

## NEUTRALITY OF WHAT ? PUBLIC MORALITY AND THE ETHICS OF EQUAL RESPECT

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### ABSTRACT

After having presented a variety of problems the concept of political neutrality is supposed to solve, it is argued that defining limits to what a state may legitimately enforce upon its citizens, is the main issue and not a radical anti-perfectionism concerning state action. Even within an egalitarian concept of justice — justifying manifold ‘interferences’ with people’s lives for the sake of the norm of equal concern — morals legislation should be rejected, as force is not the appropriate nor a legitimate means to implement moral convictions. Mill’s harm principle remains an important, though not exclusive criterium to define legitimate political interference.

### *1. The ethical place of politics; variations on a modern theme*

Arguments about state neutrality can certainly not be qualified as illustrations of the moral indifference or permissiveness that some ascribe to political impartiality or public detachment regarding personal conceptions of the good. If one observes the enthusiasm or the indignation of participants in the debate, state neutrality (and derived notions such as ‘neutral jurisprudence’ or ‘neutral public schools’) is undoubtedly a ‘hot issue’ in modern moral and political philosophy. The very meaning and scope of what a ‘blindfolded Justitia’ should (not) take into account is central in any discussion on political justice. And whilst the discussion originally took place within the confines of growing pluralism in western cultures, it nowadays acquired a new relevancy and a new meaning in discussions on the implications of a ‘multicultural society’ and of ‘group rights’ therein. (Kymlicka, 1989, 1995)

But that does not mean yet that it is clear what the conception of state

neutrality exactly means. Discussions on state neutrality have, ever since their appearance in the modern era, been developed from a variety of contexts that are not necessarily related to one another. Notions such as ‘generality’, ‘impartiality’, ‘universality’, ‘equality’, ‘pluralism’, ‘separation of law and morality’, ‘anti-paternalism’ or ‘anti-perfectionism’ are generally associated with the requirement of state neutrality, but their scope and implications remain widely discussed issues. As the problem which state neutrality is supposed to solve is defined in various ways, different concepts of neutrality are used in the literature.

*1.1.* First and foremost, the requirement of ‘neutrality’ implies *the separation of state and religion*, either in the sense that the state should not privilege one religious faith over another, or religions over non-religions, although it may itself entertain an explicit religious belief — as in England — or in the sense that the state itself should not endorse a religion nor privilege any religious or non-religious belief-system — as in France —, or in various other ways in which the separation of state and religion was institutionalized within modern states. The principle of state neutrality vis à vis worldviews involves that (1) a state should recognize, respect and protect the freedom of any citizen to entertain whatever belief system they happen to endorse and to build whatever infrastructure a belief system requires, as long as this is compatible with a comparable freedom of others, (2) a state has not the right — whatever the political majority which is in power — to express, through its legislation and policy a preference for one particular religion or worldview, (3) a state should create the conditions under which a variety of religions and worldviews may live peacefully and non-aggressively with one another, (4) a state should never enact laws, involving a restriction of human freedom, if they can *only* be justified on grounds from particular religious beliefs (Audi, 1989, 1991; Raes, 1992, 1993).

In a positive and general sense, state neutrality thus implies that a state should create, foster and enforce a *tolerant public culture*, in which people, at least in their outer behaviour, respect one another.

It should be emphasized that this respect is only due to the *persons* who endorse particular religious, ideological, political etc. beliefs, *not to those beliefs themselves*. People do not have the moral duty to ‘respect’ the choices of others in the moral sense. It suffices that they do not interfere with these choices simply because they do not accept them, but they may, of course, criticise or laugh at these choices. In this sense,

Sadurski prefers to talk about 'equal concern' for people, independent from whatever 'respect' or 'esteem' people may or may not have for them. (Sadurski, 1990).

A tolerant public culture implies freedom of conscience and belief *as well as* freedom of expression. It is not contrary to such a culture that people criticize, attack and even ridicule one another's beliefs. (Raes, 1995) What is essential is the idea that the freedom to endorse and to express ideas is protected in the same way as the freedom to endorse and express opposite ideas ('we will defend your freedom to say whatever pleases you as much as we will criticize what you say').

1.2. State neutrality could be interpreted as the aim to found political structures as much as possible on ('value free') science, being an 'impartial point of view'. In Comtian scientism as well as in some versions of Marxism one finds this idea expressed in the theory on 'the fading away of the state' in a transparent society, based on a scientifico-technological division of tasks ('administration of things') and no more on a politico-economic division of labour ('government over people'). (Cfr. Basso, 1975; Cohen, 1978) From this perspective, a (non-)state is neutral in as far as it does not rely upon 'ideology', being, by definition, a partisan point of view.

1.3. In a third sense, the requirement of neutrality mainly implies *qualitative impartiality* in view of the pursuance of a quantitative collective goal. Thus, it may be said that (classical, Benthamite) utilitarianism is 'neutral' in as far as it does not express a preference for one particular source of pleasure over another, but is only interested in the instrumental contribution it makes to general utility as the greatest happiness of the greatest number. No comparisons of intrinsic value of objects, states of affairs, happenings or persons are made (or considered to be possible), but one can compare their instrumental contribution to the maximization of (the non-moral value of) pleasure or happiness. According to non-perfectionist utilitarianism ('prejudice aside, the game of pushpin is of equal value with the arts and sciences of music and of poetry'), it does not matter what the source of pleasure is; counting blades of grass or creating a piece of art have no intrinsic claim to moral superiority or a certain 'moral rank'. What matters is their property to produce some amount of pleasure, happiness, benefit or advantage.

Utilitarianism translates conceptions of the good in terms of want-satisfaction as a 'second order' point of view which incorporates a plural-

ity of (perhaps) irreducible substantive conceptions of the good in the guise of 'wants' or 'preferences'. (Barry, 1995, 139). Conceptions of the good are, as it were, turned into preferences and brought into relation with one another only qua preferences (Arneson, 1992). One may say that this is a subjectivist or preferential account of neutrality.

Such an approach need not be based on an subjectivist account of moral value. It may be defended as the only possible — or acceptable — guide for public conduct, leaving open the question of how persons approach questions of (conflicts of) value. Thus, Goodin's defence of utilitarianism is in terms of a 'government house utilitarianism', where general principles of conduct are at stake, rather than private and personal choices. (Goodin, 1995, 60)

1.4. In a fourth sense, the requirement of neutrality is related to the recognition of *value-incommensurability*. As individual values and value-choices are incommensurable, a state should not favour, or the least possible favour one (set of) value(s) over another, for founding politics on explicit value choices would mean that state power relies on an (by definition) arbitrary selection of particular values.

1.5. State neutrality may be required from the point of view of *value scepticism*. If values are merely subjectivist preferences, a political order should be devoid of particular value preferences (whatever they may be), for this would, by definition, involve arbitrary power (as a matter of fact all power must be 'arbitrary' from this point of view, like anything else).

1.6. State neutrality may, on the opposite, be required from an *objectivist point of view* concerning values. The reason why a state should be neutral as far as particular moral judgments are concerned is not that there is no objective difference between right or wrong, but because it would be objectively wrong if a state enforces certain values on its citizens (Dworkin, 1983, 203). A choice of particular values is only morally valuable, if this choice is a free one. Enforced values lose their status as moral values.

1.7. In a seventh sense, the requirement of neutrality is derived from the *value of human liberty*, which rejects all sorts of state-paternalism. The state should not interfere with human liberty, except for the (formal) protection of human liberty itself. A neutral state is here understood as an institution which only interferes when harm is done to others (physical harm and harm to property) e.g. when the liberty of one individual is trespassed by another without his consent. (Nozick, 1974)

1.8: In an eighth sense, state-neutrality is *opposed to state-perfectionism*. It is not the (legitimate) task of a political order to enforce, or even stimulate, particular ideals of human character and personality, whether or not such ideals are based on moral truth. Rawls procedural justification of his principles of justice strongly favours such an anti-perfectionist approach to legitimate state interference, as his 'original position' and his 'veil of ignorance' make it quite implausible that individuals, motivated by cautious self interest, would choose a government which has the power to restrict individual liberty for the sake of people's 'true interests'. Individuals, that is, are here supposed to be mainly interested in the protection of beliefs because they may be *theirs*, not because they may be *true*. (Rawls, 1971, 328)

In this 'anti-perfectionist' version of liberal neutrality, 'political decisions must be, as far as possible, independent of any particular conception of the good life or of what gives value to life' (Dworkin, 1985, 350).

