

State Neutrality and Controversial Values in *On Liberty*

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I MILL: A “COMPREHENSIVE” DEFENSE OF LIBERAL NEUTRALITY?

In an important essay Charles Larmore tells us that

Kant and Mill sought to justify the principle of political neutrality by appealing to ideals of autonomy and individuality. By remaining neutral with regard to controversial views of the good life, constitutional principles will express, according to them, what ought to be of supreme value throughout the whole of our life.¹

On Larmore’s influential reading, Mill defended what we might call *first-level neutrality*: Millian principles determining justified legal (and, we might add, social) intervention are neutral between competing conceptions of the good life. However, Larmore insists that Millian neutral political principles do not possess *second-level neutrality*: they do not have a neutral justification. The problem with Mill’s value-based defense of liberalism,” Larmore insists, is that because the value of individuality is “far from uncontroversial,”² Mill’s case liberalism is open to reasonable objection. In contrast Larmore and, of course, John Rawls, seek to develop a “political liberalism” that defends liberal neutrality without appeal to a “general ‘philosophy of man’ or a ‘comprehensive moral ideal.’”³ The justification of liberal principles “must be acceptable by reasonable people having different views of the good life, not just those who share, for example, Mill’s ideal of the person.”⁴ Liberals, argues Larmore, need “a *neutral justification of neutrality*.”⁵

This chapter challenges this widely-accepted view of Mill as presenting a “comprehensive” defense of liberalism, to be sharply contrasted with the “political liberalism” of Larmore and Rawls.⁶ I do not, of course, wish to deny that there are fundamental differences between, on the one hand, Larmore’s and Rawls’s political liberalism and, on the other, the case for liberal neutrality that Mill presents in *On Liberty*. I do, however, dispute the currently accepted view that Mill’s case for liberal neutrality necessarily depends on a controversial perfectionist ideal of individuality or a utilitarian calculus, whereas political liberalism is grounded on a core morality that is a common ground to all reasonable citizens.⁷ I shall argue that Mill provides a broad defense of liberal neutrality that appeals to a wide-range of citizens’ interests and, in that regard, Mill shares Larmore’s and Rawls’s concern with a non-sectarian defense of liberal neutrality. This interpretation is endorsed by a careful reading of *On Liberty*, which presents a wide array of arguments for liberty, appealing to an equally wide array of citizens’ beliefs and values. No interpretation that depicts Mill’s liberalism as resting on a single value does justice to the complexity of *On Liberty*.

Section II briefly analyzes the notions of first-and second-level political neutrality. Section III takes up the question whether Mill’s liberalism — centered on the harm principle — constitutes a first-level neutral liberalism: I argue that it is strongly neutralist. Section IV then turns to the Larmore’s core claim that Mill’s justification of neutral principles is not itself neutral (in the sense of second-level neutrality). I shall argue that Mill’s justification of the value of liberty and the harm principle is surprisingly broad: because he appeals to diverse values, his case is broadly “neutral.”

II FIRST AND SECOND-LEVEL LIBERAL NEUTRALITY

(i) A Conception of Neutrality

For the last few decades political theorists have vigorously debated whether liberalism is committed to some doctrine of “state neutrality,” and whether neutrality provides a plausible constraint on legitimate laws and policies. As I have commented on these debates elsewhere, I shall not rehearse these matters here.⁸ However, I do think that a feature of this long-running debate is that there has been too much controversy about an ill-defined notion; it would behoove us to try to get a little clearer about our topic. Let us, say, focus on two citizens, *A* and *B*, who have a value-based disagreement, *D*. Consider law *L*, a coercive imposition. Let us say that *L* is neutral⁹ between citizens *A* and *B* on *D* regarding treatment *T* if and only if *L* does not treat *A* and *B* differently (engage in differential *T*) on the basis of *D*. So:¹⁰

A few points of clarification.

1. As I have characterized it, Political Neutrality is a generic principle that can be filled in with different conceptions of neutrality, depending on how the variables are specified. Of particular importance is determining what is the relevant treatment: what are the morally important ways of treating people differently that a neutrality principle identifies? Must a neutral law treat people the same in all ways? We can better understand the ideal of neutrality in political philosophy if we pause to reflect on a different, traditional, application of the notion of neutrality — combatants under international law. A government is neutral between the combatants (*A* and *B*) concerning the differences in their war aims or combatant status (*D*) when the government’s decision, say, about shipments of arms or war-related matters (*T*) does not treat *A* and *B* differentially on the basis of their war aims, alliances, etc. The

