

IMPRINTS aims to promote a critical discussion of egalitarian and socialist ideas, freed from theoretical dogma but committed to the viability of an egalitarian and democratic politics, and open to the possibility of such politics at the international level. We take for granted that most societies in the world are characterised by class oppression, but that class division does not exhaust the unjust inequalities to which their peoples are subject.

Contributions are invited on topics such as the theory and practice of equality in domestic and global contexts, the theory of history, the normative foundations of social inquiry; and on social inequality, political practice, and institutional change. The criteria for the acceptance of papers include analytical power and empirical rigour; no school of thought or intellectual tradition is excluded, though we are committed to the view that the world remains a rationally intelligible place.

Editor

Catriona McKinnon

Associate Editors

Christopher Bertram

Harry Brighouse

Alan Carling

Saladin Meckled-Garcia

Axel Gosseries

Jeremy Moss

Steve Smith

Published three times a year by the *Imprints* editorial collective.

ISSN 1363–5964

All rights reserved. No part of this publication may be reproduced, stored in a retrieval system or be transmitted in any form or by any means (electronic, mechanical, recording, photocopying or otherwise) without the written permission of the *Imprints* editorial collective.

Copyright © *Imprints* 2005

Interview:

Legal Theory, Liberalism, Value Incommensurability, Equality and Authority: An Interview with Joseph Raz

Could you say a little about how you came to political philosophy and legal theory. Who do you consider to be your biggest influences, and what do you take to be your most intellectually formative period?

I became interested in philosophy in my early teens. I have no idea how it happened. But when the time came to go to University I enrolled to read law. After all one has to be responsible, and the prospect of unemployment at the end of a BA in philosophy loomed large. Luckily, I got to know the university registrar (at the Hebrew University where I studied) who was a keen philosopher, and he immediately suggested that I should specialise in legal philosophy, and that I read philosophy in parallel with my legal studies. I intended to audit courses in philosophy in any case, and his encouragement meant a lot to me. It also produced

© 2005 *Imprints*, Politics, University of Reading, RG6 6AH, United Kingdom.

the opportunity to read for a D.Phil. in Oxford as a British Council scholar. (I am afraid I turned out to be everything the British Council does not want: going to Oxford rather than to Exeter, or one of the other civic universities where they would have liked me to go, and eventually settling in Britain rather than taking to my mother country whatever knowledge and understanding I acquired). So my turning to legal philosophy was opportunistic: taking advantage of the opportunity to study in Oxford with H. L. A. Hart, an opportunity which depended on doing legal philosophy. Later it appeared that my chances of getting a teaching job at Oxford were much better if I applied for a position within the faculty of law, which of course meant staying close to legal and political philosophy. While always interested in politics, and briefly active in Israeli politics after returning to Israel in the late 60s, I shied away from mainstream political philosophy till a decade later, when somehow I drifted into it. It was difficult to avoid at the time. Or rather Rawls was difficult to avoid, for someone with my interests. I have enormous respect for his contribution to practical philosophy in general, but I have to admit that initially his views appeared to me so implausible and his arguments for them so porous that it seemed undignified to expose their flaws. Well, I could not have been more wrong. His influence soon made clear that it was essential to expose the flaws in his position, and I tried to contribute my share. I concentrated primarily not on direct criticism, though I have done some of that, but on presenting a version of an alternative approach. There was a time when Rawls's triumph seemed to sweep all in front of him, with the danger that people might even forget that his is a novel way of conceiving of politics and political ideas. The surest way of winning an argument is to make it appear as if there are no alternatives, and for a brief period it seemed as if Rawls might enjoy this kind of success.

You may say that my intrusion into political philosophy started, and continues, even in my answers to your questions, against my better judgement. I never felt qualified to pontificate – professionally, or ex cathedra; I do not doubt my right and duty to have political views like any other citizen – about how societies should be run or organised. I believe that one needs more experience of practical affairs than I have, and a good deal of knowledge of economics and social studies, to be really good at political philosophy. Such background is not needed, and

is certainly not needed to the same degree, in dealing with all issues. The limits on the possible achievements of good philosophers who are short on that non-philosophical background are not absolute. It is all a matter of degree. But it explains why I am not sure that countries, like contemporary France, which do not have much political philosophy in the analytical styles (Rawls, Nozick, Kymlicka, Dworkin, etc.) necessarily miss much.

One question calling for philosophical reflection, but one which we neglect to our cost, is about the relation between political theory (philosophical even when well fed by economics and the social sciences) and political practice. There seem to be inherent limits to how detailed the conclusions of theory can be. So that the role of political action is not merely to mobilise people to implement conclusions reached by theory, but to go beyond what theory can legitimately direct in forming political ideals, and concrete programs. I would feel more comfortable writing in political theory if I had a better understanding of its limits.

I am sometimes surprised at how even today one's world of discourse is heavily influenced by personal contacts. Rawls, whom I met only a few times, and did not know at all well, apart, my thinking has been affected by reactions to people I knew: Herbert Hart, Ronald Dworkin, Bernard Williams, and others, people whose voice I could hear when reading their work, whose reactions to questions, or to my own fumbling thoughts I could – sometimes – anticipate.

