

THE LIBERAL DOCTRINE OF STATE NEUTRALITY: A TAXONOMY*

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INTRODUCTION

The doctrine of the ethical neutrality of the state is frequently invoked by liberal theorists in examinations of the ambit of state authority in relation to moral issues. Professor Jeremy Waldron claims that the ancestry of the idea of the 'ethical neutrality' of the state may be traced back through John Stuart Mill's essay *On Liberty* and Immanuel Kant's *Metaphysical Elements of Justice* at least as far as John Locke's *Letter Concerning Toleration* and maybe even further.¹ While many, perhaps all, liberal theorists endorse some form of the doctrine, issues pertaining to both the substance and application of the doctrine are far from being settled. In his essay entitled *Legislation and Moral Neutrality*, Waldron observed that there is not just one doctrine of liberal neutrality, or one liberal view, but rather several such views, 'each based on premises and yielding practical requirements that differ subtly from those involved in each of the others'.² From this observation, Waldron concludes that:

Different lines of argument for the liberal position will generate different conceptions of neutrality which in turn will generate different and perhaps mutually incompatible requirements at the level of legislative practice.³

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¹ Waldron, J. *Liberal Rights. Collected Papers (1981-1991)* London: Cambridge University Press, 1993, 143.

While the idea of neutrality may be conceptually related to the notion of toleration these earlier theorists did not mention neutrality as such and it appears that at some point these two concepts of toleration and neutrality have become blurred by a presumption that in order to be tolerant one must also be neutral.

² Waldron, J. *Liberal Rights. Collected Papers (1981-1991)* London: Cambridge University Press, 1993, 143.

For the major works of Dworkin, Ackerman and Nozick covering the subject of neutrality see Dworkin, R. *A Matter of Principle* Cambridge: Harvard University Press, 1985. Hampshire, S. (ed.) *Liberalism in Public and Private Morality*. Princeton: Princeton University Press, 1978. Nozick, R. *Anarchy, State and Utopia* Blackwell, 1984; Ackerman, B. *Social Justice and the Liberal State*. New Haven: Yale University Press, 1980; 'What is Neutral about Neutrality?' (1983) *January Ethics* 93.

³ Waldron, J. *Liberal Rights. Collected Papers (1981-1991)* London: Cambridge University Press, 1993, 152. Such a position is acknowledged by Waldron to be contrary to that of Bruce Ackerman in his work *Social Justice in the Liberal State*.

Since the neutrality doctrine, or some variation on it, is frequently invoked by liberal theorists to defend legislation such as the *Rights of the Terminally Ill Act 1995* (NT) and the *Acts Amendment (Abortion) Act 1998* (WA), this paper seeks to provide a taxonomy of the various interpretations of the doctrine which are currently defended by scholars of jurisprudence in the liberal tradition and to point to the various difficulties each position faces in defending the proposition that the doctrine is not biased against non-liberal positions⁴ Although the doctrine has been the subject of criticism from scholars within the natural law tradition of Catholic jurisprudence, the purpose of this article is not to rehearse their criticisms but rather to examine the various versions of neutrality from the perspective of the internal logic of their positions.⁵

I

THE NEUTRALITY OF POLITICAL LIBERALISM

The major theoretical division within the liberal tradition is between those theorists who believe that the state ought to remain neutral even with respect to the promotion or suppression of liberal philosophical claims, and those, like William Galston and Joseph Raz, who argue that exemptions may be made for the promotion of particular liberal values. This difference is summarised by the terms 'political liberalism' and 'perfectionist liberalism'. The former, favoured by John Rawls and Charles Larmore, refers to a set of values which though 'liberal' are not meant to be conceptually dependent on any particular philosophy of liberalism. According to the political liberals the values which may be legitimately promoted by the state must be distilled from the philosophy of liberalism in such a manner that no trace of the philosophy remains, but merely a substrate of free-floating values for the 'domain of the political', that is, the legislative, judicial and executive branches of government.⁶ This is because the property of neutrality could not be sustained if the state is seen to be favouring any particular philosophical or theological outlook, be it Liberal, Marxist, Secular-humanist, Judeo-Christian or Islamic. This process of distillation which Rawls describes as 'political constructivism'

wherein Ackerman posits the argument that it is both possible and desirable to be as liberally noncommittal about the justification of neutrality as we are about the issue of the good life itself

⁴ These Acts altered the *Criminal Code* 1913 (WA) s199 and the *Health Act* 1911 (WA) s344 to make abortion legal and widely available.