range of T is a matter of dispute between different notions of state neutrality in war (just as it is in debates about liberal neutrality). In 1914 President Wilson insisted that “The United States must be neutral in fact, as well as in name... We must be impartial in thought, as well as action, must put a curb upon our sentiments, as well as upon every transaction that might be construed as a preference of one party to the struggle before another.”¹¹ But that is extreme (and certainly was not adhered to). A very different view was taken by the Swedish Government in 1941: “Neutrality does not demand that nations not participating in an armed conflict should be indifferent to the issues of the belligerents. The sympathies of neutrals may well lie entirely with one side, and a neutral does not violate his duties as long as he does not commit any unneutral acts that might aid the side he favors.”¹² On this view T is restricted to some actions, and certainly does not include thoughts and sentiments. The Swedish doctrine explicitly allows that the neutral government need not always refrain from different treatment of A and B on the basis of their war aims (D): the neutral government’s public schools might still favor A ’s aims, and treat A and B differently in its curriculum, but this would not impair the state’s neutrality regarding T – e.g., arms shipments or war materials. Note also that even when we have identified T , the idea of neutrality does not require a neutral to always treat (T) A and B the same. Suppose the neutral government sells arms to both A and B , but A has paid and B has not (international law allows neutrals to sell arms). Then the neutral state may treat A differently than B even regarding T , because the difference in treatment is not grounded on D (their war aims), but on whether payment has been made.

Depending on how “treatment” (T) is explicated, Political Neutrality might be understood as, for example, neutrality of (some or all) effects, neutrality of justification, or neutrality of aims.¹³ Depending on how D is filled out, conceptions

can be neutral between people's conceptions of the good, comprehensive conceptions, values, religious beliefs, and so on. The philosophical work of a conception of neutrality will be to make out a good case for focus on a particular form of treatment (T) and a particular dispute (D).

2. It is an advantage of the above characterization that it makes clear that neutrality is always between people in a certain set (A and B). At the limit, neutrality might be the set of all persons, but it will almost always concern a smaller set, such as the set of reasonable citizens, or the set tolerably rational citizens, and so on. Until we identify the set, we can't apply a neutrality principle.

3. Note also that Political Neutrality is not concerned with neutrality between conceptions of the good or values. Liberalism is neutral between *persons*, and this neutrality requires not treating them differentially on the basis of their differing values, conceptions of the good, and so on. (As the Swedish government made quite clear, a neutral need not be neutral between wars aims, but between combatants.) Liberalism is not concerned with neutrality between values or conceptions of the good, as if conceptions of the good themselves had claims to neutral treatment. It is only because citizens hold such conceptions that neutrality between citizens has consequences for the way conceptions of the good can enter into laws and political principles. This might seem pedantic, but, I think, it helps us avoid confusion. Suppose at time t_1 there are two conceptions of the good in society, C_1 and C_2 but at time t_2 , everyone has come to embrace C_1 . It would seem that, if liberalism is really committed to neutrality between conceptions of the good per se, then even at t_2 , it must be neutral between C_1 and C_2 , but this seems all wrong. As I interpret the liberal understanding of political neutrality, since it requires neutrality between persons, appealing at t_2 to C_1 does not run afoul of neutrality, since there are no differences

among citizens on this matter. So it is not in itself non-neutral to appeal to conceptions of the good; it all depends on the differences that obtain among moral persons and citizens.

4. Another advantage of the above formulation is that it helps us avoid common errors, such as the claim that neutral laws cannot appeal to controversial conceptions of the good. Laws can be neutral with regard to controversial conceptions of the good *and yet still appeal* to them. For example, consider neutrality of justification: on this view a law treats (*T*) citizens neutrally if its justification for its action does not depend on the differences between citizens (i.e., its justification cannot depend on its “taking sides” on *D*). Now a justification may be based either on *consensus* or *convergence* of values. A consensus justification maintains that *L* is justified because everyone has the same grounds to endorse it; a convergence justification maintains that *L* is justified because Alf has his own grounds to endorse it while Betty endorses it for different reasons. Suppose, though, that *both* parties to the dispute *D* endorse the law on the basis of their *differing* views. A convergence justification is perfectly neutral: the justification does not rely on our disagreements about values (*D*), but, instead, on our agreement about the implications of our different values. Thus we must reject the plausible idea that liberal neutrality prohibits appeal to “controversial conceptions of the good.” This point shall prove important.

(ii) First-level neutrality

At the most basic level, a law (or, more generally, a political principle which determines the acceptability of laws) is neutral with respect to Alf and Betty on matter *D* if it does not *T* (treat) them differently on the basis of their positions on *D*. But what are the relevant forms of treatment, and what are the relevant differences?

It is often supposed that there must be a single answer to this query: “When liberals talk of treating people neutrally they mean neutrality qua ____” where the blank is filled in with, say, neutrality of effect, or neutrality of aim. There are, though, many different ways to treat people “the same,” and there is no reason why a doctrine of political neutrality should not endorse several.

Although some political philosophers still endorse versions of it,¹⁴ we should certainly reject as implausibly strong “neutrality of effect”: i.e., to be neutral between *A* and *B* on *D*, *L* must have the same effects on *A* and *B* (or, perhaps, no differential effects are caused by *D*). This supposes a very expansive notion of a “treatment.” Return to the idea of neutrality in war: for a state to be neutral between *A* and *B* would require that its actions and policies have no differential effect on them (or at least none that can be traced back to their combatant status). Suppose the neutral state refuses to sell arms to either of the combatants — this certainly looks neutral. But if country *A* has lots of alternative sources for arms while *B* does not, then this refusal to sell arms would violate neutrality of effect because the arms policy effects *B* more than *A*. Thus neutrality (qua “of effect”) might require the neutral state to sell arms only to *B*! That cannot be right.