You are well known for your perfectionist liberalism, and for your argument that the 'epistemic abstinence' to which political liberalism aspires is undesirable and anyway unattainable. The ideal which informs your perfectionism is personal autonomy; that is, 'the vision of people controlling, to some degree, their own destiny, fashioning it through successive decisions throughout their lives' (The Morality of Freedom, Oxford: Clarendon Press, 1986, p. 369). Could you say a little about why people have reason to value personal autonomy so understood? At one point in The Morality of Freedom you state that 'The value of personal autonomy is a fact of life. Since we live in a society whose social forms are to a considerable extent based on individual choice, and since our options are limited by what is available in our society, we can prosper in it only if we can be successfully autonomous' (p. 394). Is it the case, then, that the ideal of personal autonomy has normative force only in particular cultural contexts which

have developed so as to emphasise the significance of the individual in ethical thinking?

'Epistemic abstinence' is proposed as a type of response (there can be variations on the theme, hence I describe it as a 'type') to persistent disagreements over deeply felt moral issues in contemporary societies. It is supposed to transcend disagreement by limiting the grounds for political action at all or some levels (say, constitutional, or legislative) to considerations to which all agree. Given the likelihood that there are no such considerations this initial response is revised to refer to considerations to which all those whose views are so-called reasonable would agree if they are true to their own (disputed) principles. I fear that this position is not only illusory but unhelpful for several reasons. I'll mention only a few.

While I tend to believe that there is a fairly widespread agreement even in countries where disagreement is rife, that agreement does not extend to the doctrine of epistemic abstinence. That is, people who agree, for example, about the sanctity of human life, about the bindingness of promises and other voluntary undertakings, and much else, do not agree that political action should be based only on those of their principles to which others agree. It may appear paradoxical, but in relying on that principle one may actually command less agreement in the population than if one did not rely on it.

As I noted, supporters of 'epistemic abstinence' confine their demand for universal consent to the consent of those holding 'reasonable' views. People are reasonable and they hold their views reasonably if they respond appropriately to factors, reasons, evidence, arguments, experiences, which could modify their views, or their confidence in them. People are unreasonable and hold their views unreasonably if they are impervious to such factors, and would stick with their views come what may. Views in themselves are neither reasonable nor unreasonable, though given what we know of some people we could say that certain views are unreasonable for them to hold (even though it would be reasonable for others to have them). Some of Rawls' followers are likely to be unreasonable and their belief in his theory is unreasonable. Others, holding what are the most preposterous beliefs (see, e.g., the significant proportion of Americans who believe that there never was a successful

manned landing on the moon) may not be unreasonable in their beliefs, given their background and their experiences (e.g., of being manipulated systematically by the media on matters of this kind). Reasonableness of belief, in other words, has little to do with the contents of the belief. It is a mistake to think that those who hold views diametrically opposed to ours are unreasonable or that they are unreasonable in holding those views.

Rawls and his followers ignore all of this. They identify 'unreasonable' beliefs by their content, basically dubbing unreasonable those who disagree with what they take to be fundamental principles, and take this to be a licence to dispense with their consent. (They think that that excludes from those whose consent is required some whose views belong with religious fundamentalism, whom they are happy to disregard, but they also exclude people with views like mine, in spite of the fact that we share many of the substantive ideals of 'political liberals').

Underlying this is, I believe, a misunderstanding of the significance of the factors which require, according to Rawls and others, agreement on the principles which govern political action: respect and stability. Rawls was right to emphasise the importance of political stability, and he was right to be sensitive to its vulnerability. He did, I believe, mistakenly assume that stability depends on agreement to the principles underlying the constitution. Such agreement can fortify it, but stability depends much more on allegiance to country, or nation, or to various symbols, on people's relative economic prosperity, on the available modes of mobilisation for collective action, on basic attitudes to dissent and conformity, and on a whole variety of other psychological, social and economic factors. Consent to basic principles of legitimacy is neither sufficient nor necessary for it. The need for stability is at best a reason to value consent to the principles underlying the constitution as one among many factors which help secure stability.

The crux of the moral argument for the consent of the reasonable is however elsewhere. Many people, and not only contractualists, have come to believe that the legitimacy of any government depends on the consent of the governed to the principles under which it holds power. This is taken to be a duty of respect for people, or perhaps I should say persons, or autonomous agents, as they are generally called. The thought is that those who have the capacity to guide their life according to their

own understanding of their situation should not be subject to rule by others to which they do not consent. One fundamental assumption underlying this thought seems to me to be right: there is a significant moral difference between two ways in which one may affect the reasons which apply to people. The fact that an action may have a predictable impact on others bears on the case for and against it. In deciding how to conduct ourselves we should take other people's interests into account, as we say, and be mindful of the way our actions affect them and their options. There is, however, an additional dimension to actions such as issuing orders, making rules or demanding conduct of others. In such cases the aim of our actions is to affect the conduct of others by being recognised as people whose orders, rules and demands are binding on those others. When taking such actions we assume a power to rule over others. The duty to respect the autonomy of people kicks in here. In these cases it is not enough that we act only after due consideration of the interests of others. We must, so the argument goes, act with their consent.

While I agree with the premises about the implications of our duty to respect people's autonomy, I doubt that it leads to a requirement of consent. If consent is required then it has to be the consent of all people who are subject to the authority, however reasonable or unreasonable they or their views may be. And the consent has to be actual (even if tacit) rather than hypothetical. That is a recipe for anarchism, as it is always probable that a significant number of people will refuse to consent and will not be subject to authority. Anarchism is a respectable position, but not one which I share. I believe that there are conditions under which legitimate authority is possible, even though it restricts people's freedom (though if it is legitimate and successful it is also likely to expand people's freedom, by extending their opportunities even as it also narrows them in some respects).