1.9. In an ninth sense, a state may express particular value judgments through its policies and legislation, as long as these value judgments are either (i) objectively true or (ii) widely shared by its citizens and as far as they are limited in their application to the public domain. State neutrality is derived from *the separation of public and private morality*, this separation being usually founded on the above mentioned *harm-principle*; public morality is limited to the avoidance of (illegitimate) harm to others. Illegitimate harm is harm not committed out of self defence and harm not committed to illegitimate goods or interests. (Feinberg, 1988)

1.10. In a tenth sense, neutrality-as-impartiality may be related to the requirement that (legal) rules should be 'general' or 'impersonal' and not specific. Here, neutrality is expressed in the constraints that a government should respect when applying rules. Recognizing the difference in scope between the rule of law and the moral point of view, neutrality implies that people have the right to behave according to and to use legal rules in whatever way which pleases them. They have, in fact, the legal right to do moral wrong, as long as they behave within the constraints of the law.

This view on state neutrality is particularly relevant in the context of legal procedure and of jurisprudence. It is not only at the core of the institutionalization of the judiciary as an independent body with the duty to control the executive power, but includes also particular constraints on

the judge's freedom to interpret and to apply the law. Not only in the sense that jurisprudential arguments should, in the main, be based on legal sources and not on personal preferences, but also in the sense that there are procedural constraints on what the judge may accept as 'evidence', even though this may hinder the revelation of 'the truth of the matter'. A judge has — at least in civil procedures — to judge a case as it is brought before him by the parties concerned. He has not the right to initiate legal suits himself, nor to redefine what is at stake. A judge's neutrality consists, in this sense, in his passiveness. Judges are, furthermore, no moral experts and should be neutral about the motives which inspire people to make use of legal rules.

As it is impossible to foresee all feasible applications of legal rules, of what people will do with legal rules, the requirement that legal rules should be general implies that the chance that people will make use of legal rules for other purposes than the intended ones should be accepted and not be seen as an 'abuse of rights'. There exists, that is, no political obligation of citizens to use or apply legal rules with the same intentions as the intentions the lawmaker had when the rules were proclaimed. No such 'community of intentions' is supposed or required. The judge should be neutral about the reasons which inspire people to make use of particular legal rules, as long as the requirements of the rules themselves are fulfilled. (Raes, 1994a) A similar idea is expressed in Goodin's notion of 'government house utilitarianism' according to which the government should, when proclaiming legal rules, be inspired by the goal to maximize general utility, whilst the reasons why legal subjects apply or obey the rules need not be utilitarian.

*1.11.* Finally (though not exhaustively), neutrality may also be related to the value of *interhuman equality*, in the sense that the state should express an equal concern and an equal respect for any individual human being. A state is neutral in as far as it realizes and enforces general conditions of justice. Here again, impartiality is the central notion, but contrary to its utilitarian interpretation, impartiality-as-equal-respect does not start from a qualitatively equal weighting of sources of human pleasure or pain, but from a moral concept of the human person. Because of what human beings are, they have a right to equal treatment and to treatment as an equal human being, independent from the quantities of human pleasure they may enjoy or produce and independent from their personal conceptions of the good.

Various conceptions of state neutrality may thus give rise to various kinds of states, from constitutional welfare states to minimal states, from republican states to liberal states. The requirement of neutrality is invoked to answer a variety of problems either of an axiological, a moral, a political or a rather pragmatic nature. But central to all conceptions of state neutrality are (a) the sense in which 'impartial rules' in a society of 'equal legal subjects' are understood and (b) the question *when and why a state may use force to make citizens comply with rules.*

In this essay, I will argue in favour of a concept of political neutrality, based on egalitarian justice and the notion of equal respect. (Rawls, 1993; Dworkin, 1990; Cohen, 1988; Barry, 1995; Sen, 1992). Central to this tradition is the search for conceptions of equality which try to combine substantial measures of equality (in terms of preference- or need satisfaction, primary social goods, resources, access to advantage or capabilities) with human freedom and responsibility for the choices people make in and by their lives. It is, in some respects, related to (1.1.) as the principle of equal respect implies toleration for individual conceptions of the good, but it emphasizes that this is only true in as far as the conditions of 'informed consent' are fulfilled, in as far as principle (1.8.) or the 'no harm'-principle is taken into account and in as far as (1.9.) the pluralist range of ethical options which a state has to foster in not a priori considered to be infinite. As (1.7.), it emphasizes the value of human liberty, but gives it an egalitarian interpretation in the sense that a neutral state should guarantee and promote just conditions of equal liberty. It is thus developed from the perspective of (1.6.), rejecting scientific (1.2.)<sup>1</sup>, utilitarian (1.3.), subjectivist (1.5.) and libertarian (1.7.) conceptions of state neutrality and rejecting some absolutist interpretations of (1.4.); to some (limited but nevertheless morally significant) extent, interpersonal comparisons of intrinsic value can be made (cfr. Rawls' notion of primary social goods), yet, they do not in themselves justify state interference.

Egalitarianism does not involve the moral project to reduce social relations to some general 'pattern' which should be applied and enforced within a variety of social spheres. 'Complex equality' (Walzer, 1983) takes account both of various social practices wherein the distribution of various goods may be derived from different notions of equal respect and of possible justifications of (in)equality, based on need, desire-satisfaction, desert, risk-acceptance etc. (De Beus, 1993) It is only based on the

norm that there should be reasons to treat human beings unequally, arguments that can be accepted on rational grounds, not on the idea that no inequality can be justified. As libertarianism, egalitarianism is about the value of justice. It is — contrary to mainstream communitarianism — based on the belief that it makes sense to develop a concept of justice, however divergent particular conceptions of the good life may be. (Raes, 1993) Egalitarianism is thus, like libertarianism, mainly a public or political conception of morality, leaving open, as much as possible, controversies about the meaning of life. Like libertarians, egalitarians start from ‘the fact of pluralism’. They are, from this perspective, ‘individualistic’; individuals are the primary actors in and of social life and thus the primary subjects of justification for any moral norm whatsoever as well. (Gilbert, 1990) Though there may well be non-individual and non-human values, values should be, if they are inferred to justify political action, justifiable to human individuals as the sole rational subjects. No state may invoke to act from arguments ‘in the name of’ or ‘for the sake of’ non-human entities, if these arguments are not or cannot be rationally accepted by human individuals. There is thus an inescapable ‘anthropocentrism’ implied in concepts of egalitarian justice. Not in the sense that such concepts cannot take account of non-human values, but in the sense that the use of political power should always be mediated by reference to (the points of view of) human individuals and what is reasonable from their point of view.<sup>2</sup>

I will further mainly focus on the problem of legitimate state-paternalism as discussions on impartiality exceed discussions on the morality of state action, but encompass conceptions of ‘the moral point of view’ in a more general (though not integral) way. It is a fundamental characteristic of states that they may threaten with or make use of coercive means to enforce compliance with their rules. Particularly this characteristic is essential to understand the very nature of the ‘neutrality’ that is or should be required of modern states.

A consistent egalitarian is confronted with the question of the legitimate means to implement the norm of equal concern. For however sophisticated his concept of equality may be, he has to answer the question how far a government may go in realizing an ethics of equality. This is both a question about effective and about legitimate means, in the sense that an egalitarian ideal cannot give a licence to the state to intervene with social life by whatever means it has at its disposal for it may be that such

means are either counter-effective or illegitimate.