Let me propose three ways — which have been important in the liberal tradition — in which laws can be neutral: if a law is neutral in all three ways I will call it a neutral law. If it is neutral in some but not all these ways, I shall call it a partly neutral law.

1. A law can be *neutral on its face*. A law to establish Episcopalianism would not be neutral on its face: it would treat Episcopalians and those of other faiths differentially on the basis of their religious differences. In cases such as this the law refers to a disputed position, and gives differential benefits and burdens on the basis

of it. Fundamental to liberalism is the idea that some disputes among citizens (such as religious differences) should not ground differences in legal rights and duties.

2. A law can be *neutral in its intent*. This, of course, is much harder to discern, and it has been a matter of controversy whether such intent can be discerned by courts. In contrast — and I concur — others recently have argued that “it makes perfectly good sense to speak of legislative intent.”¹⁵ A law is neutral in intent between *A* and *B* regarding *D* if the goal of the legislation was not to favor either side in the *D* dispute; whatever differential effects the law may have, it was not goal of the legislature that the differential effects be based on *D*.¹⁶ A law that is not neutral on its face can be neutral in intent. Suppose that the legislature has accepted the claims that (1) strong families are needed to protect the general welfare (for example, to reduce crime and poverty) and (2) strong families require a married father and mother in residence with the children. A resulting law may give special advantages to heterosexual couples with children, being clearly non-neutral on its face in relation to differences over the value of homosexual households. Yet insofar as the aim was, say, to prevent crime and poverty, the law was neutral in its intent.

3. *A law may also be neutral or non-neutral in its interpretation*. Suppose a law is neutral on its face and in intent — say a law provides for freedom of religious expression, and the goal was such freedom. But suppose further that the interpretations of the law draw on controversial conceptions of religion (say, monotheism). In that case interpretations of the law treat differentially monotheistic and polytheistic citizens on the basis of this difference. If so, the law fails to be fully neutral.

Of course all of this still leaves open the set of citizens and range of disputes over whom the law is neutral in these ways. No law can be neutral without limit.

Some citizens are criminals: a law that seeks to reduce crime clearly is not neutral between criminals and the rest of the population. Any notion of neutrality must identify the range of valuational disputes among citizens regarding which the law must be neutral. However, once the range of relevant valuational disputes is identified, it would seem that an acceptable liberal theory, at this first level, must be *neutral among all citizens on that dispute*. If there is some valuational dispute *D* that has been identified as worthy of respect (in the sense that laws seek to be fully neutral in relation to it) the law should be neutral with respect to all citizens party to the dispute. That, crucially, is what is meant by equal citizenship in a liberal regime and equality before the law.

(iii) Second-level neutrality

Larmore's important contribution is to insist that once we have identified an ideal of first-level neutrality, another, deeper, issue of neutrality arises: is the commitment to first-level neutrality itself neutrally justified? Hence Larmore's criticism of Mill: he thinks it is manifest that Mill offers a deep justification of first-level neutrality that is based on a controversial ideal of individuality. Put bluntly, Larmore's core claim is that Mill thinks the best way to promote his ideal of individuality is through neutral political principles (that mandate first-level neutral laws). But such a defense of first-level neutrality (laws that operate neutrality) would ultimately not advocate a deep neutrality between citizens on fundamental disputes, such as whether individuality is really a value to be cherished. In this sense, it is charged, Mill is not truly a neutralist liberal or, if he is, his is only a surface sort of neutralism. It is this latter claim about Mill that I shall dispute in section IV.

III MILL'S FIRST-LEVEL LIBERAL NEUTRALIST PRINCIPLES

(i) Mill's three principles

Before disputing Larmore's interpretation of Millian liberalism, we should note that it is based on an important insight: at the first level Mill's theory is strongly, though we shall see not perfectly, neutralist.¹⁷ Although we have heard it many times, we must not forget Mill's insistence that he defends "one very simple principle, as entitled to govern *absolutely* the dealings of society with the individual in the way of compulsion and control."¹⁸ And, of course, "[t]hat principle is, that the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number, is self-protection.... That the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others" (CW, 18: 223). More precisely, Mill's liberalism can be explicated in terms of three principles:

- (1) The presumption in favor of liberty;
- (2) The principle that only harm to others can meet the presumption (and so self-regarding actions are left free);
- (3) The principle that harm to others is necessary,¹⁹ but not sufficient, to justify a coercive limitation of liberty; there may be good reasons for allowing harm.