Today I see the nature and relevance of autonomy somewhat differently than I did when writing *The Morality of Freedom*. There I distinguished between two ideals of autonomy. The fundamental one had to do with the power to act for reasons, the power of rational agency. I disclaimed any intention to address it. I was concerned with a more superficial, historically contingent ideal of autonomy, which I called 'personal autonomy' namely the ideal of a life which is guided by what

we call the free choice of people from among an ample array of options. The thought was that in many societies people enjoyed the autonomy of rational agency, but, due to a combination of social, economic and technological factors, they did not have the autonomy of choosing whom to marry, or indeed whether to marry, whether to have children, and how many, and when, nor did they have a choice of occupation, or town of residence, and so on. I saw the autonomy of guiding one's life by one's choice from among an adequate range of options as a contingent form of life, which many – not all – enjoy in the affluent post-industrial countries.

This may suggest that it is not an ethically desirable condition, but simply a condition which is sometimes enjoyed. However, my thought was, and still is, that in our societies it has turned into a condition of success in life, for the options available to us require choice. We, those who live in societies where that kind of autonomy is the norm (except if we belong to relatively self-contained and isolated sub-groups) have no one to decide for us whether or whom to marry, no established coercive practices that we should have children, and we have access to reliable contraceptives, we have a choice of various educational avenues, various occupational avenues, etc. The point is that in the absence of technical limitations, coercive norms, or traditional authorities to dictate our paths through life, we have to exercise personal autonomy to have a successful life. This expectation is built into the nature of the options among which we choose, built into the shared understanding about the meaning of personal relationships, one's relations to one's children, to one's job, and the rest. Hence in our societies those who are denied such choices are denied the possibility to engage fully and in the right spirit with the various activities which make life good. That is, while one can have a good life without personal autonomy, generally speaking this can only be achieved in societies whose shared meaning and available social forms allow for valuable options which do not depend for their meaning and success on the possibility of being chosen, or being open to be rejected in favour of any of an adequate range of alternatives. Even in post-industrial societies there are social enclaves where people can enjoy a good life without personal autonomy. But it is not an option for the bulk of the population and powerful economic and cultural factors continue to erode the enclaves were it is possible. So personal autonomy is an ethical requirement for having a good life in societies such as ours.

All this still seems to me to be basically right. But I now believe that what I call personal autonomy is related to the basic autonomy, namely the capacity for rational agency. Respect for it requires protecting and securing conditions which make possible its successful exercise, where success is determined relative to the point and function of the capacity. For most people in societies like ours these are the conditions for the successful exercise of personal autonomy. I would not deny that while on the one hand this is a familiar and popular view, on the other hand its vindication is a complex and controversial task. But I am hopeful that that task can be discharged.

In The Morality of Freedom you give a detailed account of the incommensurability of many values and valuable pursuits, by which you mean that many values cannot be ranked according to a master value, and/or cannot be ranked per se. This is a seductive portrayal of the nature of pluralism. On the basis of this you argue that pluralism is 'competitive', by which you mean that 'feelings of rejection and dismissiveness' towards that which is incommensurable with one's own way of life are inevitable and appropriate ('Multiculturalism: A Liberal Perspective' in Ethics in the Public Domain, Oxford: Clarendon Press, 1994, p. 165), and you give as an example the hostilities that exist between many Muslims and Christians. Given the emergence of religious affiliation as an axis dividing ever more opponents on the world stage today, can't we hope for more than competitive pluralism? Is the top down state enforcement of principles of toleration sufficient to resolve such conflicts? Don't we instead have to require of the parties to the conflicts that they attempt to engage with those they oppose?

The argument for widespread and significant incommensurabilities of values and of reasons for action relates primarily to the incommensurability of particular options: choice of school for a child, or choice of career, or more everyday decisions, like between two films to go to, and the like. It aims to strike a balance between over-ambitious and over-sceptical views of the evaluative realm. I think that there are evaluative facts such as that certain properties contribute to the value of a house, a career, a film, etc., whereas others detract from them. But I do not believe that such matters admit very fine discriminations which can determine a complete ranking of all options relative to each agent, and to

each choice situation. As you say, this is part of a conception of value pluralism, which has considerable ethical and political implications.

The feature you focus on is that hostility, dismissiveness, etc. are often an expression of feeling not backed by judgement. We are hostile to evil doers, or to those we take to be evil doers, to those whom we take to be using unfair tricks to gain advantage, etc. We are dismissive of those we think of as lacking abilities to discharge their undertakings, or who have unfounded pretensions, and so on. But we go further. We tend to back all such affective reactions with evaluative judgements, like the mother whose fondness for her newly born leads her to think that he is exceptionally beautiful or clever. These are all too often rationalisations, judgements which follow the affective reaction rather than being true grounds for it.

I was trying to emphasise two points: First, that proper pursuit of our goals and relationships and other interests requires, and in part consists in, dedication to them and affective involvement in them: we are unhappy when our friends suffer, or when our friendships proves difficult, we are delighted when successful at work, and disappointed when projects we worked on stall or fail, and that is regardless of the personal implications of such successes or failures to our promotion or remuneration, etc.

Needless to say, this means that we are attached to, emotionally invested in, our friends, and pursuits, and interests, and not in others. I think that we should recognise that that neither justifies regarding ours as more important or more valuable than others, nor does the fact that the pursuits of many other people are as valuable as ours mean that there is any fault with us for being attached to ours and not to theirs.