Ideals of equality that are highly person- and context-related — such as Arneson's equality of welfare or Sen's equality of capability — raise the questions of (a) how to gather the relevant information, (b) who should or may gather this information, (c) how to control the implementation of the relevant criteria and (d) who may or should control this implementation. One of the reasons to prefer rather simple egalitarian rules — such as 'equality of income', 'equality of primary social goods' or 'equality of resources' — could be that, although they do not take account of all morally relevant information, they are better suited as *political* conceptions of justice because they do not rely upon very demanding, perhaps impossible and morally indefensible methods of information gathering.

There exists an unbridgeable gap between moral conceptions of justice and political or legal ones, a gap that may be understood in terms of neutrality as well; there are limits to what political bodies may legitimately ask from persons as there are limits to legitimate state intervention. Even if some information would make the relevant rules more just, it could be the case that what is required to find the reliable information for a just application of these rules is unjustifiable. This is not to say that all public rules of justice should be abstract and very general even if this results in grave injustices. It is to say that there are limits to what a 'blindfolded Justitia' is allowed to take into account and that there is a field which is not the law's business both for reasons of effectiveness and of legitimacy, even though interference within this field would result in a more encompassing application of the rules of equal justice. The eventuality that particular applications of a rule result in deviations from the ideal of equal concern — either in the sense that somebody receives not enough or too much of a relevant good — is in itself no reason to reject the rule, if alternatives to it would imply, if generally applied, graver interferences with people's lives or a greater waste of available means.

It is, admittedly, difficult to assess the precise implications of this remark. As is well known, it is central to many libertarian criticisms of governmental interference per se, from Nozick's paradigmatic Wilt Chamberlain until the most horrible scenarios of big brother watching us all. One may easily get rid of most apocalyptic sketches of egalitarian totalitarianism, but nevertheless, the question of how to realize an ideal of equal justice, which takes account of all relevant aspects of unjust

inequality, remains a pressing one. Exactly for this reason, the problem of the limits of state paternalism is integrally related to the problem of how to realize conditions of equal concern.

It should be emphasized that the scope of the discussions treated in this essay is limited in a way that is difficult to justify. For it starts from the assumption that we already know who are the members of the relevant society to whom neutral principles of political justice apply. All arguments, that is, are derived *from* membership and the question which arguments should count as arguments *for* membership is not taken into consideration. (Postema, 1992). Even a superficial view on recent migrations on a world scale amply illustrates that this is a very limited approach to the problem of political neutrality and, perhaps, the problem of how to apply conceptions of neutrality in the case of refugees, asylum seekers and migrants is much more integrally related to the problem of what the morality of the 'impartial point of view' exactly means, than what is here taken into consideration.

## 2. *State neutrality and the enforcement of morals*

### 2.1. *The classic liberal approach*

The question of the legitimate reasons to use force was already central in the 19th century debate between the views which John Stuart Mill defended in his *On liberty* (1859) and John Fitzjames Stephen's views in *Liberty, equality, fraternity* (1874) on the legitimacy of state interference. The debate was, a hundred years later, done over by Herbert Hart (1963) and Lord Devlin (1965), on the occasion of the publication, in 1957, of the so-called Wolfenden Report by the Committee on Homosexual Offences and Prostitution. (George, 1995, 48-82) According to this report, it is not the duty of the law to concern itself with immorality as such and there must remain a realm of private morality and immorality which is 'not the law's business' (Wolfenden Report, par. 61 & 62). A distinction should be made between 'immoralities that implicate public interests' and 'immoralities that are merely private'. Whether or not an act is a matter of public concern depends on whether the act is in itself likely to damage the legitimate interests of third (non-consenting) parties. If it does not do so, the question of whether or not the act is 'immoral' is irrelevant from

the point of view of the criminal law: it is a private act and thus not the law's business. Victimless 'crimes' or 'immoralities' should not be the concern of the criminal law.

Herbert Hart has been known, in his discussions with Devlin, to be a firm defender of this liberal approach to 'the proper sphere of the law'. Central to this approach is that there are fundamental limits to what state power may legitimately enforce. The alleged fact that an act is 'immoral' is not sufficient to justify the use of force to prohibit it. It should, furthermore, be harming the legitimate interests of others. People have, that is, a legal right (according to some, even a moral right) to do moral wrong. What is more; the problem of harm is prior to the problem of an act being immoral or not, for in a pluralist society, opinions may diverge on this issue. An act may be harmful, whilst some may well consider it to be morally right. Central to the liberal (and, in the case of Hart, also utilitarian) approach to 'public morality' or 'the morality of the rule of law' is thus not an intrinsic moral valuation of what is right or wrong, but a valuation of acts in terms of their (harmful) consequences on others. (Lyons, 1984)

## 2.2. *Devlin's conventionalism*

Devlin attacked the idea that the law should not be concerned with immorality as such and should restrict its interference to cases where harm is done to others. Moral laws may well be justified in order to preserve social cohesion. Although such laws, which enforce specific moral obligations may indeed, in a secular and pluralist society, not be based on 'truth-claims', they may nevertheless be justified in terms of social self-preservation, which depends upon the existence of a shared set of moral beliefs through which people identify themselves with a society as being 'theirs'. As the threat of social disintegration is a matter of public interest, a state may legitimately use its power to stave off such a threat. Whether or not such a danger exists cannot be decided theoretically in terms of 'harm'; it also depends upon society's constitutive morality e.g. on whether or not particular acts are widely and strongly condemned as wicked in society and are thus an offence against its constitutive morality.

Interestingly, Devlin does not ground his case for moral state paternalism on the objective truth of some moral beliefs. On the contrary, he explicitly rejects a ('Platonic') justification of moral legislation in terms

of its aim to promote 'the virtue of the citizenry' as being tyrannical (Devlin, 1965, 89). Devlin relates moral convictions to particular cultures, to conventions these cultures consider to be important. If a culture considers polygamy to be a positive good, then it has the right to protect and promote the practice of polygamy by means of state power, in the same way a monogamic culture does. This is an example he himself gives. Similarly, Devlin should accept that if people from a certain culture are strongly convinced that it is a social duty of young girls to undergo clitoridectomy, then the law, in order to preserve cultural integrity and social cohesion may allow and even enforce this practice.

One cannot, according to Devlin, answer the question of whether an action may cause harm to others, in abstraction from whether it is strongly condemned by the constitutive morality of a society. Even if, for example, homosexual acts between consenting adults in the private sphere, do not harm others, the very knowledge that such acts may freely be committed, may harm the constitutive morality in which people within a society believe. This constitutive morality is a cultural artefact which the legal system nevertheless may legitimately protect.

This account of the legitimacy of morals legislation is strongly conventionalist. It does not matter whether or not certain acts really do harm others, independent from their condemnation by conventional standards. If they *are* firmly condemned by society's constitutive morality as being anti-social acts, they are anti-social acts which, for the sake of social cohesion, may be forbidden. The *reasons* for this condemnation are irrelevant in an account of the legitimacy of certain laws. Whatever the moral beliefs that are shared by the members of a particular society, the fact of them being shared as constitutive for a society's identity, suffices as a ground for legal enforcement. 'What is important is not the quality of the creed, but the strength of belief in it'. (Devlin, 1965, 114)

However, Devlin is not a mere sceptic. Although moral convictions may vary from culture to culture, the right of cultures to preserve their integrity is nevertheless presented as a universal moral claim. It is a moral right of cultures to protect their constitutive moral beliefs, whatever these happen to be. This position is not sceptical in view of Devlin's non-cognitivist conception of morality as a matter of (shared) feelings, rather than reason. A society, as a 'community of ideas', including shared ideas on politics and ethics, relies on such shared feelings as its 'common sense'. Without such common, fundamental agreement about

good and evil, no society could exist (Devlin, 1965, 10).

Devlin thus argues, from the universal fact that all societies condemn social disintegration, in favour of the moral right of societies to protect their cultural/moral practices against such disintegration.