(ii) The presumption in favor of liberty

According to the first principle (as Mill says in the *Principles of Political Economy*) "the onus of making a case always lies on the defenders of legal prohibitions" (CW, 3: 938) or (as he says in the *Subjection*), "in practical matters, the burthen of proof is supposed to be with those who are against liberty" (CW, 21: 262; see also CW, 18: 299). Now to say that the basic presumption in favor of freedom is (at this first level)

neutral is to say that (1) it is neutral on its face between various conceptions of the good life; (2) it is neutral in its intent and (3) it is neutral in its interpretation — its interpretation or does not require appeal to a rationally contentious conception of the good life. For now I put aside the question whether Mill offers a neutral *justification* for the presumption in favor of liberty (a question of second-level neutrality): our concern now is whether the presumption in favor of liberty is a first-level principle of neutral legislation.

I take it that the idea that each person should be free to act on his controversial values unless good reasons can be provided for interfering is the basis of liberal tolerance.²⁰ Certainly this principle is neutral on its face among a range of controversial views about what makes life worth living, and the intent is to allow each to pursue his vision of the good life. To be sure, as with any neutral principle, its neutrality covers only a certain range of disputes among citizens (*D*). The presumption is not neutral between those who wish to be free and those who wish to control others. No principle is neutral between its defenders and opponents. Mill recognizes that some people object to presuming others should be free; he spends a good deal of time arguing that a denial of the presumption of freedom makes a tolerant society impossible. Such denials, he argues, rest on a “principle of tyranny” (CW, 18: 290-291); they insist that there is no asymmetry between the choice of a person as to how he will live and the choice of others as to how he will live. But, insists Mill, “there is no parity between the feeling of a person for his own opinion, and the feeling of another who is offended at his holding it; no more than between the desire of a thief to take a purse, and the desire of the right owner to keep it” (CW, 18: 283). This is a bedrock liberal principle, and liberal laws are certainly not neutral on the issue of whether there is a presumption in favor of tolerating individual choice.

So the presumption is not neutral on its face or intent on *this* issue, but it *is* neutral among all disputes concerning which values can ground a person's choices about how he is to act. The presumption applies to all choices, and no citizen is treated differentially because he has made a certain choice about how to live his life, what, if any religion to follow, etc.

Now, it may be charged, the presumption cannot be neutral in its *interpretation*. If liberty is an essentially contested concept, then to know what the presumption in favor of liberty entails, we must employ some contested conception of liberty resting on some controversial values.²¹ Thus any application of the first principle would necessarily be non-neutral. But, surely, if this is a problem it plagues all liberal theories; if we accept this critique, there can be no such thing as a neutralist liberalism. Our concern in this essay, though, is whether Mill's liberalism is non-neutral in some sense that contrasts with Rawls's or Larmore's neutralism. As Mill sees it, he is appealing to widely shared understandings of freedom and coercion, which do not rest on any controversial moral values.

There is, I think, one point where Mill's application of Principle (1) is manifestly non-neutral, viz., his claim that "Liberty, as a principle, has no application to any state of things anterior to the time when mankind have become capable of being improved by free and equal discussion" and so applies only to peoples who "have attained the capacity of being guided to their own improvement by conviction or persuasion" (CW, 18: 224). To determine the range of application of the presumption in favor of liberty Mill appeals to his controversial theory of individual and social development (see §IV.iii). This should not be ignored: Mill does not have a neutral account of the distinction between properly liberal and non-liberal states. Yet Mill is

also quick to point out that his concern is the workings of the liberty principle within liberal states and here the application of it is neutral.

(iii) What is a harm?

Principle (2) is the heart of the harm principle — Mill’s very simple principle. Because Mill insists that it is a simple principle that governs absolutely, the presumption in favor of liberty can never be overturned unless the person whose liberty is being limited has done “definite damage” or incurred “definite risk of damage” to others (CW, 18: 282). Now here critics of Mill have long insisted that the conception of a “harm,” or an “injury” to the interests of another (CW, 18: 276) is hopelessly controversial. Long ago Robert Paul Wolff complained that:

Mill takes it as beyond dispute that when Smith hits Jones, or steals his purse, or accuses him in court, or sells him a horse, he is in someway affecting Jones’ interests. But Mill also seems to think it is obvious that when Smith practices the Roman faith, or reads philosophy, or eats meat, or engages in homosexual practices, he is not affecting Jones’ interests. Now suppose that Jones is a devout Calvinist or a principled vegetarian. The very presence in his community of a Catholic or a meat-eater may cause him fully as much pain as a blow in the face or the theft of his purse. Indeed, to a truly devout Christian a physical blow counts for much less than the blasphemy of heretic. After all, a physical blow affects my interests by causing me pain or stopping me from doing something I want to do. If the existence of ungodly persons in my community tortures my soul and destroys my sleep, who is to say that my interests are not affected?²²

Thus Wolff and other critics imply that Mill’s most distinctive contribution to liberal principles — the harm principle — draws on secular values (a real harm is a bodily

harm), and so begs the question against religious conceptions of harms and interests. Thus even at our first level of interpretation and application, Mill looks non-neutralist.