⁵ For criticisms from a natural law perspective: George R 'Public Reason & Political Conflict' (1997) *Yale Law Journal* 106

⁶ Larmore, C *Liberalism and the Neutrality of the State Patterns of Moral Complexity*; London: Cambridge University Press, 1987; Rawls J *Political Liberalism* New York: Columbia University Press, 1993

invokes the doctrine of neutrality so as to preclude particular non-liberal conceptions of the good from becoming a part of the 'domain of the political', that is, from being enshrined in legislation or forming some element of the jurisprudential framework of the judiciary.⁷

This process of the distillation of the philosophical foundations of liberalism from the political values of liberalism is, however, highly problematic. Eamonn Callan, for example, has described political liberalism as a 'closet ethical liberalism' since a partially comprehensive doctrine of the sort that ethical liberals have traditionally advanced is embedded in Rawls' idea of the reasonable.⁸ Similarly, Thomas Nagel has argued that Rawls' particular version of neutrality is a 'bogus neutrality' since it has the non-neutral effect of 'discounting the claims of those conceptions of the good that depend heavily on the relation between one's own position and that of others'.⁹ Waldron believes that this criticism is unjustified since 'the liberal has not arbitrarily plucked his account of what it is to have a conception of the good out of the air'. Rather, 'he has settled on that view of the subject matter for his concern because of the fundamental principles and values that underlie his position'.¹⁰ Waldron also believes that communitarian conceptions of the good involve an 'urge by people to implicate themselves in the moral governance of others' and as such, communitarian conceptions are not in a class of views among which the liberal thinks there is good reason to be neutral.¹¹

However the problem Waldron and other protagonists of some form of the doctrine of neutrality have is the difficulty of escaping from the

⁷ Rowland T.A. & S.A. 'The Political Values of the Public Conception in the work of John Rawls' (1995) 18(3) *University of Queensland Law Journal*.

⁸ Callan, E. 'Political Liberalism and Political Education' (1996) Winter, *Review of Politics* 22.

Callan uses the term 'ethical liberalism' rather than Rawls' 'comprehensive liberalism' since he argues that the term 'comprehensive' applies to liberalisms whose constitutive ethical doctrine is only partially comprehensive and it is doubtful whether any truly liberal ethical doctrine could be fully comprehensive since its distinctive emphasis on freedom, diversity and innovation are not obviously consistent with the idea of a systematic ordering of all relevant values which a fully comprehensive ideal entails.

For a philosophical defence of the principle that no conception of rationality is value-neutral see: Putnam H. *Reason, Truth and History*. London: Cambridge University Press, 1981; MacIntyre A. *Whose Justice? Which Rationality?* London: Duckworth Press 1988.

⁹ Callan, E. 'Political Liberalism and Political Education' (1996) Winter, *Review of Politics* 22, 165. For the quotation from Nagel see Daniels N. (ed) *Reading Rawls: Critical Studies of A Theory of Justice*. London: Basic Books 1975 9-10.

¹⁰ Waldron J. *Liberal Rights: Collected Papers (1981-1991)*. London: Cambridge University Press 1993, 166.

¹¹ Waldron, J. *Liberal Rights: Collected Papers (1981-1991)*. London: Cambridge University Press, 1993, 166.

criticism that precisely because 'the liberal has not arbitrarily plucked his account of what it is to have a conception of the good out of the air' and because he has, 'settled on that view of the subject matter for his concern because of the fundamental principles and values that underlie his position' that the term 'bogus' is applied to the neutrality doctrine.¹² Further, Waldron's belief that communitarian conceptions of the good involve an 'urge by people to implicate themselves in the moral guidance of others' raises the question of whether this is not also true of liberal conceptions? Waldron himself makes reference to the need to examine more thoroughly the whole notion of a 'conception of the good'. It may be that such an examination would reveal that conceptions of the good are composed of both: (1) a list of values or goods of human flourishing, and (2) some kind of theoretical framework for rank ordering those values in situations of competition. It may also be the case that a major difference between liberals and non-liberals is not the fact that non-liberals wish to implicate themselves in the moral guidance of others, and that liberals wish to leave individual citizens to their own devices; but rather that they both wish to implicate themselves in matters of moral guidance of others and that they simply differ both as to the values which make it onto their lists of goods, and also, as to the framework which is used to decide what to do when difficult ethical issues arise requiring a rank ordering of the goods. For example, if one considers the case of abortion, some non-liberals may take the view that the good of life as a value is not commensurable with other goods, that is, that it cannot be traded in for the sake of any other good; whereas most, if not all, liberals will take a position contrary to this. If both of these positions are classified as ethical, then the doctrine of neutrality is 'bogus' if it is invoked to defend the liberal-preferred pro-choice position. In many cases where the issue is precisely what value to give the good of life or how to rank order this good in relation to other goods, the state will be placed in a zero-sum position. Any preference for a liberal position will have the effect of working directly against the competing non-liberal positions. As Eric Mack observed:

No appeal to state neutrality or to the beauty of the private/public morality distinction can settle this [abortion] dispute. What matters is who is right about where the rights lie.¹³

Perfectionist liberals, in contradistinction to the political liberals, acknowledge the close reliance of versions of perfectionist liberalism upon liberal philosophy in general, though they still seek to invoke the neutrality doctrine in some form so as to circumscribe the powers of the

¹² Callan, E. *Political Liberalism and Political Education* (1996) Winter. *Review of Politics* 22

¹³ Mack, E. *Liberalism, Neutralism and Rights in Religion, Morality and the Law, Nomos XXX*. Cambridge: Harvard University Press 1988. 47

state to take action in relation to the enforcement of particular non-liberal values. Foremost among the perfectionist liberals is Joseph Raz who identifies three different interpretations of the neutrality doctrine: (i) neutrality as an 'anti-perfectionist stance', (ii) narrow political neutrality, and (iii) comprehensive political neutrality.

II

NEUTRALITY AS AN ANTI-PERFECTIONIST STANCE

Raz associates the notion of neutrality as an 'anti-perfectionist stance' with the work of Robert Nozick. Its principal characteristic is the idea that:

No political action may be undertaken or justified on the ground that it promotes an ideal of the good nor on the ground that it enables individuals to pursue an ideal of the good.¹⁴

This position is in substance identical with that of Ronald Dworkin according to whom legislators and other state officials:

must be neutral on what might be called the question of the good life or of what gives value to life. Since the citizens of a society differ in their conceptions [of what makes life worth living] the government does not treat them as equals if it prefers one conception to another, either because the officials believe that one is intrinsically superior or because one is held by the more numerous or powerful group.¹⁵

This definition does not however tell us precisely what Dworkin understands to be the essence of the property of neutrality. In other words, it does not tell us what, in practice, it means for legislation to be neutral about conceptions of the good, and what it means for judges and public servants to be neutral. Moreover, Dworkin does not provide an argument against the proposition that while there are a plurality of conceptions of the good, the role of elections is to give citizens an opportunity to vote for representatives who act as advocates and eventually legislators for their particular conceptual preferences. In short, he does not provide an argument against the notion that parliament is an acceptable arena for the competition among different conceptions of the good. Implied in his failure to entertain this theory is the idea that measures need to be taken to define the ambit of 'electoral jurisdiction'. In other words, just as judges and legislators and government administrators have constitutionally defined jurisdictional boundaries, the neutrality doctrine is offered as an extra-constitutional brake on the possibility that the majority might vote for policies which have a

¹⁴ Raz J. *The Morality of Freedom*. Oxford: Clarendon Press, 1986. 114; Nozick R. *Anarchy, State and Utopia*. Blackwell, 1984.

¹⁵ Dworkin, R. *A Matter of Principle*. Cambridge: Harvard University Press, 1985. 144.

decidedly non-liberal character. To successfully achieve its aims Dworkin's definition needs to be developed to distinguish between conceptions of the good where there is a free for all competition, where a majority of votes in a legislature is sufficient to justify a policy preferring one conception to another, and conceptions about issues which are deemed to be beyond the jurisdiction of the electorate and subsequently the legislature. It is perhaps because of the underdeveloped nature of the concept as defined by Nozick and Dworkin that Raz identifies this first type of neutrality as a mere 'anti-perfectionist stance', rather than as a fully developed doctrine of neutrality.