In brief, it seemed to me important to liberate the constructive attitudes of attachment and preferential devotion to some pursuits from unjustified judgements of their superiority. This in itself is one way in which recognition of value pluralism can contribute to reducing hostility and negative attitudes to others. But here things become complicated. First, our attachment to and fondness for our friends and pursuits spreads itself, and breeds fondness and appreciation of tastes similar to ours, sensibilities similar to ours, abilities that lead to success in the relationships and pursuits we are devoted to, and so on. And while we tend to accentuate the positive, every preference for something is a preference against something else. The way our emotions spread

themselves over other objects, people and properties displays what you may call a natural systemic character, even though it tends to extend well beyond what is strictly necessary to sustain our affective attitudes. Hence competitive pluralism, the acknowledgement that just as positive affective attitude can survive, quite properly, independently of judgement of the superiority of their objects, so can negative affective attitudes exist independently of judgement of the inferiority of their objects. Unwelcome as this fact is it must be recognised.

So what do we have to do to avoid competitive pluralism leading to immoral attitudes and actions? How can we stop unwarranted intolerance? Perhaps naively I believe that it would help to understand these points. Understanding will not remove the attitudes of dismissiveness and dislike but it may take some of the edge off them. Encountering a whole variety of affective attitudes, some more welcome than others, is so much part of life that I find it difficult to think of it in itself as bad. Only its excessive manifestations which can be curbed are so.

I never thought that they can be curbed by law alone. The law can do some good in this regard, but only in a society which recognises the implications of pluralism, and the virtue of toleration. Toleration extends, of course, well beyond tolerating those whose lifestyle and pursuits are good but not to our taste. Intolerance is particularly mindless in such cases, but is to be curbed even when based on correct judgement that the non-tolerating attitudes are aimed at worthless activities, even evil ones. It is not as if when dealing with the really worthless and harmful all is permitted. Toleration is still often the order of the day, to make sure that reactions are not excessive, or that they do not violate other values.

In all such cases a culture of toleration is essential. Some countries have moved into a period of moralistic self-righteousness, a period in which zero-tolerance is regarded as a virtue, rather than as one of the worst afflictions of our time. I could not agree more with your implied suggestion that the law with its crudity and inflexibility and with its dependence on a supportive public attitude will be little help without a tolerant public morality. The degree to which that is to be achieved by 'engagement' with those on the other side is not something I feel competent to judge. My experience suggests that a culture of toleration

benefits from opposites: on the one hand it benefits from familiarity with those one inclines not to tolerate, and engagement with them. I doubt that engagement can overcome disputes and disagreements. But it can demystify them. It helps to avoid demonisation of the opponent, another tendency all too evident in the public culture of today, and encouraged by many among our political leaders. On the other hand, I suspect that toleration also requires distance. Close proximity can breed contempt and intolerance, especially when it is intrusive, invades our privacy, stops us from enjoying our lifestyle, or forces us to continuously defend it against detractors and competitors. I would hate to have to venture a recipe for the cultivation of toleration.

In addition to religious affiliation, national identity and nationalism are at the heart of many major conflicts in the world today. Do you have an overall view on the acceptability of nationalism as a political project? Do you see any current nations embroiled in such conflicts as exhibiting the best and/or the worst of nationalism?

You are inviting me to step beyond my area of competence. I am neither an expert on nationalism nor on international relations. It is a truism that culture, civilisation, economic resources, everything which makes our lives what they are, depends on the existence of groups and the modes of co-operation. It is also a truism, though one occasionally ignored by some social and political theorists, that membership of groups fulfils much more than a mere instrumental function in our lives. People have a way of finding and attributing meaning to various aspects of life, even those whose function is also instrumental, even to those which should not exist at all unless they fulfil well some functional tasks. Regarding groups, identification with them, and with their fortunes, analogous in a number of ways to our attitudes to friends and other people to whom we are personally attached, is important in our moral psychology, and colours quite a number of our preferences, aims and activities. Besides, but also connected to group-membership, action in the public arena is important to many people. Admittedly many others have no wish to get involved in anything beyond their personal interests and relationships. But others find opportunities for engagement in public life, relating to their children's schools, neighbourhood civic activities, trade unions, charitable associations, religious organisations and communities, and of

course main stream politics, either through parties, or through single issue groups, and others, vital to their life.

We go beyond truisms when we consider what forms of groups are desirable, and which kinds of groups are undesirable, and then apply such considerations to nationalities. I have only two comments to make. But first I think we should remember the distinction between two forms of nationalism, which I will call state-nationalism and ethnic-nationalism. The first is the form of nationalism in countries where the nation is identified with the citizens of the state. The United State is a prime example. Ethnic nationalism exists where the nation is identified with an ethnic group. Perhaps British on the one hand and English nationalism on the other are examples of the two kinds of nationalism. This example as well as that of Bretons and others illustrates that ethnic-nationalism need not even aspire to control a nation-state. The question of the desirability of state-nationalism, where it diverges from that regarding ethnic nationalism, is the question of the desirability of the nation-state. In the age of economic globalisation we are aware more than ever of its limitations. The international community is subject to conflicting forces all striving to lead to various forms of super-national regional or world-wide political organisations. This process is inevitable, and some of its outcomes are welcome. It is important to remember that while the European Union is one of the most welcome and impressive developments in that direction, its example does not and is unlikely to dominate international development. The World Trade Organisation provides another model for the way the old nation state is likely to be reconceived, that is by being subject to compulsory jurisdiction of functional rather than territorial organisations. But there is much more going on which you will not expect me to comment on here. Suffice it to say that the political debate in Britain suffers from a blinkered all-or-nothing conception of the options: either Britain remains an old style nation state or it loses its 'sovereignty' to a European superstate. This is an odd way of thinking in a country which has not been a typical nation state at least not before the demise of the British Empire.

