens of judgement, as I have indicated, are themselves controversial. I now want to turn to another area where the emphasis on consensus is problematic. This is Rawls' account of objectivity. Again, we may have a conflict here with the claims made by reasonable conceptions of the good.

#### *The Political Account of Objectivity*

When Rawls sets out his account of public reason and reasonableness, he also discusses the nature of the objectivity he claims for this account i.e. the standard of objectivity for the political realm. Rawls wants such a standard to 'establish a public framework of thought sufficient for the concept of judgement to apply and for conclusions to be reached on the basis of evidence and reasons after discussion and due reflection' (Rawls, 1993, 110). Rawls notes: 'Kantian constructivism holds that moral objectivity is to be understood in terms of a suitably constructed social point of view that all can accept. Apart from the procedure of constructing the principles of justice, there are no moral facts' (Rawls, 1980, 519). As with Rawls' explanation of disagreement, most reasonable comprehensive doctrines already possess a view of the sources of normative authority. Rawls' view of the public realm is expected to garner their support in an overlapping consensus. Otherwise, there will be a continual tension between the standards by which people judge the basis of important political claims, and the standards by which they judge the rest of their lives.

Whilst it should be stressed that Rawls intends for this conception of objectivity to govern only the political realm, Rawls does want the account to assign reasons to reasonable people. They

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dens of judgement certainly seem to bear in leading us to expect that our standards of proof need not be the only reasonable ones, and that they need not determine a uniquely correct answer.

'are to act from these reasons, whether moved by them or not; and so these assigned reasons may override the reasons agents have, or think they have, from their own point of view' (Rawls, 1993, 111). As Wenar points out, again this will conflict with some comprehensive doctrines, as

comprehensive views, as we know them and expect them to remain, are settled in their explanations of the origins of normative force . . . if a person, to be a reasonable citizen of a just consensus must believe that constructivism provides the real reasons for just action, then there are now no such reasonable people. None, that is, save adherents of a comprehensive Kantian constructivism (Wenar, 1995, 55).

It might be objected that Rawls' political constructivism need not go as far as either of the other two views of objectivity that he discusses, the Kantian and the rational intuitionist. For example, whilst Rawls says rational intuitionism might go so far as to say that 'a reasonable judgement is true, or probably true . . . of an independent order of values', political constructivism need 'neither assert nor deny that. For its aims . . . the concept of the reasonable suffices' (Rawls, 1993, 113). However, at least in the private realm, rational intuitionists would not believe that *mere reasonableness* is sufficient. Rawls' description of the political realm is continuous with rational intuitionism, but only in the sense of a 'highest common factor'. The rational intuitionist will want more than Rawls' account provides. Asking the intuitionist to use Rawls' account for the public realm, and his own for the private, would lead to two problems highlighted by Wenar. He writes, 'this sort of public reason would inevitably result in hypocrisy (where people publicly endorse policies which they would privately reject) or cheating, (where people bend their public reasoning toward the conclusions they are really convinced of)' (Wenar, 1995, 57). If people endorsed constructivism as a compromise, a common ground between their own and other views, the result would be public reason as a *modus vivendi* rather than an overlapping consensus.

However, this area indicates another, deeper problem with his proposal. Rawls appears to believe that his theory is neutral with regard to metaethical disputes because it leaves the 'concept of a true moral judgement to comprehensive doctrines' (Rawls, 1993, 116). Even if Rawls' account uses the word reasonableness rather than truth, this does not suffice to show that his account of reasonableness is not freed from suppositions Rawls makes about the nature of justification. Indeed, Rawls' account of the status of the political judgements and their power as guides to action does not remain neutral with regard to its account of the sources of justifi-

cation. Of course, being distinct from other accounts of objectivity does not render his proposal non-neutral. Instead, the way in which his political account *conflicts* with more thoroughgoing accounts of objectivity leads me to this conclusion. It is political in the sense that it applies to the political realm, but in fact it makes substantial claims on a wider sphere. In Rawls' own words, it establishes an 'order of reasons' upon which any individual can be found mistaken, and makes 'a distinction . . . between reasoning and judgement, however sincere and seemingly correct, and what is true or reasonable' (Rawls, 1993, 112) which will be applied outside of political questions. Rawls' account of objectivity is thus more than merely political or minimal. It is in conflict with other accounts of objectivity, and hence controversial.

A similar situation arises with regard to Rawls' idea of 'commonsense reasoning'. Rawls' public reason is intended to operate on the basis of 'guidelines and rules . . . specified by reference to forms of reasoning and argument available to citizens generally, and so in terms of common sense, and the procedures and conclusions of science when not controversial' (Rawls, 1993, 162). At the very least, this stands in need of an account of what constitutes 'common sense' — as Gaus points out, people have different ideas of what constitutes common sense (Gaus, 1996, 132-6). If we allow that different reasonable people have different reasonable standards of judgement, the burdens of judgement imply that we could not impose a single set on people without being unreasonable. Therefore, people have to hold the same commonsense norms. Here a similar problem arises to that with the political account of objectivity above. Individuals' accounts of which modes of reasoning are and are not commonsense will differ. Even if we take the 'highest common factor' of their accounts of commonsense reasoning, we will produce an account which is incomplete. That is, it will not include all that individuals want from an account of commonsense reasoning; they are left endorsing one standard for the public and another standard for the private.