As he does not refer to the objective truth of a society's values, in order to argue its right to protect them, his approach somehow resembles defences of the principle of toleration in interhuman relations; independent from what an individual's conception of the good happens to be, the individual has the right to be respected, including the right to express and to live according to his conception of the good, exactly because it is *his* — presumably freely chosen — conception of the good. But this resemblance also destroys Devlin's — and many communitarian — defences of cultural integrity, for a culture may, indeed, have the right to protect its integrity (against 'outsiders') but has not yet the right to enforce it on its members. We cannot, that is, argue the case for cultural integrity without arguing the case for individual integrity. As long as the members of a particular culture freely accept and comply with the generally shared moral convictions which constitute their 'common sense', no moral problem arises. But if some members of that particular culture oppose some of these conceptions, they have a right to have their integrity respected as well; they may not be forced to 'accept' these conceptions.

This point is particularly relevant in all present day discussions on so-called 'group rights' for national or ethnic minorities. Authors such as Kymlicka (1995, 181) and Rawls (1993, 29) do not only accept particular regulations protecting (the culture, language, traditions etc. of) such minorities, but even go so far as to argue in favour of tolerating practices within such cultures that are fundamentally contradicting individual rights. This is untenable. Of course a 'culture' or 'group' has the right to protection, but that does not imply that it has also the right to enforce its values or practices *on its own members*. Groups or cultures should both respect democracy and individual rights. They have no right to claim tolerance for practices which they enforce on their members against their will and neither do they have the right to force people to remain members of the group. Group-specific rights, based on cultural differences, can only be invoked as long as the members of the group have democratic voice within the group and do accept freely the values these rights protect. (Raes, 1992). If not, special group rights may justify 'a tyranny of traditions' which cannot democratically be challenged

because of the existence of these rights, blocking the road of change. (Galenkamp, 1993) Leaders may, in the name of culture or tradition claim authority over their cultural group, whilst its members would lack the individual rights to leave the group or to change the rules within it.

### 2.3. *Social integration as a value*

Returning to Devlin's right of a society to protect it from disintegration, one could attack his position both (1) on the ground that societies do not have a general moral right to protect themselves against social disintegration, (2) on the ground that moral pluralism or tolerance does not, in fact, threaten social cohesion as such. As far as the latter is concerned, Hart argued that even if it is admitted that social cohesion is valuable, it does not follow that changes in moral views do, of necessity, 'destroy' or 'disintegrate' society, at least not in the strong sense Devlin seems to suggest. (Hart, 1963, 50) Such a point of view would simply discredit any criticism of or changes in existing moral practices and beliefs. As a matter of fact, one cannot maintain that moral changes and moral pluralism within western societies have disintegrated these societies. Moral views may change and vary without society being destroyed. But, as far as the former is concerned, even if a society would disintegrate because of changes in moral beliefs, one cannot judge such disintegration, independent from the content of the conventional or new moral beliefs. Changes in moral views or the existence within a society of different moral views are not, by definition, 'losses'. The only 'disintegration' Hart would accept as relevant, would be in terms of harm. If new moral views justify practices which do less harm to others than the traditional ones, there is all the reason to welcome such a change, even if it leads to the breakdown of an existing social order. If they justify practices which do more harm, then one has all the reason to resist the change.

There is, however, another possible approach both to the meaning of 'social cohesion' and to the legitimacy of moral change. One could, as many communitarians have done, interpret 'disintegration' not in terms of a total breakdown of some Hobbesian concept of 'order', but rather in terms of the erosion of the 'integrity' of a culture (its language, folkways, 'ways of being' etc.) upon which the integration of the members of a culture is based. Society is more than a collection of individuals living in proximity to one another in peace. Social cohesion is more than

a question of 'order'. It is also a shared experience, a shared practice. If one conceives persons as integrally related to the culture they belong to, then a disintegration of shared beliefs may, indeed, be conceived as a disintegration of society. This process has been, by many authors, identified as what 'modernity' wherein 'all that is solid melts into air' (Marx) is all about. One can hardly deny such processes of disintegration as empirical, historical facts but neither can one deny that modern societies have developed new mechanisms of social integration by means of constitutional protections of the citizens, democratic procedures and the rule of law.

### 3. *Pluralist objectivism*

The main question thus becomes whether or not particular, culturally shared moral beliefs are worthy of protection and even enforcement by the law. And this question cannot be decided either (a) independent from the moral truth of what is protected or enforced under moral laws or (b) independent from what the individual members of a society themselves think on this issue. The first position may be called the traditional objectivist one (which Devlin opposed). The second position may be called the pluralist objectivist one (which Devlin would have opposed as well). According to the first position, the existence of objective moral values, may in itself offer reasons enough either to protect and enforce generally shared moral values or to change and forbid generally shared moral values, depending on whether these values correspond to objective moral truths; it is the task of a state to protect its citizens against vice or intrinsic wrong. According to the second position, the use of force or coercion always requires specific reasons; the recognition of an objective moral truth is not enough to protect it by means of enforcement.

There is a crucially important difference between 'protecting' particular moral beliefs and 'enforcing' them (protecting a religious faith by means of the right to religious freedom is totally different from 'protecting' it by enforcing it). Legal rules may very well protect moral beliefs that are shared within a community, without enforcing those beliefs. This is exactly what the pluralist point of view on this issue involves.

Whether or not certain moral beliefs are objective is, in this view, not enough of a reason to enforce them. The question whether an act is

right or wrong and the question of whether it is right or wrong to interfere are always distinct questions. (Galston, 1983, 321) This point distinguishes the traditional objectivist position from the pluralist objectivist position.

Contrary to Devlin's conventionalism, the traditional justification of morals legislation was based on an objectivist account of moral value. Laws may uphold and reinforce a morality — whether 'public' or 'private' — precisely in as far as this morality is true. It may be paternalist in order to encourage and even force people to behave virtuously and not wickedly. Although the law should not forbid all vices, it should forbid the more grievous vices, independent from whether or not they are damaging others. They harm the moral character, the real nature of human beings and this is enough of a reason to prohibit them.

A pluralist objectivist develops a different approach. Although believing in the existence of objective moral truths, he is (a) fundamentally aware of the possibility that one may be mistaken in what one firmly believes to be objectively valuable (there are no 'absolute truths'), (b) not indifferent about the ways possible moral truths are recognized by those for whom they are valid as moral truths.

(a) As far as (a) is concerned, a pluralist objectivist denies that there are moral certainties and considers this to be an independent reason not to force values on people even if a lot of evidence points in the direction of them being 'true'. In an important sense, a parallel may be drawn here with the practice of free inquiry within the scientific community. As free inquiry has proven to be the best available soil to find (always revisable) scientific truth, so a society of equally free citizens may be seen as the optimal soil to find moral truth. This denial of certainty on moral issues should therefore not be identified with moral indifference. (Barry, 1995, 184) Accepting some scepticism is not the same as rejecting the possibility that answers may be right. Rejecting moral absolutism is not the same as embracing nihilism.

(b) Contrary to traditional objectivism, the question whether or not a value, one is firmly convinced to be objective, is freely accepted by a person makes a morally relevant difference to the objectivist pluralist. Thus, whilst catholics such as Schotsmans may argue that 'the problem of who decides is not an ethical issue' (Schotsmans, 1992, 45), a pluralist objectivist makes a clear distinction between 'the truth of a moral conviction' and 'the value of believing a moral conviction'. Moral truth is

no final reason to enforce it and, what is more, enforcing moral truths upon persons may have as a consequence that belief in them loses its moral value. An enforced moral conviction simply stops to be a moral conviction (as an enforced religious faith loses its value as being a religious faith). Even though moral values are not simply 'chosen' but rather 'discovered', it is central to the pluralist objectivist position that the free individual acceptance or recognition of value is an essential and not an accidental requirement in valuing its moral standing. The use of force always requires a particular justification. Moral truth is not a sufficient condition for this and even not a necessary condition.

A pluralist objectivist is not insensitive to Devlin's conventionalist argument about 'social disintegration'. But whilst conventionalists argue against moral pluralism because they consider it to be a sign of such disintegration taking place, from the pluralist point of view, enforcing one particular morality is, on the contrary, seen as a disintegrating social force, which would lead to upheavals, civil war, repression and discrimination.