Mill's analysis of such cases is much more sophisticated than this criticism indicates. He is fully aware that offense to religious sensibilities can be intense, and he does not dismiss them as, say, superstitious or irrational. Rather Mill reflects on the acceptability of a principle allowing interference with liberty to protect religious sensibilities. Suppose we adopt a principle "Offense to religious sensibilities are harms." If so, Mill argues, the same principle that would protect Protestant sensibilities against Catholic "outrages" would protect Catholics against Protestant "outrages" such as married clergy. But Protestants cannot accept a principle that would allow suppression of their cherished activities: "we must beware of admitting a principle of which we would resent as a gross injustice the application to ourselves" (CW, 18: 285). Thus, Mill thinks, the only tenable principle for everyone is one that does not count such outrages as harms, but as "self-regarding concerns of individuals [with which] the public has no business to interfere" (CW, 18: 285). Mill is doing here precisely what Larmore recommends: retreating to a common ground in the face of disagreement.²³ A principle that allows intervention on grounds of protecting sensibilities will seem a "gross injustice" when applied to us; hence the only principle that can be accepted by all is mutual tolerance.

Readers often overlook the importance of impartial principles in *On Liberty*. Mill repeatedly criticizes opinions in favor of intervention that are based on mere preferences (CW, 18: 220-22). He begins *On Liberty* with the complaint that "[t]here is, in fact, no recognized principle by which the propriety or impropriety of government interference is customarily tested. People decide according to their

personal preferences” (CW, 18: 223). Throughout *On Liberty* Mill repeatedly reformulates proposals to prohibit a certain action in terms of a general underlying principle, and then finds the principle wanting, often on the grounds that once we see it as a principle, it will become clear that it is unacceptable, even to those who are friendly to some of the interventions it warrants. Lord Stanley, for example, argued that the sale of liquor harmed him because, among other reasons, it impeded his “right to free moral and intellectual development” by surrounding his “path with dangers, and by weakening and demoralizing society.” Mill replies that the principle underlying Stanley’s complaint is that “all mankind [has] a vested interest in each other’s moral, intellectual, and even physical perfection, to be defined by each claimant according to his own standard” (CW, 18: 288). But such a principle is impossible to accept because it makes mutual toleration impossible.²⁴ For Mill the idea that principles governing intervention must be general and impartial is absolutely crucial in eliminating a host of proposed claims to being harmed by the actions of others. Importantly, Mill is contemptuous of “principles” based on the “logic of persecutors” which “say that we may persecute others because we are right, and that they must not persecute us because they are wrong” (CW, 18: 285). Such principles are manifestly non-neutral since they presuppose that one party is correct in the dispute; only principles of interpretation that are not partial in this way are acceptable.

Mill, then, aims for a neutral interpretation of the harm principle. The only acceptable interpretations of “harm” are those that, once formulated in general terms, are not partial to one side in a religious or other valuational dispute about how to live life. The test of this partiality is whether the proponent of a conception of harm really endorses it when it would be employed against him; if not, it is objectionably

partial. Thus Mill argues all religious citizens should see that they could not accept a conception of harm in which their own religious practice could be seen as harmful to others. Consequently, he argues that a general principle of, say, not counting as a harm offense to religious sensibility, is indeed neutral because it does not take a side in the dispute between religions. Of course there will be limits to the range of dispute that any interpretation of the harm principle can respect: the harm principle is not neutral between those who like to be harmed and those who do not, or between those who think that it would be better to die than to live among heathens and their more worldly brethren.²⁵ We shall consider anon just how wide Mill seeks to cast his net (§IV), but for now the crucial point is that Mill repeatedly resists simply appealing to his own controversial conception of individuality when determining what constitutes a harm, something we might have expected from a “comprehensive” liberal. Indeed, Mill implies in *Principles* that appealing to a controversial conception of harm as the basis of a law — even if that notion of harm is verified by an appeal to utility — is to be avoided unless it is endorsed by the general citizenry.

...[U]nless the conscience of the individual goes freely with the legal restraint, it partakes, either in a great or in a small degree, of the degradation of slavery. Scarcely any degree of utility, short of absolute necessity, will justify a prohibitory regulation, *unless it can also be made to recommend itself to the general conscience; unless persons of ordinary good intentions either already believe, or can be induced to believe, that the thing prohibited is a thing that they ought not to wish to do* (CW, 3: 938, emphasis added).²⁶

(iv) *When can society bear the harm?*

We have seen that Mill's principles do not achieve first-level neutrality in relation to their range of application (i.e., liberal v. non-liberal societies). However, the deep worry about whether Mill's doctrine achieves first-level neutrality arises at the stage in which it has been shown that an action has harmed others and we now must decide whether this harm is significant enough to prohibit, or whether society can bear the harm. Remember, according to Mill

it must by no means be supposed, because damage, or probability of damage, to the interests of others, can alone justify the interference of society, that therefore it always does justify such interference. In many cases, an individual, in pursuing a legitimate object, necessarily and therefore legitimately causes pain or loss to others, or intercepts a good which they had a reasonable hope of obtaining. (CW, 18: 292)

In deciding which harms *to allow*, it seems impossible for Mill to avoid some sort of cost/benefit calculation, and so he straightforwardly appeals to the general interest (CW, 18: 293). We might say that, for Mill, while all laws must be neutral on their face, in their intent, and in their interpretation, the decision whether to refrain from legislating (in cases where Principle (2) allows it), is a matter of social utility and requires appeal to the public welfare. This raises an interesting problem for Millian neutralist liberalism. We could have a body of laws each of which is neutral, but the system nevertheless reflects general utilitarian (or even perfectionist) concerns because such concerns inform the decision not to legislate: only legislation, not its absence, requires a neutral justification.