III NARROW POLITICAL NEUTRALITY

The second type of interpretation identified by Raz is what he terms, 'narrow political neutrality'. This is the principle that:

No political action may be undertaken if it makes a difference to the likelihood that a person will endorse one conception of the good or another, or to his chances of realizing his conception of the good unless other actions are undertaken which cancel out such effects.¹⁶

The difficulty with this conception is that it makes no provision for the fact that some conceptions of the good may be more socially worthwhile than others. For example, different conceptions of the good give greater and lesser value to the defence of particular social institutions. Policies which seek to be neutral regarding such conceptions end up having an impact upon both social and political culture. For example, a policy which sought to enforce child maintenance payments through the taxation system by placing levies on absconding parents would seriously disadvantage those whose conceptions of the good included not accepting responsibility for the financial support of one's children. Conversely, however, a government policy which taxes the community as a whole to support state welfare payments to abandoned children disadvantages those parents who do support their own children since they have to contribute more money in taxes to provide support for the dependents of other less responsible people. The attempt to formulate a calculus whereby government policy in matters relating to the function of social institutions will neither advantage nor disadvantage the proponents of any particular conception of the good is arguably a theoretical impossibility since even government inaction in certain areas will itself have an effect on the fortunes of different conceptions of the good, and on the fortunes of different social institutions such as the family.

¹⁶ Raz, J. *The Morality of Freedom*. Oxford: Clarendon Press, 1986. 115

IV COMPREHENSIVE POLITICAL NEUTRALITY

The third interpretation which Raz describes as 'comprehensive (political) neutrality' is the principle that:

One of the main goals of government authority, which is lexically prior to any other, is to ensure for all persons an equal ability to pursue in their lives and promote in their societies any ideal of the good of their choosing.¹⁷

The difference between comprehensive and narrow neutrality is that the first consists in 'helping or hindering the parties in equal degree in all matters relevant to the conflict between them'; whereas the latter consists in 'helping or hindering them to an equal degree in those activities and regarding those resources that they would wish neither to engage in nor to acquire but for the conflict'.¹⁸

In either event the same problems would arise in the formulation of government policy guidelines. If neutrality were to be promoted as a basic principle of good government, no government decision would ever be safe from challenge on this ground, as it is impossible to predict all the social and economic consequences of a policy. Policies would be rendered vulnerable to attack from the smallest of interest groups on grounds of their likely non-neutral effect. This would give rise to a political problem of just how many members of a state would have to be disaffected before a court would strike out legislation on the grounds that it fails to pass the neutrality test. Liberal political philosophy would thereby find itself in the ironic position of having begun its intellectual life with a utilitarian 'greatest good for the greatest number' principle, only to arrive at the inverse position of 'the greatest good is that which does not displease the smallest number'.

V BENTHAMITE NEUTRALITY

A fourth interpretation identified by Eric Mack in his essay *Liberalism, Neutralism and Rights* is that which he describes as 'Benthamite neutrality'. According to this interpretation any promotion or thwarting of specific life plans or conceptions of the good would be entirely incidental to the social maximisation of whatever forms of satisfaction are taken to have intrinsic value.¹⁹ This type of neutrality relates to one

¹⁷ Raz, J. *The Mortality of Freedom* Oxford: Clarendon Press 1986, 115

¹⁸ Raz, J. *The Mortality of Freedom* Oxford: Clarendon Press, 1986, 122

¹⁹ Mack, E. *Liberalism, Neutralism and Rights in Religion, Morality and the Law, Nomos, XXX* Cambridge: Harvard University Press 1988, 47

aspect of Jeremy Waldron's position according to which if there may be certain goods which can reliably be said to be regarded as values by everyone, no matter what their conception of the good life, and assuming that such a class of goods can be specified, any attempt to provide the principles for their distribution will not in itself be a violation of the doctrine of neutrality. In this later category Waldron places what Rawls describes as 'primary goods'. These include health, bodily integrity, (of those outside the womb), wealth, self-respect, negative liberty, and some degree of education. Concretely, Waldron argues that if a class of goods can be specified, for example, the list offered by Rawls, then the doctrine of neutrality will not be violated if a legislator formulates principles for the distribution of these goods which have the effect of favouring particular social groups. For example, if one of the goods is the provision of a national educational system, the doctrine of neutrality will not be violated by the fact that citizens whose conceptions of the good includes having a private education will be less advantaged by a national education policy than those who desire to make use of state funded educational institutions.