According to Larmore, one could thus derive the norm of equal respect from prudential reasons. In a society with deeply conflicting convictions on moral issues, it may be a good strategy — if not the only available peaceful solution — that conflicting parties retreat to neutral ground, to some common ground which no party disputes and which abstracts from highly disputed issues (Larmore, 1987, 61).<sup>3</sup> Although such a common ground cannot simply be assumed, its existence is neither impossible. A common ground may exactly be found in principles of state action which do not interfere with the dispute about the nature of the good life but guarantee all parties conditions of equal freedom. It may result in the attitude which accepts that however much one disagrees with others and repudiates what they stand for, one cannot merely treat them as objects of their will, but owes them a justification they can accept for those actions that affect them.

The neutrality-requirement will strongly favour procedural approaches to public debate and decision making, guaranteeing all participants equal voice and will thus, because of the 'burden of public justification' guarantee more rational solutions as well.

Neutrality follows from the desire to reach agreement with others on terms that nobody could reasonably reject and will be expressed in institutions based on an agreement about the ways disagreements should be

settled. Although a desire for civil peace does not necessarily favour neutral political institutions, it may do so if the parties become conscious of the fact that they cannot win the battle by means of force. This is not to say that the parties should give precedence to other (for instance, 'economic') issues than the disputed ones. The parties do not have to take their disagreements less seriously. They only have to renounce violence as a means to solve disagreement. In *this* sense, Rorty is right in emphasizing that in a political culture democratic procedures ('the way things are said') should have priority to philosophic topics ('what is said') such as 'an ahistorical human nature, the nature of selfhood, the motive of moral behaviour and the meaning of human life'. (Rorty, 1990, 283)

Moral pluralism and state neutrality should not be seen as the enemies of social cohesion and social integration. They may, on the contrary, be the very conditions to counter processes of social disintegration which may end in civil war.

#### 4. *Political neutrality and ideals of the good*

The objectivist case for pluralism, sustaining that it is wrong for the government to dictate and enforce a morality to the individual citizen, is thus 'not that there is no fact of the matter about what forms of life are fulfilling and what forms of life are not fulfilling, or morally wrong in some other way (If there were no such thing as a moral wrong, then it would not be wrong for the government to impose moral choices)' but that such enforcement expresses lack of respect for persons as autonomous moral agents and is, because of this, an objective moral wrong, because such respect 'requires that we accord them the right to choose a moral standpoint for themselves, however repulsive we may find their choice'. (Putnam, 1983, 149) If choice and freedom are, in one way or another, regarded as essential components of what it means to act morally, it should be accepted as well that persons may make, and have the right to make, the wrong moral choices. The fact that a choice is a morally wrong one is therefore not, in itself, a reason to interfere with it. If someone has the right to perform an act, he is entitled to perform it, even if it is morally wrong and no one has the right to forbid or interfere with it.

This approach needs qualifications (apart from the generally accepted qualifications concerning incompetent minors and the mentally disordered). *First*, it does not imply that no legal enforcement can be legitimate. Whilst recognizing ‘the right to do moral wrong’, it makes use of the ‘harm principle’ (though not only of the harm principle) to draw a line between ‘the proper sphere of legal enforcement’ and the sphere of personal freedom. Protecting individuals (including *future* individuals) against the harmful consequences of other’s behaviour is one major task of the law. *Second*, it does not imply that the law may not promote fulfilling forms of life. It is not radically anti-perfectionist. The law may rightly do so, as long as it does not make use of force. And it does imply legal interference in order to guarantee conditions of equal respect and equal liberty, that is ; conditions of justice. I will elaborate further on these issues from the perspective of state neutrality.

#### 4.1. *The harm principle and justified paternalism*

Ever since John Stuart Mill, the harm-principle, according to which ‘the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number is self-protection, and the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others’, has been at the top of the list in a liberal account of state neutrality. Nevertheless it (a) needs ammendation and (b) cannot be the only principle that a neutral government should respect. The principle needs ammendation for, as Barry argues, it would entail the illegitimacy of any kind of legislation for the protection of the interests of non human entities and this can hardly be defended. (Barry, 1995, 86) Harm to non human entities should be taken into account as well. Furthermore, the almost natural way by which Mill restricts his principle to autonomous or competent persons needs qualification as it does not say anything about how to treat the incompetent, particularly children. Does the curtailment of the ‘no-harm principle’ to competent persons simply implies that *any* paternalism regarding children is justified ? And shouldn’t there be politically relevant criteria to define the proper sphere of parental and the proper sphere of governmental paternalism ? Finally, can one really approach competency in terms of an ‘all or nothing’ — matter as if people are either autonomous in all aspects of their lives or

the mere objects of paternalist authority in all aspects of their lives? Is competency not rather a question of degree and a question of contextuality in the sense that children — and, as a matter of fact, all human beings — may very well be competent to decide on certain issues whilst not on others or be competent to decide if certain conditions are met — such as the conditions required in the doctrine on informed consent — whilst their decision may be deficient if these conditions are not fulfilled? (Buchanan & Brock, 1989)

Mill's no-harm principle, that is, is (a) much to anthropocentric and (b) much to of an 'all or nothing'-kind.

But does the principle, for all the rest, simply outlaw any intervention 'for a person's own good'? According to Barry, paternalism may be justified when there is a disproportion between the harm risked and the good forgone, as is, in his view the case with legislation which obliges people to wear seatbelts in cars or helmets on motorcycles. (Barry, 1995, 87) From a similar perspective, one may argue in favour of an obligatory health insurance or unemployment insurance. Such a disproportion may also be the consequence of time-discounting, the fact that people have the tendency to undervalue risks they are only confronted with in the long term. This may be an argument for obligatory pension contributions.

In a sophisticated argument, Dworkin has defined his notion of legitimate paternalism. (Dworkin, 1989; George, 1995, 103) First, he distinguishes volitional from critical well being. A person's volitional well being is improved whenever his wants or desires are gratified. His critical well being is improved when he acquires or achieves those things which he should want. There are thus two kinds of paternalism. Volitional paternalism uses coercion to help people acquire or achieve what they already want to acquire or achieve (Dworkin cites, again, seat belts). Critical paternalism uses coercion to provide people with better lives than the lives they now think good. Critical paternalism is clearly 'perfectionist'. It is based upon an ideal of the human good. Dworkin does not reject all such forms of paternalism, but introduces a further distinction, based on conceptions of the good life. In an additive view, the various events, experiences, associations and achievements that make up a person's life on the one hand, and that person's own value judgment about these components of his life on the other are regarded as separate. If that person's judgment is affirmative, Dworkin considers it to be an endorsement. In a constitutive view, the notion that endorsement is an additio-

nal value is rejected; without endorsement, no component contributes to the value of a life.

Dworkin distinguishes furthermore two models of the ethical life. In a model of impact, the ethical value of a life depends entirely on and is measured by the value of its consequences on the rest of the world. In a model of challenge, events, achievements and experiences can have ethical value, even when they have no impact beyond the life in which they occur. Dworkin argues in favour of the challenge model of ethics which is intrinsically related to a constitutive view of what makes a life valuable. Within such a perspective, most of critical paternalism is self defeating, for it attempts to coerce people to live in certain ways that, without endorsement, can have no human value. A critical paternalism which seeks to improve a person's life by coercing him into some act of abstinence he thinks valueless is, for Dworkin, never permissible. An endorsed paternalism however, which seeks to improve a person's life by coercing him into behaviour he does not presently value, but which will eventually result in or contribute to his conversion to endorse its value may sometimes be permissible, if the paternalism is sufficiently short term and limited, such that it does not significantly constrict choices if the endorsement never comes. Substitute paternalism, on the other hand, which justifies prohibitions, not by pointing to the badness of what it prohibits but to the positive value of the substitute lives it makes available is rejected by Dworkin. Conceptual or cultural paternalism relies, finally, not on coercive power but on educational decisions and devices that remove bad options from people's views and imagination; it creates a cultural atmosphere in which bad or wasted lives have been screened out collectively so that individual's decisions are from a deliberately restricted menu. Dworkin accepts such paternalism when the interests of justice are served — as is the case when racist views are banned — but rejects it in all other cases.