Let me turn to my two remarks (focused, as I mentioned, on ethnic-nationalism, but with some bearing on the other kind too): first, I need to allay some apprehensions that my comments on competitive pluralism when coupled with approval of nationalism are likely to arouse. Yes, it is

true that affective attachments to national groups generate, inevitably, preferential attitudes favouring one's own relative to other groups. The dynamics typical of competitive pluralism apply. But this does not entail an endorsement of Schmidt-like identity through enmity, nor its historical manifestations. The danger of such developments is undeniable. But there are familiar ways of counteracting them. Classical Communism hoped that class identification, cutting as it does across ethnic and national borders, will automatically dissolve the problem of national conflicts, and the European Union was established in the hope that giving new life and new content to the old, fuzzy sense of identification with a larger territorial area will help abate that problem. I think that we still believe that both strategies can help. Communism was mistaken in its analysis of the sources of national conflicts, but it remains true that national conflicts can be abated if people belong to many cross cutting groups, and to many groups of various degrees of territorial extension: city, region, etc. The dangers of destructive conflict are at their greatest when national identity is the only form of group identity, or the one whose importance far outweighs that of all others.

My second comment is, surprisingly, more controversial. Given the need for and importance of membership in groups and identification with them, ethnicity as well as citizenship are not inherently bad or undesirable determinants of such groups. Ethnicity is associated with common 'collective' 'historical memories', with a familiarity with a common culture, and such like factors which facilitate the ability to understand the feelings, needs, views and reactions of others, and tend to incline people to take for granted the need to take account of others, to curb one's own ambitions and aspirations for the sake of others, to make sacrifices when this is needed to help them, and all the other automatic responses whose absence regarding outsiders, in a nation-state, makes foreign aid so difficult and foreign military adventures so readily judged by one's country's self-interest. And please remember that I am not commending such differential attitudes. I am merely recognising their prevalence in today's conditions. My point is that one of the functions of group membership is that it helps foster understanding, sympathy and the unquestioning willingness to recognise the claims that others have on one. That is what I meant by saying that ethnicity is not an inherently undesirable basis for group membership.

Actually, I meant a bit more. It has the advantage of not being inherently an ideological basis of group membership (though in some regrettable cases ethnicity is turned into an ideology, e.g. Arianism, or Pan-Slavism). The twentieth century which brought among other horrors some of the worst examples of ethnic nationalism, has also displayed some of the consequences of ideological nationalism. The Soviet Union and the United States are, were, both ideologically based states, and both displayed how this can lead to denial of membership, persecution and condemnation for un-American etc. activities. I do not mean to equate the wrongs perpetrated under such banners by the two states. Nor do I wish to ignore the differences between their use of the ideology, or the fact that people can be persecuted for their beliefs in states whose sense of their own identity is not bound up with an adherence to a set of beliefs or to a religion. But there is an additional wrong which is specific to ideological countries, not in the sense that they inevitably commit it, but in that only they can commit it. They are peculiarly liable to claim monopoly of certain (alleged) values or principles, using this to assert their superiority over other countries, their right to change other countries' regimes, and to export their ideology (and way of life) to them, and they breed an atmosphere of unquestioning acceptance of those alleged values and principles, leading in extremis to denial of full membership in the nation to those who dare question their cogency or validity. The very importance of national membership in today's world, and its function in our lives, is a powerful argument for making that membership available to all independently of their views. Religious and ideological groupings are important too. But since adherence to a belief or a religion should be free, and guided by conviction in their truth, religious and ideological groupings should be built on voluntary membership.

That is the reason for thinking that in ethnicity is an acceptable basis for group identity. It can fulfil a positive role in historical transitions, in shifting allegiance from an empire, say the Austro-Hungarian or (to a lesser extent) the British, to new forms of political organisation. Arguably it fulfilled such a role in the overthrow of the ideological regimes of the former communist countries. But as the dissolution of the British Empire showed there are other bases of allegiance, which arguably led to more ethically desirable results than the ethnic-based

ones, and the more recent history of the former communist countries made us all aware of the downside of the legitimisation of ethnic nationalism.

I suppose my answer to your question was a typical yes and no: some possible good, some possible bad effects of ethnic nationalism. I think this ambivalence or complexity is inevitable when dealing with major historical forces. We are not free to do away with them. Such utopian aspirations are worse than pointless. They are dangerous. We need to recognise the complexity of the forces we deal with, their good and bad aspects, realise that they are more likely to be transformed through their interaction with other forces, and try to moderate their dangers through such transformations rather than by outright approval or disapproval. With regard to the former communist states in Europe the efforts of the European Union and the forces of economic globalisation may curb the worst excesses of ethnic nationalism. In some other parts of the world the situation is less hopeful.

Despite your attack on the idea of equality (The Morality of Freedom), as an empty concept, equality seems to be at the centre of contemporary political philosophy, as evidenced by the burgeoning literature on egalitarianism in the last fifteen years or so. Would you still insist on the uselessness of the idea of equality as an independent or fundamental value of political morality?