In this treatment of the issue of primary goods, Waldron, however, begs a number of questions. Having stated that some subjects are the law's business and others not, though not defining what they are, Waldron asserts that it is possible to formulate a framework of principles and institutions to govern the supply and distribution of goods which will not 'wrongly discriminate between the adherents of various conceptions of the good life'. He fails to explain however how this is either theoretically or practically possible. He acknowledges that the principles being promoted may fall into a general category of morality, but claims that this does not violate the neutrality principle if a class of primary goods can be specified. He believes that the Rawlsian list of primary goods are values accepted by everyone, but this is merely an unsubstantiated presumption upon which the rest of his account of the neutrality of legislative effect stands or falls. While Rawls' list of primary goods may 'reliably be said to be regarded as values by everyone' in the sense that most persons wish to be healthy not sick, financially secure, not destitute, educated not ignorant and self-respectful rather than self-loathing, it is far from agreed that: (1) this list is exhaustive;²⁰ (2) that it is the duty of the state to provide for any such goods;²¹ (3) whether the

20 John Finnis, for example, has described this list as a radical emaciation of human good for which no satisfactory reason is available. Finnis J *Natural Law and Natural Rights*. Oxford: Clarendon Press, 1980, 106

21 Some theorists, including those who are regarded as liberal theorists challenge the idea that the state is the best provider of social welfare and seek to demonstrate that the institutions which are best placed to provide social welfare are those mediating institutions such as private schools, university colleges, and private hospitals which stand in a position mid-way between the state and the individual

state is as a matter of empirical fact, the best provider of these goods; and (4) there is the problem that in some circumstances legislators will be in a zero-sum position whereby simple inactivity or abstention from involvement in a particular issue will have the effect of favouring one group in the conflict. In the context of problems (2) and (3) not only are there divisions between liberals and non-liberals, but within the liberal tradition itself there is a wide variety of opinion about exactly what goods the state is obliged to provide and what goods the state is competent to provide. There is, moreover, the further problem that the fairness of the process whereby values are classified as either acceptable or unacceptable is begged. Why for example, must the ambit of the 'law's business' be defined by reference to liberal values?

VI

RAZ'S PERFECTIONIST LIBERALISM

The main theoretical problem as Raz sees it is to 'find any reason for supporting politically some elements of a conception of the good and not others that are admitted to be valid and valuable.'²² A basic premise in Raz's search for such a reason is that 'perfectionism' [presumably here defined as the idea that some conceptions of the good are more worthwhile than others] is compatible with moral pluralism, which 'allows that there are many morally valuable forms of life which are incompatible with one another'. A second premise is that 'supporting valuable forms of life is a social rather than an individual matter' and accordingly certain valuable forms of life, for example, monogamy, 'require a culture which recognises it, and which supports it through the public's attitude and through its formal institutions'.²³ Raz believes that 'perfectionist ideals require public action for their viability' and that 'anti-perfectionism in practice would lead not merely to a political stand-off from support for valuable conceptions of the good', but it would 'undermine the chances of survival of many cherished aspects of our culture'.²⁴

Implicit in these premises is Raz's rejection of what he terms the 'moral individualism' of rights-based theories of morality. Raz argues against the presumption that the protection of liberty rests primarily on respect for individual rights and argues that the liberal tradition is not unequivocally individualistic, and that some of the typically liberal rights depend for their value on the existence of a certain public culture, which their protection serves to defend and promote. Raz also argues that the justification for providing entrenched constitutional protection for typical

²² Raz J *The Mortality of Freedom* Oxford: Clarendon Press, 1986. 140

²³ Raz J *The Mortality of Freedom* Oxford: Clarendon Press. 1986. 162

²⁴ Raz J *The Mortality of Freedom* Oxford: Clarendon Press. 1986. 162

liberal rights is not that they articulate fundamental moral or political principles, nor that they provide for the protection of individualistic personal interests of absolute weight, but rather that they 'maintain and protect the fundamental moral and political culture of a community through specific institutional arrangements or political conventions.'²⁵

Unfortunately Raz does not define what he regards to be the constitutive elements of a political culture. He does however acknowledge that there are socially worthwhile and socially unworthwhile conceptions of the good and that these may be fostered or hindered in their flourishing by the background political culture. In this sense Raz is in agreement with the Aristotelian position according to which a citizen's social environment is deemed to influence his or her ability to flourish. Where Raz parts company with the Aristotelians is in his principle that the end of society is the fostering of individual autonomy rather than the fostering of individual virtue; and it is this principle which turns his philosophy full-circle back to the problem of neutrality. The difficulty once again becomes that of the unresolvable conflict between a principle of autonomy which makes the individual 'self' the arbiter of what is good or worthwhile, against a principle that some conceptions of individual autonomy are really not 'morally' or 'socially' valuable. In the latter case Raz does not provide any criteria for distinguishing the worthwhile from the unworthwhile social goods and appears to hold that such judgments are a matter of common-sense observation or intuition. Raz's position is caught mid-way between Aristotle and Finnis, on the one side, and Rawls and Dworkin on the other.