Dworkin has carefully drawn borders around the realm of justified paternalism. Yet, his approach still allows too much on the one hand and is too restrictive on the other. It remains questionable whether his justification of 'endorsed paternalism' would not allow certain methods of 'brainwashing' or 'conditioning' in order to reach the intended 'free' endorsement of a particular conception of the good. Whether or not a paternalist intervention is 'short term' and 'limited' is not the issue, but the techniques that are used to reach endorsement.

In a sophisticated argument, George attacks the idea of anti-paternalism and political neutrality both because they are inconsistent and because they are morally objectionable (George, 1995). Although his case for moral paternalism is mostly negative, arguing that anti-paternalist neutrality simply cannot be sustained, whilst not elucidating the objective morality by which a public morality should be inspired, his case for the eventual legitimacy of 'morals legislation' (based on an 'objective morality') is highly relevant. George challenges not only the no-harm principle, but rejects as well Dworkin's appraisal of endorsement as integrally related to what it means to lead a valuable life. Although admitting that for 'reflexive goods', such as religious faith, endorsement is inherent in the basic good, there are other goods for which it is not true that the absence of a person's positive appreciation deprives them, by definition, of their value. According to George, 'substantive goods, such as life and health, have intrinsic human value, regardless of any feelings or valuelessness which a particular person may experience and give in to in choosing or acting against those goods'. (George, 1993, 106) As knowledge is an intrinsic good, even to the most avowed anti-intellectual, life and health are intrinsic goods, even to the life despiser.

But, admitting that goods such as 'knowledge' (which knowledge?), 'health' (which health?) or 'life' (whom's life?) have intrinsic value, what would follow from this? They may inspire a government, as in Dworkin's case for conceptual or cultural paternalism, to create a cultural atmosphere in which knowledge, health and life are generally respected. But they certainly would not justify governmental measures to enforce these goods on persons against their will. What is, for instance, morally repulsive in the fact that Winston Smith in Orwell's *1984* is tortured until he accepts the truth of  $2 + 2 = 5$  is not that Smith, as an autonomous person, is forced to accept *a lie*, but that he is *forced* to do so. Similarly, autonomous persons may not be forced to stay alive if they do not value their lives anymore and neither may they be forced to care for their health if they do not value it or give priority to other values.

George raises the question of how the choices of a supposedly autonomous person, and his autonomy itself, can be valuable, when nothing of value is realized in those choices. (George, 1995, 175) One could, of course, reply that if a person chooses the bad, his choice is not autonomous. But this argument could easily slip toward a 'catch 22' - situation. The only answer is that autonomy is a necessary, but not a sufficient

condition to lead a valuable life and that the general recognition of personal autonomy is, as such, no guarantee that valuable lives will be lived. There is more required for this and the government should use all means at its disposal — except the use of force which would destroy personal autonomy — to foster valuable choices. If the only choice is that between enforcing values on people, destroying thus both their autonomy and the value of a non-endorsed good, and respecting personal autonomy, even if nothing of value arises from it, only the second is compatible with political morality.

Take, for instance, Dworkin's liberal position on abortion. It first rejects 'the extreme opinion that abortion is morally unproblematic, and insists, on the contrary that it is always a grave moral decision... Second, abortion is nevertheless morally justified for a variety of serious reasons... Third, a women's concern for her own interest is considered an adequate justification for abortion if the consequences of childbirth would be permanent and grave for her family's life... The fourth component (is that even) when a foetus is sufficiently developed to have interests of its own, the state has no business intervening even to prevent morally impermissible abortions, because the question of whether an abortion is justifiable is, ultimately, for the woman who carries the fetus to decide'. (Dworkin, 1993, 32 - 33) Dworkin clearly does not conflate 'moral reasons' with 'mere preferences'; there are morally defensible and morally indefensible abortions. But even a morally wrong abortion cannot be forbidden, because it would enforce a value on the bearer of the child, which she does not accept. Here again, endorsement of a value is necessary, which involves that the woman has the liberty to decide whether or not to have an abortion, even if a 'potential' objective value is thereby lost. A state must let her decide for herself and may not impose other people's moral convictions upon her ; this is the basic commitment of the ethics of political toleration.

Rawls' doctrine with regard to religious liberty, considered to be the 'paradigm case' of the norm of toleration for a variety of conceptions of the good has two parts (Rawls, 1971, 212 - 213; Barry, 1995, 186 - 187). The first invokes the agreement motive, saying that only a system of equal religious liberty is capable to elicit general agreement, since anyone who would be disadvantaged by unequal religious liberty has the right to object ; the requirement of universal agreement for a norm to be valid, favours equality of religious liberty. The second part says that the

principles agreed on will imply an agreement which would limit the kinds of reasoning that may properly be used in arguments about their implementation. The principle of equal religious liberty will incorporate a clause which permits its restriction on the basis of the no-harm principle and on the basis of justice itself, in the sense that activities, even if they are justified on religious grounds, may be forbidden if they damage others or if they radically contradict the norm of equal respect for one another.

George denies the relevancy of the 'paradigm case' of religious toleration for all moral goods. It is not true, he argues, that people tend to act, in the areas most commonly dealt with in morals legislation, out of deep and settled convictions as to what is valuable for them. (George, 1993, 107) This may be the case for religious toleration or for toleration of homosexuality, but in many other fields — such as pornography or drugs — no deeply held convictions, but only mere preferences are at stake. To say that one cannot fundamentally benefit a person or improve his life by compelling him to live against the grain of his most profound ethical convictions, compels assent only if indeed deep and settled convictions are at stake, but not to most kinds of conduct that moral paternalists seek to discourage by punishing it.

Admittedly, there is an important difference between 'mere preferences' and 'profound convictions'. But it cannot be applied in a simple way in the context of political action. George is right in emphasizing that some paternalism is inherent to all public policies, but the major issue is the legitimacy of enforcing values — whether preferential or objective — on people against their will, independent from any harm done to others. Why couldn't erotic literature, which is considered by some as 'pornographic', or the use of hallucinogen drugs be part of one's deeply felt ethical outlook?

George's case for political paternalism as not in principle violating basic rights to equality remains convincing only as long as it does not involve the use of force. Thus, I agree, that a government should not *promote* unhealthy ideals as it should *discourage* racist or sexist ideals.<sup>4</sup> But it does not follow that a government may, by the same token, enforce conceptions of the good. The case of smoking can be relevantly invoked here. (Goodin, 1989) For a long time, moral objections against smoking were mainly in terms of an puritan anti-pleasure ethics. Since the sixties, objections against smoking evolved from the value of (personal) health,

the fact that smoking harms the smoker. Recently, the ethics of smoking behaviour became more and more a public issue because medical science could prove the significant harmful consequences of smoking on non-smokers.

It will be clear that this last point is a sufficient reason for the government to prohibit the harming of non-smokers against their will and indeed, legislative initiatives in most western countries develop toward a general ban of smoking in closed, public spaces. Discouraging smoking may even be inspired by paternalist motives (for the sake of the health of the smoker himself), either (a) because most people develop an addictive smoking habit when they are still minors (toning down the informed consent of beginning smokers) and cannot get rid of the habit once they are adults, (b) because most smokers are addicted and admit that they would prefer not to have developed the habit of smoking (raising the problem of weakness of will) and (c) because there is a disproportion and a time gap between the harm risked and the good forgone. All of this is reason enough for a government to have the right to prohibit smokers from harming non smokers (the case of the fetus, harmed by the smoking of its mother not included, cf. *supra*, as this would conflict with the mothers' right to physical integrity) and to develop a policy discouraging smoking by means of public campaigns, warnings etc. But it does not give the government the right to prohibit a smoker to smoke 'for his own sakē', even though his health may be 'an objective good'.