I think that I have not changed my view about equality. It can be summarised in two points: 1) Many invocations of 'equality' or 'egalitarianism' in political discourse are similar to invocation of 'the left', and mean roughly the same thing. They do not designate any political principle or ideal, rather they refer to congeries of views, which keep changing over the years, but which have roughly a common historical lineage, and some degree of association with one or another of several ethical values, and ways of understanding political institutions and processes. 2) Some people believe that equality is intrinsically good, or that equality in some respects is intrinsically good. Some people believe that treating people equally is intrinsically good, or that it is something we have a duty to do. These views can relate to things which are intrinsically valuable, such as enjoying autonomy or a good life. Or they can be related to instrumental goods, such as the distribution of income or property among people. I believe that regarding matters of

general social concern, those which can be the subject of public action, equality is not intrinsically valuable. It may have instrumental value, sometimes important instrumental value, but that is all. It is not something good in itself, nor is treating people equally something good in itself. Moreover, I think that the belief in the intrinsic value of equality has a pernicious impact on societies where it has become part of the currency of political debate.

As you would expect part of the defence of my view aims to distinguish between valuing equality (in whatever respect) and other aims it is often confused with. I will give just a few examples:

Poverty and deprivation are ills which we should (and, I believe, can) eradicate through collective, public, action. But reducing and eliminating poverty is not to be confused with promoting equality. On any measure of equality there are possible distributions of wealth and income such that a population in which some are poor enjoys greater equality than one in which no one is. It is true that in the society without poverty everyone is equal in this respect, no one is poor. But what is good about the situation is that no one is poor, not that they are equal. Equality here is a mere by-product of what is valuable, i.e. the absence of poverty and deprivation. (I am not taking this or any of the following points as proof that equality does not matter. It is merely an illustration of how it should be separated from other social goals).

Treating people as if they do not count, treating them as second-class or second-rate, excluding them from full participation in social decisions, or in the collective life of a community, is an ill which ought to be (and can be) avoided. Here again what matters is that people who do matter simply because they are people, people who are not second rate or second class, etc. should not be treated wrongly. Most of the evils of discrimination are examples of these wrongs. But none of them is a case where the wrong is inequality. This is a context in which equality is most often invoked. But it is invoked in vain. Some people should be excluded from the collective life of a community. For example, they may not belong to it, or they excluded themselves from it by their conduct. There is nothing wrong in excluding them, even though this is treating them unequally, i.e. differently from the rest who are not excluded. What is required here is treating people as they deserve to be treated. This again produces by-product equality, i.e. all those who deserve to be

treated one way are equal in being treated that way. But what matters is not that they are treated equally, but that they are treated as they should be.

Some ways in which people should be treated, or some social states we should aim to achieve are relational. Poverty is, if not completely at least to a degree, a relational condition. The poor in affluent countries might not be poor if they lived, with the same wealth and income, in poor countries. There are other important social requirements which are relational. Disparities of wealth and income should not be too great, for if they are then some of the experiences and struggles of some people are so remote from those of others that mutual understanding and sympathy between them are difficult to achieve and their absence undermines the ability of the society to function properly. It undermines the ability of its political institutions to be sensitive and responsive to the needs of all. Furthermore, disparities of wealth involve disparities of political power, which undermine democracy. Similar factors militate against other sharp divisions in society. The division between religionists and secularists can (though it need not) equally undermine the ability of a society to understand and respond to the needs of all its members. But here the response is not to force uniformity (for reasons which I hope are too obvious to need explaining) but to foster mutual understanding through mixed education, and so on. Regarding wealth part of the solution is to try and reduce economic disparities, since they serve no end in themselves, and the absence of great riches does not deny anyone irreplaceable valuable opportunities. You note that in this example the reduction of disparities is not a half way measure on the road to equality. Equality is not needed, not even instrumentally, to achieve the ends I mentioned.

Should not governments treat all their citizens as equal? I think that there is a sense in which they should. To understand what it is ask yourself the following: if this is, as I join many in believing, a duty special to public bodies (and you and I are allowed to favour the people we favour, etc.) then the question arises do they have that duty because people are equal or in spite of the fact that they are not equal? Certainly government should not treat everyone the same way. There is compulsory education for children but not for adults, sick pay for the sick but not for the healthy, and so on and so forth. People are not the same and should not be treated the same, not even by government. So

what does it mean that governments should treat their citizens as equal? It means that there are certain reasons for treating people differently which though good reasons, which you and I may rely on, are not proper considerations for governments. What these are is far from clear and is certainly controversial. Here is one example. Arguably I should not give money to religious charities, since this would encourage religious organisations and they are based on false beliefs. But I believe that governments are not allowed to take account of that fact, and must treat religious charities the same way they treat non-religious ones which are dedicated to the support of similar goals. If this is roughly along the right lines then the principle that governments should treat their citizens as equals has nothing to do with equality. It asserts that certain considerations which are valid considerations and constitute proper reasons for action by other agents, are not allowed to governments. Governments, and perhaps other public bodies, must exclude them from their considerations. Mill suggested that government action should not be based on any considerations except the avoidance of harm to others. Ultimately this may not be quite the right principle, but it illustrates the point I am making, i.e. that treating people as equals, in spite of the fact that they are not, means, to the extent that it has any good sense, the exclusion of certain otherwise good reasons from being relied upon by governments.

Finally, I should mention that in societies whose public culture is rife with envy (a condition which tends to result from belief in the value of equality, even though it is not entailed by it) a reduction of envy-inducing disparities may be needed for the preservation of social peace.