VII

NEUTRALITY AS A POLITICAL VIRTUE

While other liberals do not share Raz's Aristotelian focus on the importance of the nature of political culture, they do however come close to the issue by positing yet another notion of neutrality, this time not as a doctrine or an anti-perfectionist stance, but as a political virtue. In the context of the practicality of the application of the neutrality of legislative intention doctrine, Waldron suggests that while it is difficult to determine what the reasons behind a particular piece of legislation were, the doctrine could be understood primarily as a basis for political morality in a narrow sense - that is, as a basis for each lawmaker to evaluate his own intentions - rather than as a doctrine for evaluating legislation as such. Waldron asserts that 'perhaps we should not think of political morality simply as a set of principles for judging outcomes' but rather 'its primary function is to guide action and to constrain political

²⁵ Raz, J. *The Morality of Freedom*. Oxford: Clarendon Press, 1986, 245

thought.²⁶ If this interpretation of the neutrality of legislative intent is accepted then it is not so much a property of a particular piece of legislation, but some species of virtue. Indeed Waldron describes neutrality as a 'specifically political virtue' and states that the requirement of neutrality is generally taken to be specific to *political* morality.²⁷ Here he is in accord with Bruce Ackerman who has argued that rather than linking liberalism to ideas of natural right or imaginary contract, we must learn to think of liberalism as a way of talking about power, a form of political culture.²⁸ According to Ackerman, 'the notion of constrained conversation should serve as the organising principle of liberal thought.'²⁹ Presumably what must be 'restrained' are certain perfectionist ideas. It is precisely this interpretation of the neutrality doctrine which has been the subject of criticism from scholars classified as communitarians, principally Charles Taylor and Alasdair MacIntyre.³⁰

MacIntyre interprets the concepts of neutrality and 'public reason' or 'public discourse' as a means of achieving a proscription of appeals to first principles in public debate. Thus he states:

Conventional politics sets limits to practical possibility, limits that are characteristically presupposed by its modes of discourse rather than explicitly articulated. It is therefore important in and to the political sphere that there should not occur extended argumentative debate of a kind that would make issues about these limits explicit and therefore matter for further debate. And one means of achieving this is to proscribe appeals to first principles.³¹

MacIntyre treats such proscriptions as the jurisprudential adoption of an emotivist moral philosophy and as such he is opposed to it. However MacIntyre's own work on the relationship between virtue and political culture lends strength to the interpretation that neutrality is in fact a particular type of political virtue associated with the promotion and defence of a liberal political order. Moreover, like all virtues, the neutrality concept is embedded within a particular metaphysical framework. The metaphysical framework underpinning the concept involves a reconstruction of the pre-liberal understanding of the relationship between the domains of the ethical and the political.

²⁶ Waldron, J. *Liberal Rights. Collected Papers (1981-1991)* London: Cambridge University Press, 1993, 151.

²⁷ Waldron, J. *Liberal Rights. Collected Papers (1981-1991)* London: Cambridge University Press 1993, 155.

²⁸ Ackerman, B. *Social Justice and the Liberal State*. New Haven: Yale University Press, 1980, 6.

²⁹ Ackerman, B. *Social Justice and the Liberal State*. New Haven: Yale University Press 1980, 10.

³⁰ This categorisation is commonly used notwithstanding MacIntyre's eschewal of the label. MacIntyre, A. 'The Spectre of Communitarianism' (1995) March/April *Radical Philosophy*, 34-35.

³¹ MacIntyre, A. *Politics, Philosophy and the Common Good* (1997) *Studi Perugini*.