It could be argued that the no harm principle itself favours a particular conception of the good, e.g. the utilitarian one, which defines harm as a form of negative utility. But this is not the case. What is considered to be harmful must be considered bad within a variety of conceptions of the good, including, amongst others, utilitarianism. (Barry, 1995, 141) Even if it is admitted that conceptions of the good are incommensurable, that does not preclude the possibility of some shared conceptions of what is harmful behaviour. However great cultural diversity may be, there are things which any culture values as a bad thing such as physically hurting someone, the taking of a person's liberty or life, destruction or stealing of property etc. The point is not that all conceptions of what is harmful should overlap — for this is certainly not the case —, the point is to found public morality and state action on the prohibition of these kinds of harm which are widely accepted as harmful from different conceptions of the good, not 'independent' from such

conceptions. Cases against harmful behaviour should be argued for on the ground of good reasons that can be accepted within a variety of conceptions of the good. (cfr. Ackerman's notion of 'neutral dialogue' in Ackerman, 1980, 7) Nobody should, that is, be able to claim a privileged position for any conception of what is harmful from the point of view of a conception of the good on the basis of the correctness or superiority of that conception of the good.

According to George the harm principle cannot be the only principle of public morality. This is, indeed, true. A public morality, based on the right to equal concern, justifies many interferences with people's life for the sake of (neutral) justice. Labour law, social security law, consumer law etc. all developed from the aim to protect people from abuses of power, even 'against their will' (such as in the protection of minimum wages, obligatory health and unemployment insurances, obligatory clauses in contracts etc.) from the general consideration that circumstances of unequal power relations endanger the personal autonomy of the weaker party. They are protections against unjustifiable (ab)uses of power. But these 'democratic paternalist' interferences for the sake of justice, which are justifiable in terms of Dworkin's notions of 'endorsed paternalism' and 'equal concern' are different from interferences for the sake of some conception of the good as is the case with morals legislation.

#### *4.2. Perfectionist and anti-perfectionism*

Rawls' case for a neutral public conception of morality and Dworkin's defence of public policies that are neutral between different conceptions of the good are strongly anti-perfectionist; it is not by using political power that ideals of the good should be spread. However, Rawls' approach leaves room for some state action, based on particular moral ideals. As he developed, in earlier work, the distinction between 'justifying a practice' and 'justifying a rule or an action falling under it'. (Rawls, 1955), he argues that societal institutions must be anti-perfectionist, not that within them, legislative decisions may never reflect ideals of the good. (Rawls, 1971, 238) What is essential to his procedural approach of decision making processes is that they should be based upon the norm of equal respect. What the results of such decision making processes are, is left open. As long as these decisions respect the general procedural requirements, they should be accepted as just.

Rawls' rejection of perfectionism is motivated by the cautious self interest of the parties behind the veil of ignorance. Therefore, it is mainly directed against the means that can justifiably be used to implement certain ideals of human perfection. Again, force is what people basically would reject, because it excludes any exit-option.

But exactly because religious toleration is, in Rawls conception of political neutrality, treated as the 'paradigm case', his rejection of perfectionism is too general. His concept of neutrality is strongly determined by a definition of rationality which leaves room only for strategic considerations within his original position and by the recognition of an absolute veto-right against whatever would possibly transgress whatever conception of the good an imaginary person might possibly have. This is simply too abstract. Would it really be rational of people, inspired by 'the highest order desire for justice' to ask for the protection of whatever their ideas, desires, preferences or wants happen to be? Would they, independent from considerations about harm to others, not take account of the possibility and the preparedness they might show for changing radically irrational and self-destructive beliefs? It is hardly plausible that the search for justice, by which subjects in the original position are supposed to be inspired, would be that much alienated from conceptions of the good life, that they wouldn't exclude some forms of life as being fundamentally worthless and demeaning. It is not 'rational' to ask for 'respect' for any want, preference or desire people may happen to have. It is, even within the constraints of the original position, rational to evaluate life options and to disfavour certain ones on the ground that they are intrinsically degrading, even within a pluralist conception of the good.

For these reasons, Raz denies that a Rawlsian approach to political neutrality is defensible or desirable. 'An agreement on a method for choosing between perfectionist principles cannot be ruled out on the grounds that the methods of evaluating different ideals are themselves subject to evaluative controversy.' (Raz, 1986, 126). He furthermore denies the plausibility of the Rawlsian priority of 'the right' over 'the good', arguing that it is only possible to ascertain what is right for a government to do if one knows what is good for human beings. According to Raz' liberal perfectionism, governments should be based on a conception of the good, e.g. a conception which understands individual liberty and autonomy as essential to it. A concept of 'the right' should not be developed *independent from* any conception of the good, it should

*encompass* a plurality of conceptions of the good. Not a 'politics of neutral concern', but a politics which protects, supports and advances personal autonomy should inspire governments. A concern for the dignity and integrity of persons requires moral pluralism, not neutrality or the exclusion of ideals. (Raz, 1986, 127).

Moral pluralism is, as we already argued, not the view that any way of life is as valuable as any other, as long as it is 'freely chosen' by someone. First, the class of morally good options may be pluralist and large, but it is not infinite; pluralism is the view that people should have the freedom to choose between valuable options, not between whatever option is available. Second, an option can only count as a morally relevant option (a) if its choice relies upon some idea of *informed consent* and (b) if it can be based on (instrumental or intrinsic) *reasons*, implying that merely wanting something is, as such, not enough of a reason for doing it ; allowing for free space to unreflective wants may be *part* of a conception of the good life, but a conception of the good life cannot be *constituted* by unreflective wants or sheer desires. Pluralist objectivism thus requires that a government should provide its citizens not only with basic information but also with primary social goods, resources or capabilities, so that their choices can really count as informed and unenforced choices for which they can give reasons.

It has to be emphasized that even within Raz' perfectionism, which accepts moral ideals as legitimate reasons for action, the legal prohibition of 'victimless immoralities' or 'choices which do not harm others' is excluded because this would be insufficiently respectful of the value of personal autonomy (not to be confused with moral autonomy). Although Raz thus rejects anti-perfectionism and neutralism, he accepts the harm principle as central in justifications for using coercive means. Not the ends, but the means are illegitimate.

This is compatible with the above mentioned principles of pluralist objectivism, according to which it is the duty of a government to create the optimal cultural soil in which people may, as informed citizens, choose their own ideals of the good. A government may and even should promote a plurality of valuable conceptions of the good life and should discourage evil or empty ones, but a government should do so by persuasive, not by coercive means, because such means would destroy the value of personal autonomy. Protecting personal autonomy implies, that is, the protection of immoral choices as well. Not because they are, as

such, worthy of protection, but because one cannot protect personal autonomy and at the same time enforce particular choices upon persons. Raz may criticize the idea of a neutral political morality, but as his case for pluralism makes clear, he is more of an ally than an enemy of the tradition of political neutralism.

Eventually, one could argue that the use of force is not by definition indicative of disregard or contempt for those persons whose preferences or wants are banned. According to George, it may manifest, on the contrary, a sense of the equal worth and dignity of those people, if their 'preferences' express a serious misconception of their worth and dignity (George, 1995, 95). But what if those people simply do not 'get the message'? What is — even apart from the problem of effectivity — won by enforcing people to live according to a conception of the good they radically reject or even do not understand? What can be 'good' in a life lived without any endorsement of its goodness by the subject itself? If, a supposedly radically evil or empty life is lived without it harming others, what could be the reason to force other options on the person who values it nevertheless, if all persuasive means have failed? What reason can there be given that can and will not, by definition, be accepted by the person involved, and yet count as decisive enough to enforce it on him? It is thus, in the field of political morality, not easy to distinguish ends from means, exactly because the means have a direct influence on ends. Whereas enforcing rules of justice can be justified from the perspective of their effects on interhuman (outer) behaviour, no such justification is available if the end is a change in what people think or believe. Moral norms and rules may be enforceable, but ethical beliefs and ideals are not.

Raz rightly emphasizes that a government should do more than being passive regarding conceptions of the good and that it may well promote certain aesthetical, ethical and epistemic ideals. This is, however, not incompatible with the Rawlsian or Dworkinian spirit of political neutrality, which is mainly concerned with the legitimacy of using force. Neither Rawls' procedural concept of political decisions making within the constraints of his concept of justice, nor Dworkin's concept of a politics of neutral respect, exclude perfectionist ideals from governmental policies. What they exclude is certain means to spread such ideals and this is also, from a different approach, Raz' point of view.