None of this 'proves' that equality is not valuable in itself, and I will not try to do so here. Can I say anything to make the thought that equality in itself does not matter more plausible? Here is one thought: if equality is valuable in itself then it matters even among people or creatures who do not interact in any way and have no knowledge of each other, and even if they cannot interact and cannot have knowledge of each other. So on this hypothesis if there are somewhere in the universe, in a galaxy too remote for us ever to reach it, people who are better off or worse off than we are (in whatever respect is supposed to matter) then the world is, in at least one respect, worse than it would be if they did not exist. I find that thought absurd. Though it is certainly not a proof of

anything it may suggest that equality matters only when it is a relationship among people who do interact and do know or can know of each other. That means that at most it is not equality in itself that matters, that equality is just one aspect of something more complex which is of intrinsic value. I pointed out that relational facts certainly do sometimes matter. I just do not know of any one which requires equality, except when it is required instrumentally, for its consequences.

The debate between legal positivism and interpretivism still dominates jurisprudence courses in the Anglo-American world. You have yourself provided a very distinctive version of legal positivism as part of this debate. Do you think that positivism has won the argument? Should legal theorists still be so concerned with this debate?

Thinking of recent times, it seems to me that there was a period when reflection on the issues between legal positivism and various opponents of legal positivism was productive and led to improved understanding, even if not to agreement. The fortunate result of these developments is that there is no longer a point in treating legal positivism as an important unified school of thought, with a common understanding of the law. The divisions of opinion among people generally identified with the legal positivist tradition are often bigger than the divisions between them and some writers outside that tradition. Interpretivism, by way of contrast, is a new approach, though related to strands in general hermeneutics. It is basically just the name we give to Professor Dworkin's views on the nature of law. These views and the arguments for them have been effectively criticised, but then this is the common fate of new ideas. They gain by such criticism rather than being refuted by it. Criticism points the way to problems and initiates further reflection. Interpretivism is unlikely to last in the form presented by Dworkin in *Law's Empire* (1986), but both Dworkin himself and a few other scholars are working along lines suggested in that book, and may emerge with improved versions, or not even versions but new accounts of the nature of law influenced by Dworkin's ideas. I am not sure that they will undermine the basic theses about law which I advocated, but it is very likely that these theses themselves will re-emerge in new and improved forms in the course of such debates. I hope that this does not make you think that I see a happy convergence of these different accounts in a synthesis which will combine the best of all of them. I think that there are good

reasons to believe that that outcome is highly unlikely so long as free inquiry persists.

I think that while the essential social nature of law, and the fact that it is quite likely to be bad, and therefore the identification of its content cannot be premised on the supposition that it is good, or close to good, has to be recognised, we know that interpretation is central to it, as well as to other subjects like history, and that we have a very poor grasp on its nature. To me the great appeal of Dworkin's work is that he held the promise of transcending traditional conceptual divisions. In particular the debate around legal positivism presupposes a division between evaluative and non-evaluative discourse (and between evaluative and non-evaluative facts). Dworkin suggested that in interpretation we transcend this divide, we use concepts which do not allow discourse and facts to be analysed as either one or the other. Unfortunately he failed to deliver on this promise. His analysis of interpretation includes the claim that an interpretive claim is assessed by its success along two dimensions: fit and justification, which reintroduces the familiar distinction through the back door. Note that the so-called 'legal positivist' reliance on the distinction does not assume that every assertion can be classified as either purely evaluative or purely non-evaluative, or that every one can be analysed into assertions which are pure one way or the other. Many assertions are irreducibly mixed, but we still understand them using the evaluative / non-evaluative contrast. And Dworkin does not seem to add anything to that. Instead of transcending existing distinctions he obscures them, for no good reason, that is, he obscures the fact that courts function to develop as well as to apply the law. But as I said, his writing opened up various possible lines of thought and we have to hope that they will be productively explored.

You have advanced a general justification for authority according to which a person should recognise a person or body as authoritative just in case allowing their commands to pre-empt a person's own deliberation about what they have most reason to do will enable that person better to act on the reasons that apply to them. From the perspective of traditional views of political obligation, this looks dangerously weak as a justification for the authority of states and law, since it makes recognition of authority conditional on what a person's

deliberative and cognitive capacities happen to be. On the other hand, your position looks much weaker than the philosophical anarchist view that we ought never to recognise state authority. How do you see your position in relation to traditional conceptions of statism and anarchism?

There is a difficulty in understanding how authority can be legitimate. How can it be that another has the right to order us around? Some theories are in denial. They argue that being governed by authority is like being governed by oneself through a proxy, an agent. That is the way consent theories go. Others regard it as an expression of collective action: in obeying authority we obey what we, collectively, ordained. I have not seen successful accounts along those lines. My account belongs with another tradition. It recognises that being subject to legitimate authority is having a duty to obey the instruction of another. How can this be reconciled with people's rational autonomy and with their responsibility for their own actions, ask the anarchists (or some of them)? But is there really a problem here? Autonomy is consistent with having reasons, with being subject to duties. Those are often, and I have touched on these matters in reply to your first question, the result of human activity. Someone is threatening my neighbour and that is a reason for me to call the police, to assist my neighbour, and so on. Someone, aiming to divert me into shopping in one shop rather than another, blocks one road giving me reason to go down another, which is also a reason to go to the shop he wanted me to go to since that has now become much more convenient than the alternative. Parents get their children to do their homework by promising a treat for the weekend, or by threatening to withhold their pocket money if they do not. Sometimes people act well when they change our reasons, at other times they act badly. Either way they generate reasons for us, intending to do so, and no authority is involved.