VIII

THE LIBERAL RE-CONSTRUCTION OF THE DOMAINS OF THE ETHICAL AND POLITICAL

Implicit in Waldron's use of the notions of a 'political virtue' and a 'political morality' is the principle that the realm of politics has its own particular moral values and virtues³² Instead of the *raison d'être* of politics being the formulation of social policies to realise some list of goods of human flourishing, politics is treated as conceptually prior to ethics, and an ethical system is formulated with reference to a set of sociological factors (such as the existence of different conceptions of the good life among citizens) which characterise the liberal conception of the 'domain of the political' This turns on its head the Thomistic conception of politics as a sub-branch of ethics, and returns to the classical Greek idea that political science is the 'most truly architectonic science'³³ In effect it makes politics the 'queen of the sciences' In this re-construction of the domains of the ethical and political what are popularly regarded as 'moral issues' are transmuted into 'political issues' Rawls, for example, characterises the abortion issue as a *political* issue involving 'three important *political* values': (1) 'the due respect for human life', (2) 'the ordered reproduction of political society over time, including the family in some form', and (3) 'the equality of women as equal citizens.'³⁴ Precisely what he means by the last two of these 'political' principles is not clear. For example, it is not clear what Rawls means by 'ordered reproduction', nor is it clear how the equality of women (presumably qua men) has anything to do with abortion. However, notwithstanding these ambiguities, the fact remains that he has characterised the issue as one involving three 'political' values rather than as three 'ethical principles' By characterising the issue in this way, that is, as 'political' rather than as 'ethical', Rawls is able to justify a *laissez-faire* abortion policy on the part of the state

³² The project for the development of a set of virtues based on liberal theory is well advanced in the work of William A. Galston. Galston W.A. *Liberal Purposes. Goods, Virtues and Diversity in the Liberal State*. London: Cambridge University Press, 1991; and Macedo, S. 'Charting Liberal Virtues. Nomos, XXXIV. New York: New York University Press 1992

³³ Although St Thomas Aquinas took over much of the Aristotelian framework, one major difference between St Thomas and Aristotle is that St Thomas had the advantage of Christian Revelation and therefore argued that 'the ultimate end of the whole universe is considered in theology rather than taking over the Aristotelian idea that it belongs to political science to treat the ultimate end of human life'. St Thomas Aquinas, *Commentary on Aristotle's Nicomachean Ethics*, trans. C.I. Litzinger O.P. Dumb Ox Press, 1993. Lecture II: The Supreme End of Human Affairs, 7-11

³⁴ Rawls, J. *Political Liberalism*. New York: Columbia University Press, 1993. 243, fn 32

While the nature of politics is not directly addressed by the neutrality theorists, implicit in their theories is a notion of democracy and representative government whereby legislators are not simply the representatives of a particular social group elected to advance the interests of that group in the formulation of government policy. Rather, the doctrine of neutrality operates so as to fetter legislative freedom and to divide moral values into categories of 'acceptable' and 'unacceptable' for the domain of the political. In other words the purpose of the doctrine is to proscribe certain values from receiving legislative endorsement. In this context the neutrality of the legislator takes the form of an abstention from any behaviour which might help or hinder the promotion of the unacceptable value.

CONCLUSION

There are at least four interpretations of the doctrine: (1) a doctrine regarding the kinds of issues which might be subject to legislation; (2) a doctrine about the kinds of justifications or reasons legislators may promote to defend or oppose particular measures; (3) a special kind of 'doctrine of double effect' or 'Benthamite neutrality' whereby it is acceptable to pass legislation which will have an indirect effect of advantaging some social group, but which was not formulated with that non-neutral effect in mind as the primary objective; and (4) the theory pertaining to the exercise of a particular kind of liberal political virtue. The historical transition has therefore been from a notion of the State's tolerance of competing theological propositions to a conception of neutrality which links the idea of tolerance to the idea of equality. The notion of equality which was originally confined to the legal relationship between the citizen and the state is in the process of being transposed to the realms of ethics and culture. Such an analysis confirms the assessment of John Gray that:

What the neutrality of radical equality mandates is nothing less than the *legal disestablishment of morality*. As a result, morality becomes in theory a private habit of behaviour rather than a common way of life. The practical legal and political result of these newer liberal ideas is found in policies of reverse discrimination or positive discrimination and in the creation of group or collective rights.³⁵

It may be argued that the neutrality doctrine occupies the position in contemporary liberal theory which the concept of fraternity occupied in earlier liberal theory. Equality remains as one of the three 'theological

³⁵ Gray, J. Tolerance and the Currently Offensive Implication of Judgement in Anderson, D. (ed). *The Loss of Virtue*. National Review Publications, 1992.