Interestingly, this asymmetry seems built into the fabric of Mill's account, and perhaps liberalism in general. If leaving people free does not require a justification — if, as Mill says, “the onus of making a case always lies on the defenders of legal

prohibitions” (CW, 3: 938), then no one need to defend a decision to leave people free. And that means that they might be legitimately left free for a variety of reasons. I don’t think Mill would be worried about this. At least in his day, he thinks over-regulation was rampant; and since regulation limits liberty, I believe that he generally supports bearing “inconveniences” for the “greater good of human freedom” (CW, 18: 282) whenever possible. Notice that the appeal to liberty now plays a different role in the argument: it is not simply a presumption (as in principle (1)), but a great social value (“a greater good”) that can often outweigh even legitimate harms to others. Insofar as liberty is a great social value that outweighs harms to others, and *that* is why we do not legislate, we may have a neutral justification for a wide-range of cases *not* to legislate. If, that is, there is a neutral case for seeing liberty as so important. We are thus led to the heart of Mill’s liberalism: is there a neutral justification for liberty as a great social value?

(v) Is anyone not a neutralist in this sense?

Before going on to look at Mill’s case for neutral legislation, it is important to stress that many liberals have defended distinctly non-neutral principles of legislation. Consider the British idealists, whose version of liberalism dominated late nineteenth-century English political theory. Their principles of liberal legislation really were perfectionist and non-neutral. Indeed, their master political principle was that, with regard to compulsory government policies, the state should “hinder hindrances” to “the best life.”²⁷ And so, in his doctrine of liberal legislation T.H. Green maintained that “[t]here is no right to freedom in the purchase and sale of a particular commodity, if the general result of allowing such freedom is to detract

from freedom in the higher sense, from the general power of men to make the best of themselves.”²⁸

IV MILL’S SECOND-LEVEL NEUTRALIST LIBERALISM

(i) *What would be a neutral case for first-level neutrality?*

Thus far we have been examining the extent to which Mill defends neutral legislation; what is required to, as Larmore says, provide a neutral justification of neutral principles? Recall:

Political Neutrality: *L* is neutral between *A* and *B* on dispute *D* in relation to *T* if and only if it does not *T* them differently on the basis of *D*.

Applying this idea, we can say that the justification (*J*) of a principle of (first-level) neutral legislation is itself neutral between *A* and *B* on dispute *D* if *J* does not treat *A* and *B* differently. In this context, for *J* to treat *A* and *B* differently would be for the justification to presuppose, or favor, *A*’s or *B*’s position on the disputed matter. Now it is obvious that just “how neutral” the justification is will turn on how broadly we specify *D* and the members of *A* and *B*. If *D* only covers a small range of disputes (say, about the proper interpretation of Christian doctrine), the justification would be neutral in relation of Christians, but not *vis a vis* non-Christians.²⁹ Again if the parties to the disputes are characterized narrowly — for example, fully rational citizens who have no false beliefs — the justification would not be neutral between the views of this group, and the positions of less-than-fully-rational citizens on *D*.

We can see, then, that rather than asking simply whether a justification is neutral, we should think about how broadly neutral it is: the broader the range of disputes, and the broader the class of citizens among which the justification is neutral, the broader the second-level neutrality. I shall argue that Mill’s second-level justification

of his three core principles is very broadly neutral, and goes far beyond the set of citizens who embrace his ideal of individuality. Indeed, he seeks to appeal to the general public — that “miscellaneous collection of a few wise and many foolish individuals” (CW, 18: 232). The point of *On Liberty* is that public opinion cannot be allowed to freely rule over the lives of others. So, as we have seen, Mill clearly does not respect the opinions of ordinary members of the public about how others should live. However, this does not mean that Mill does not wish to show ordinary members of the public — even those who fail to value individuality — that they have good reasons to embrace neutral legislation. Mill offers justifications for neutral legislation that appeal to general members of the public, and which do not require taking sides on a wide range of disputes about the best way to live, including the value of individuality.

It is important to stress that not every justification that Mill offers needs to be neutral with regard to every dispute. As we will see (§§IV.ii, IV.iv), Mill does indeed offer consensus justifications, but *On Liberty* is partly devoted to *convergence justifications* (§II.i.4), which show how the public in general have various strong reasons to adopt his principles, based on their differing interests and aims. Different parts of the public will respond to different arguments. A convergence justification can be neutral between Alf and Betty and yet draw on Alf’s controversial belief β to justify a neutral principle, if it can provide Betty, who does not share β , with another reason, perhaps based on a controversial belief that she holds but Alf does not, to endorse the principle. The important point is, by the end of the day, every member of the general public has reason to endorse the principles.