If there is no threat to our autonomy in these cases why is there when the (alleged) reason for doing something is a law laid down by authority? One difference is that the authority does not change the environment, forcing us to take account of the changed situation. Rather it addresses our judgment and invites us to obey because we recognise that we have a duty to obey. This is a fundamental difference, but surely it shows that our autonomy is less in danger here, for the person has legitimate authority over us only if it is right that he should have authority, and therefore only in circumstances in which we will

acknowledge his authority if we are rational and know the relevant factors.

OK, you may say, if reason requires me to obey someone I should but reason never does. Why not? My contention was that it does when basically two conditions are met: 1) in the conditions of my life I would better conform to reasons which apply to me anyway by trying to follow his instructions than if I do not, 2) the matters to which those instructions relate is not one on which it is more important to decide for oneself than to decide correctly. The second condition respects the importance of deciding for oneself. To some degree the matters on which one should decide for oneself, rather than follow others, are common to all of us, and to some degree they depend on our choices. Most people who have savings would rather have someone decide what they should do than decide for themselves. Some people enjoy playing the market and for them it is more important (at least within certain bounds) that they should decide for themselves than that they take the best action.

I do not believe that the anarchist can claim that it is always more important that people should decide for themselves than that they should do the right thing. Hence there will be some legitimate authorities, the debate is only about their scope, and that would be a substantive moral debate, case by case.

From the other side of the fence I am, as you said, criticised for an account of authority which makes its scope vary (potentially) from person to person. How can that be? Well, it has always been thus. At least since the arrival of contractarian theories. They assume that each person must consent to the authority for it to be a legitimate authority over him. This means that some may consent and others may not. It also means that some may consent to a more extensive authority than others. It is true (a) that traditional contractarians did not take this problem seriously (though Nozick – who was not one of them – did) and (b) that I am not a contractarian. I mention the fact just to show that the idea of individualised authority is not new with me. Moreover, it is supported by good arguments. Does it not suffer from unacceptable consequences? I doubt it, for reasons which your next question reveals.

Your view of authority seems to justify it in terms of possession of expertise. Yet while the fact that one person has greater wisdom than

another might give the less wise reason to accord the wiser expert authority, it surely doesn't give the wiser the right to enforce his directives with coercive force. What justification does your account of authority provide for the state's rights to enforce its commands?

My thought was that you will need something more to justify enforcement, but that that comes out of the same account of authority, and does not require its modification. Suppose you have a law imposing a duty to pay tax. It is justified if it enables people to discharge a pre-existing duty to: 1) contribute to common services, and 2) help people in need, and if they can do so better by collective action than individually, etc. etc. It does not follow the state has authority to punish those who fail in their duty to pay tax. Possibly all the state is entitled to do is to declare what people ought to pay, and leave it at that, or perhaps withdraw services from them if they do not pay, but not punish them. To be entitled to punish it must be the case that those who act to impose the punishment, various agencies which detect offences, collect evidence, conduct prosecutions and carry out sentences are acting properly, that is, (given that they act in execution of some legal duties) that the state has the authority to instruct them so to act, which requires a moral reason for people to punish (or play a role in punishing) if nominated to do so by legitimate authority. So the punishment will be justified, according to my very simple account of authority, only if there are independent moral duties which justify it, i.e. which show that the state is the proper authority for these purposes as well.

I chose the example of authority to raise tax to dispute your suggestion that my view justifies authority in terms of expertise. Some authorities are entirely based on expertise. Others, among them political authorities, are only partly based on it. Their main justification is their ability to secure collective action when one is required. Many of our duties, as Hobbes reminded us (even though he exaggerated the point) are conditional on others behaving as we have a duty to behave – there is a point not to murder or assault another even if I am the only one who does not murder and assault. Here each act is required in itself. But there is no point in contributing to common services unless others do so as well, and the same goes for most of what states do. Their legitimacy depends on their ability to secure what ought to be secured anyway, but cannot be secured as well by voluntary action not guided by authority.

This shows that the degree to which the scope of a political authority varies among individuals is not that great. It is great when the authority is based only on expertise, since people vary a good deal in knowledge, but we all suffer more or less equally from the difficulty of securing collective action when required. Here the differences are not among individuals in one society, but between different societies. In some voluntary associations can secure much more than in others, where state intervention will have to be more extensive.

What are you working on now?

I am always working on what I worked on before, just taking time off to work on other topics, to refresh my mind and recharge the batteries before returning to old topics and trying to revise or improve what I did before. But it is true that I try to extend the range of problems I deal with. Over the last few years I spent some time thinking about aggregations, and the way we should proceed when reasons conflict. That task is far from accomplished.

Article:

Equality and Vulnerability in Biomedical Research on Human Subjects

Philip Bielby

Introduction

Biomedical research with human subjects is replete with issues that have ramifications for equality as a theoretical and practical principle. However, it is beset by an absence of any sustained analysis of what exactly equality means for research or its applicability to various subject populations. This is surprising, given that arguments used to countervail against the potential for exploitation in research typically rest upon or draw support from some idea of equality.¹ Moreover, equality is often

¹ Historically, potential for exploitation has been characterised as a feature of the relationship between the researcher and subject, but it also bears upon discussions about which groups it is morally and legally permissible to involve in biomedical research notwithstanding scientific need and decisions about how different research populations should be treated. For discussion of this point in relation to biomedical research conducted in the developing world, see Ruth Macklin, 'Bioethics, Vulnerability and Protection', *Bioethics*, vol. 17, no. 5-6 (2003), p. 472.