³⁶ The three theological virtues are faith, hope and love. Within the liberal tradition they are replaced by the political virtues of liberty, equality and fraternity.

virtues' of liberal theory with liberty represented by the concept of individual autonomy.³⁶ In the absence of genuine social solidarity the relationship between citizen and citizen is purely legal. Genuine solidarity of the kind which fosters fraternity is found only in some functional families and in some institutions of civil society where membership is voluntary and members are bound together by a mutual acceptance of particular values. In the absence of fraternity or social solidarity the doctrine of neutrality serves to define the character of the relationship between citizen and citizen, and, between citizen and state, in such a manner that politics is no longer 'the location of the moral virtues insofar as these virtues touch others' but rather the 'pursuit of civil war by other means'.³⁷ The liberal list of goods of human flourishing includes equality (underpinned by a belief in moral and cultural relativism), autonomy (underpinned by a belief that the individual will to power or self-assertion is the highest expression of individual freedom) and membership of a political culture designed to frustrate policies which will have the effect of promoting values other than equality and autonomy. Once autonomy and equality are enshrined as absolute goods there is no longer room for a conception of politics as the pursuit of the common good since any conception of a common good requires the application of value judgements which always *ipso facto* support or oppose some particular conception of the good. This is unless the common good is defined as the promotion of autonomy and equality. In this case there is a convergence and alliance of the liberal and socialist traditions. However the alliance is not stable. Once the good of 'autonomy' begins to be frustrated by the good of 'equality' new political and jurisprudential conflicts will emerge. The critique of liberal jurisprudence from the perspective of the Critical Legal theorists and from the proponents of a post-modern jurisprudence may be construed as a sign of tension within the alliance. In such circumstances wherein legal philosophy is called upon to adjudicate between the competing claims of the goods of autonomy and equality, the neutrality doctrine will be completely ineffective. It is by its own terms powerless to interfere in such a conflict. Its ideological power is therefore limited to a period in social history where there is still a socially significant opposition to a political culture which treats autonomy and equality as the basic goods of human flourishing. In this period it operates as a foil against the claims of the natural law tradition of jurisprudence, according to which a knowledge of the goods of human flourishing is the fruit of rational, objective discernment, rather than a rational, subjective preference.

³⁷ The description of liberal politics as civil war by other means has been popularised by Alasdair MacIntyre.

The 1930's Kisch High Court cases¹ examined the arbitrary nature of the Australian Immigration Policy of the time. The Immigration Policy was made manifest in the Immigration Restriction Act 1901, which was introduced by Prime Minister Edmund Barton. The Act arose in response to a concern that 'non-whites would lower the civilization and standard of living of the British people in Australia'.² The Immigration Restriction Act required immigrants to pass a written test in any European language. Government officials were vested with considerable discretion under the Act as to which European language the test would be conducted in for each applicant.

Egon Kisch, a multi-lingual Czech peace activist attempted to enter Australia for the purpose of speaking at political rallies. Government officials tried twice to stop him and twice he appealed to the High Court of Australia. Kisch was successful in his first appeal, which was against the Government's decision to exclude him on the basis that he was a "prohibited immigrant" pursuant to the Act. Justice Evatt determined that the requirements of the Act had not been complied with.

Kisch was also successful in his second appeal, which was in response to the Government's demand that he take a dictation test in Scottish Gaelic. Kisch was successful in arguing that "Scottish Gaelic" was not a "European language" within the meaning of the Immigration Restriction Act 1901.

Justice Hasluck takes the story of the plight of Egon Kisch and parallels it to the legendary Kafka in his novel, *Our Man K*.³ The following is an article based on the recently published work.

REINVENTING THE KISCH CASE

Nicholas Hasluck*

I have always been intrigued by the first line of Kafka's tale *The Trial*⁴, a sentence suggesting that the law is a labyrinth, a shadowy realm where half-shut doors occasionally afford a glimpse of justice, but more by chance, it seems, than by design. *Someone must have been telling lies*

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¹ *The King v Wilson and Another, Ex parte Kisch* [1934] 52 CLR 234; *The King v Carter, Ex parte Kisch* [1934] 52 CLR 221; *The King v Dunbabin, Ex parte Kisch* [1935] 53 CLR 434; *The King v Fletcher and Another, Ex parte Kisch* [1935] 52 CLR 248.

² Kercher, B. *An Unruly Child: A History of Law in Australia*. Sydney: Butterworths 1995. 149.

³ Hasluck, N. *Our Man K*. Ringwood, Victoria: Penguin 1999.

⁴ Kafka, F. *The Trial*. Hammondsworth, Middlesex: Penguin, 1953.