George's argument that merely 'respecting' whatever 'choice' a

person has made is not, by definition, an expression of 'equal respect', has a point for such 'respect' could be nothing but an expression of indifference. Not any want, preference or desire can be treated as 'a conception of the good' of the person involved, at least not from the point of view of individuals as autonomous persons with a capacity for practical reasonableness. When somebody wants to kill himself, neglects his health, spoils his talents or becomes addicted to a destructive drug, the moral way to respond to such 'choices' is not to 'respect' them, but to try to convince the other that there are better options available to him and to offer him (material and psychological) opportunities to escape a desperate condition. There is enough evidence showing that people's preferences may be irrational or merely adaptive, because 'they know of no better'. (Sen, 1992) Simply leaving a person with whatever his choices may be is not a moral attitude. But if a person persists in his choices, after all the evidence to the contrary, and all opportunities to make more valuable options available, have been presented and offered to him, and if these choices do not harm others, what else can be done than to accept his choice as *his* and to permit him to live the life he has chosen, or to end it. George's argument is valid if it is meant as a critique of an indifferent liberalism which leaves persons alone and helpless with their uninformed choices in the name of a discourse on human freedom, incommensurability and autonomy. But it does not follow that all means to change a person's point of view are therefore justified. If persuasive means fail, and if the choice is not determined by a lack of socio-economic means, there is no way to change people's attitudes, at least not 'for their own sake'.<sup>5</sup>

### 5. *The politics of equal concern*

No calculus is available to settle the problems raised by the concept of egalitarian justice. Whether starting from perfectionist or non-perfectionist ideals, the (legitimate) capacities of a state should not be overestimated and a lot of decisions should be left open to procedural justice within concrete contexts. Inevitably, many applications of the aim to realize conditions of equal concern should be settled, within the formal constraints of the concept of justice, by democratic decision making, which is itself procedurally constrained. Rawls' meta-ethical approach to

justice in terms of fair procedures is thus relevant as well in more concrete contexts.

Political liberalism develops mainly a theory of legitimate means whereas pluralism emphasizes that valuations of these means are not independent from goals. Pluralism is not simply the result of strategic considerations, it is also a good in itself, whilst a culture of equal liberty can be valued as a positive good, as the optimal soil for discovering conceptions of the good. Egalitarianism thus defines the conditions of pluralism and implies that the incommensurability of conceptions of the good is not invoked as an argument against any redistribution. Though conceptions of the good are incommensurable, some means to realize these conceptions are widely shared enough to count as primary social goods, resources or capabilities (although a lot of research on the 'quality of life' still remains to be done) of which it can be said that, regardless of what a person's conception of the good is, he will want various things as prerequisites for carrying out his plan of life. (Rawls, 1971, 92, 396). This is compatible with the view that there is a multiplicity of human goods and a wide variety of instantiations of those goods. Redistributive schemes concerning certain means to realize a variety of conceptions of the good are thus integrally related to both political liberalism and pluralist objectivism.

Egalitarianism is, finally, not the view that 'the common good' is nothing else but the aggregation of the goods of individuals. It recognizes the importance of shared interests and shared values within society. But egalitarianism is, contrary to communitarianism, more liberal as far as the state is concerned, leaving room to a variety of communities within the boundaries of political society. Egalitarianism is individualist in the sense that it recognizes individual persons as the primary actors within society, not in the sense that there may not be collective or shared values or in the sense that nothing beyond individual persons can have value. Egalitarianism is both a theory of justification — stating that moral reasons should be good reasons for all persons involved — and a theory of social organisation — stating that interhuman relations should be based on an ethics of equal concern —. Concepts of political neutrality should, from an egalitarian perspective, be valued in terms of their contribution to an ethics of equal concern. And this requires, on its turn, that the problem which conceptions of the good, and which plurality of such conceptions are, in fact, fostered by equal justice should be an integral part of

what pluralist egalitarianism is all about.

### NOTES

1. This does not imply that the scientific point of view is totally irrelevant in modern conceptions of a neutral state. First, the value of science is and should be central in all educational projects which are subsidized by the state. Public schools should favour the scientific point of view over dogmatic or traditionalist ones. Second, the state should engage in stimulating and subsidizing fundamental scientific research. Finally, the state should, in its policies, be inspired by the results of scientific inquiry. But all this does not yet mean that the state has the right to *enforce* the scientific point of view; primary and secondary education may be compulsory in the sense that minors are obliged to go to school, but the educational methods to transmit scientific information are not. Admittedly, the reality is more complicated than that. Thus, the Belgian national health system provides in some compulsory vaccinations of children (based on the truth claims of medical science) whatever the religious point of view of the parents happens to be, contrary to the United States where parents, such as Jehovah's witnesses, may, referring to their religious creed, successfully oppose such measures, as Amish parents may retreat their children from public schools on the ground that these schools would infringe upon their religious convictions.
2. This conclusion may disappoint ecologists who strive for the recognition of objective values of and within nature. (Raes, 1996b) Yet, I do not see any way to escape this conclusion if one wants to avoid authoritarian states, enforcing (supposedly 'objective') values upon people without any democratic backing. If objective values within nature are in need of political - perhaps even constitutional - protection, the case for such protection should be defended on the forum of individualist democracy. If it cannot be won there, I do not see how it could be won without undermining democracy itself. In a way, this is comparable to the status of 'scientific truth' in concepts of justice. (Raes, 1996a) As 'moral truths', 'scientific truths' do not constitute in themselves sufficient reasons to force them upon persons against their will.
3. See also Pinxten's analysis of the requirements for intercultural communication in which emphasis is stressed on finding a common ground in shared problems, rather than persons or points of view. (Pinxten, 1994, 100)
4. In discussions on pornography, a lot depends on the very definition of what is considered to be 'pornographic' material. Pornography may be defined

as (a) a moral wrong, (b) a moral good or (c) a non-moral issue. Thus, 'the right to pornography' (as a 'liberty', not as a 'claim-right') may either be argued *because* it is a moral or non-moral good, or *although* it is a moral wrong. But whether one relates the notion of pornography intrinsically to (the showing/describing of) sexual acts, considered to be morally reprehensible, or uses a morally neutral or positive definition, one cannot escape the task of arguing what exactly makes (some or all) pornography a moral wrong or good. In my view, the main issue is not what should count as a 'sexual perversity' (either in terms of the acts shown or described or in terms of them being shown or described), but what may be considered an abuse of power (as in pornographic material involving children) or a degrading, sexist view on women. Not the sexuality of the context, but power relations define the eventual immorality of pornography. But then again, even if some pornography is morally reprehensible from the point of view of power relations and the norm of equal respect, it does not follow that it should be prohibited, independent from the harm - criterium (e.g. the harm that is done to those who are involved in the production of pornographic material) and (thus) the criterium of informed consent. Admittedly, the case against pornography has been strengthened by feminist authors such as Catherine MacKinnon (1989) and Andrea Dworkin (1981). If pornography is defined as *intrinsically* sexist, why should the case of pornography be treated differently from the case of racism? If pornography (by that definition) would prove to be directly harmful to those involved in its production and indirectly harmful to its consumers (because it would stimulate aggression against women) wouldn't this be reason enough to ban it in a similar way as publications or speech acts instigating racist (e.g. harmful) acts are? In my view, the answer does not lie in a defence of censorship, but in questioning the very legitimacy of censorship, whether of sexist or of racist opinions. Particularly in this area, the state should limit its prohibiting interference with what directly harms others. Ideals of the good should be promoted by other means than censorship. (Raes, 1995)

5. Imprisonment may be justified in terms of the protection of society and in terms of its deterrent effects, but there is only scanty evidence that it contributes in any way to change the prisoner's moral convictions. On the contrary, empirical evidence rather points in the opposite direction. Whatever justifications there may be for punishment, changing 'the convictions of the convict' in a moral and not a mere prudential sense, is the least convincing one.

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