(ii) The master argument for liberty: shared epistemic interests

The “official Mill” of the political liberalism of Rawls and Larmore rests his case for the value of liberty on the ideal of individuality. But that is not the first case for liberty that Mill presents; chapter II of *On Liberty* is devoted to freedom of speech. Many political philosophers are apt to dismiss this first, lengthy, defense of freedom of speech as not directly relevant to a defense of *freedom of action*. Recall that after concluding his defense of freedom of speech Mill explicitly says that “No one pretends that actions should be as free as opinions. On the contrary, even opinions lose their immunity, when the circumstances in which they are expressed are such as to constitute their expression a positive instigation to some mischievous act” (CW, 18: 260). He then seems to begin his defense of freedom of action, which draws on the ideal of individuality (see below §IV.iii), leading to the impression that the ideal of individuality is *the* defense of free action. However, Mill explicitly tells us that

the same reasons which show that opinion should be free, prove also that he should be allowed, without molestation, to carry his opinions into practice at his own cost. That mankind are not infallible; that their truths, for the most part, are only half-truths; that unity of opinion, unless resulting from the fullest and freest comparison of opposite opinions, is not desirable, and diversity not an evil, but a good, until mankind are much more capable than at present of recognizing all sides of the truth, are principles applicable to men’s modes of action, not less than to their opinions. As it is useful that while mankind are imperfect there should be different opinions, so is it that there should be different experiments of living; that free scope should be given to varieties of character, short of injury to others; and that the worth of different modes of life should be proved practically, when any one thinks fit to try them. (CW, 18: 260-61)

Thus the grounds of freedom of speech “when rightly understood, are of much wider application than to only one division of the subject” (CW, 18: 227).

What are these grounds? Mill provides two general epistemic cases for freedom of speech. We can see one as based on our interest in truth, and one on our interest in justified belief.

1. The argument for the interest in truth is a social epistemology argument.³⁰ A society which gives great scope for freedom allows citizens to engage in many experiments of living. Just as true beliefs will tend to be produced in an epistemic climate in which they can be challenged and defended by anyone, so too Mill thinks that correct ways of living will arise in an atmosphere of freedom of action. This argument appeals to anyone who thinks that some ways of living are truer or more correct than others — one need not be a proponent of individuality or eccentricity. If one believes that there are better or truer ways of living — including non-Millian ways of living— then the social epistemological argument of chapter II of *On Liberty* is relevant. Indeed, Mill is explicit that even if we only have opinions about what is a more *useful* way of living, the social epistemological argument applies (CW, 18: 233),

2. To be sure, one may argue that Mill’s case does not succeed — that some traditional ways of living that are genuinely useful or good for humans cannot be shown to be better in a society with freedom to experiment. Perhaps they have a hard time competing in a free society.³¹ Mill has another, and I think even more important, argument to deploy at this point: if one believes that some ways of life are more useful or better for humans, *this belief is itself only justified in a society that allows freedom to experiment and challenge it*. “Complete liberty of contradicting and disproving our opinion, is the very condition which justifies us in assuming its *truth for purposes of action*; and *on no other terms* can a being with human faculties have

any rational assurance of being right” (CW, 18: 231; emphasis added). Any agent with an interest in action on the basis of justified belief has an interest in the condition that makes such belief possible — liberty. Of course one might reply here that this shows that someone who thinks there are better and worse ways of living ought to allow debate about the matter, but not allow others to actually try out alternative ways of living: it shows only the need for freedom of opinion, not of action. But surely this is the point of Mill’s reference to “experiments in living” (CW, 18: 267). To say that one could have justified grounds for believing that one’s way of living was better or more useful by allowing debate but not allow competing practice is like saying one can have justified grounds for one’s views about physics by allowing discussion but not permitting those who disagree to conduct experiments. Thus, interestingly, on Mill’s view, if a way of life cannot exist under conditions of freedom, none of its adherents could be justified in believing its way of life is good, useful, and so on.

I am not claiming here that Mill’s arguments cannot be disputed; our concern is whether they are neutral. And they are neutral among all citizens who think that some ways of living are better, that we have an interest in finding out which they are, and that we can have justified beliefs about what they are.

(iii) Individuality, social progress and diversity of tastes

Let us now turn to the Mill of Rawls and Larmore, who rests his case for liberty on the value of individuality. There is no doubt that Mill thinks (1) individuality is a genuine value (2) that it endorses far reaching liberty of tastes and pursuits and (3) that it is a controversial value insofar as many are not interested in individuality (CW, 18: 267).³² However, this does not show that Mill’s case for liberty is non-neutral:

only if it is necessary to accept the value of individuality in order to justify a person's endorsement of the principles of neutral legislation would Mill's case fail to achieve second-level neutrality. But as I have been stressing, controversial values can be an element of a neutral *convergence* justification. Mill is not precluded from advocating what he thinks are the best and true grounds for liberty in order to achieve second-level neutrality.