The central question here is whether Rawls' disavowal of the use of 'true' and 'false' as being unnecessary to a *political* theory is sufficient to make Rawls' theory and its justification neutral. Criticism that it does not has come, for example, from Joseph Raz.<sup>23</sup> Raz holds that we cannot assert something without asserting it to be *true*. He terms the position that a theory can be recommended

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[23] Estlund is another theorist who identifies problems of truth and justification in Rawls' work (Estlund, 1998).

as reasonable without being true a strategy of 'epistemic abstinence' (Raz, 1990). Rawls' claim to allow everyone to realise the fact of reasonable pluralism without scepticism might rely on what Raz describes as 'the dubious epistemological claim that there can be reasons for belief and action which are quite reasonably not recognised as such by people generally, but which are valid nonetheless' (Raz, 1990, 45).<sup>24</sup> Raz is surely right to pin Rawls down here, because maintaining your account is true, and maintaining it is objectively justified, both amount to advocacy of the account. If Rawls provides an account of justification which is controversial in itself, then the fact that he ducks questions about the truth of his account does not suffice to make his proposal 'neutral'. I want to pick up this theme later by indicating how Rawls' account leaves room for a relativist theory of moral justification. I do not, at this stage, want to argue that Rawls' account ought to have a relativist foundation. Such a controversial claim requires more support than I give it here. Chapter seven offers a fuller account of Rawls' argument, and does ultimately reach that conclusion. My purpose here is merely to draw out the complexity of Rawls' stance on questions of justification.

I have already discussed the role of the burdens of judgement in justifying neutrality. I argued that their presence implies, despite Rawls' protestations to the contrary, a substantive idea of 'reasonable doubt' in his theory. This draws him into questions of scepticism and justification.<sup>25</sup> Thus, I have now considered two areas in which Rawls' theory is both internally problematic and embroiled in debates in metaethics. In the first case, questions concern the link between reasonable pluralism, certainty and scepticism. In the second, these concern the nature of objectivity. Because Rawls wants to provide an account of why we should expect reasonable disagreement, and how we can claim objectivity for reasoning in the public realm, Rawls cannot avoid metaethical issues.

Both Larmore's and Rawls' accounts have indicated the difficulty in advocating liberal neutrality without foundations. Chap-

[24] However, a *relativist* might be able to assert something as true, however, whilst denying it was the only possible valid position on a particular question; and would also be able to assert that reasons are valid, but not for everyone. Indeed, such a claim is definitional of the kind of relativism I have been defending in this book.

[25] I am not alone in reaching this conclusion. Peter Jones for example, has argued that the priority of the 'right' over the 'good' in Rawls' work only works if 'my beliefs were not securely grounded enough to warrant their continued assertion in opposition to the principles of justice.' (Jones, 1989, 61).

ter seven will look in more detail at the difficulties of such a project.

### Conclusion

This chapter has examined attempts to provide a fully neutral justification of neutrality. I have argued that these attempts fail. Where common moral premises are appealed to, these are less common and unproblematic than might be supposed. Furthermore, any account has to say something about the status which it accords its basic norms, and the authority which they wield. To do otherwise leaves either a substantial gap in the theory or leaves it vulnerable to a 'what's that theory got to do with me?' objection. Larmore and Rawls need to establish the basis of neutrality as authoritative. Whilst Larmore is vague as to why his norms of equal respect and rational dialogue should be considered as paramount, Rawls attempts to provide a widely acceptable account of objectivity, upon which the political principle of neutrality can stand as objectively justified. This claim of authority for neutrality, I want to suggest here, cannot be achieved without a metaethical justification. This is what the failure, especially of Rawls' justification of neutrality, demonstrates.

Despite their rejection of controversial moral and philosophical questions, both Rawls and Larmore start with controversial bases for their justification of neutrality. This is an idea I want to examine further in chapter seven, where I look in more detail at the nature of reasonable disagreement and the role it plays in Rawls' and Larmore's arguments. In particular, I will suggest that the argument from the burdens of judgements, via reasonableness, to toleration, ultimately makes the best sense only if we accept a wider metaethical theory in which to situate its claim. The accounts I have examined here can perhaps claim to be *more neutral* justifications of neutrality, but not entirely so. Indeed, this chapter raises the question of whether an entirely neutral justification is possible. Perhaps the best we can ask for, as Gaus suggests, is a 'justificatory liberalism' which is explicitly non-neutral, though robust in the sense that it can be embraced by a wide variety of theories (Gaus, 1996, 6). Exactly what justificatory liberalism might look like, and whether relativism can make a significant contribution to the development of a justificatory liberalism, is the subject of my next chapter.