It has been argued, though, that Mill's defense of individuality shows that his case is clearly not neutral in relation to the "Calvinistic theory" which holds that "the one great offence of man is Self-will" (CW, 18: 265).³³ In contrast to Millian individuality, which defends the flowering of human nature, the Calvinist thinks that humanity has its nature bestowed on it in order for it to be "abnegated" (CW, 18: 266). However, even supposing that Mill believes the Calvinistic theory to be worthless, and that he thinks truth lies only in the value individuality, this would not show that his case is overall non-neutral — it would imply that advocates of the Calvinistic view cannot embrace neutral principles on the grounds of individuality. Moreover, a more careful reading does bear out the claim that Mill thinks that the Calvinistic view is without worth. "Pagan self-assertion' is one of the elements of human worth, *as well as 'Christian self-denial.'* There is a Greek ideal of self-development, which the Platonic and Christian ideal of self-government blends with, but does not supersede" (CW, 18: 266, emphasis added). This sounds much like the Mill of Chapter II (CW, 18: 252ff), where he argues that the truth is many-sided, and only freedom for the partial truths to compete and present their cases can uncover the real complex truth (in this case, about the human good).

The deep flaw of the Larmore-Rawls reading, though, is that it ends midway through Chapter III of *On Liberty*. In the first half of the chapter Mill presents his case for individuality, but then he pauses and asks:

Having said that Individuality is the same thing with development, and that it is only the cultivation of individuality which produces, or can produce, well-developed human beings, I might here close the argument: for what more or better can be said of any condition of human affairs, than that it brings human beings themselves nearer to the best thing they can be? or what worse can be said of any obstruction to good, than that it prevents this? Doubtless, however, these considerations will not suffice to convince those who most need convincing; *and it is necessary further to show*, that these developed human beings are of some use to the undeveloped — to point out to those who do not desire liberty, and would not avail themselves of it, that they may be in some intelligible manner rewarded for allowing other people to make use of it without hindrance (CW, 18: 267; emphasis added).

The remainder of chapter III then seeks to do what Mill says is “necessary” — to show those who do not value individuality for itself that they ought to value it (in others). Mill endeavors to uncover a broad common ground of values that should lead general members of the public to allow individuality, even if they do not have a taste for it themselves. (Remember, the public is composed of the few wise and the many ignorant and foolish.) Mill again invokes the epistemic benefits of experiments (CW, 18: 267), but then spends a great deal of effort in arguing that general social progress, which brings a number of conveniences to everyone, depends on the discoveries and actions of exceptional individuals, and we can only expect such genius in an “*atmosphere* of freedom” (CW, 267, emphasis in original).

Lastly, Mill explicitly says late in chapter III that the case for liberty does not depend on the pursuit of individuality and genius:

But independence of action, and disregard of custom are not solely deserving of encouragement for the chance they afford that better modes of action, and customs more worthy of general adoption...; nor is it only persons of decided mental superiority who have a just claim to carry on their lives in their own way.... Human beings are not like sheep; and even sheep are not undistinguishably alike.... If it were only that people have diversities of taste, that is reason enough for not attempting to shape them all after one model (CW, 18: 270).

Mill, then, concludes with a general argument that simply given differences in tastes and well as in our basic constitutions, people cannot get “their fair share of happiness” if they are not allowed to go about their own lives in their own way.

(iv) Arguments for the harm principle

I have been focusing on arguments that liberty is a great value that should not be limited except in the face of serious harms to others (§III.iv). But the harm principle too must be justified: why should society interfere only with harm to others and not some self-regarding actions? How broadly neutral are Mill’s arguments?

1. Mill tells us that “the strongest of all arguments” against allowing public interference with purely self-regarding “conduct, is that when it does interfere, the odds are that it interferes wrongly, and in the wrong place” (CW, 18: 283). “On questions of social morality, of duty to others, the opinion of the public, that is, of an overruling majority, though often wrong, is likely to be still oftener right; because on such questions they are only required to judge of their own interests; of the manner in which some mode of conduct, if allowed to be practised, would affect themselves”

(CW, 18: 283). But when interfering with self-regarding action of others, people tend to follow their own preferences (which, it will be recalled, is the worry at the heart of *Liberty*, §III.iii). Mill takes pains to warn us against assuming an ideal state that only makes justified interventions: real states governed by real publics will tend to make systematic and persistent errors. This is a general government failure argument that does not depend on an appeal to individuality and is consistent with a variety of values.

2. Mill explicitly appeals to an ideal of reciprocity as a basis for the harm principle. At the very outset of Chapter IV, which examines the harm principle, Mill tells us that “everyone who receives the protection of society owes a return for the benefit, and that each should be bound to observe a certain line of conduct towards the rest” (CW, 18: 276). And this conduct is not to harm the essential interests of others.³⁴ Mill holds that this is so basic to social life that anyone who refuses to observe this line of conduct is to be treated “like an enemy of society” (CW, 18: 280) or, less extremely, he is a “nuisance to other people” (CW, 18: 276). When arguing against unjustified interferences such as those based on intolerance, Mill again points out the absence of reciprocity: people demand of others what they do not demand of themselves (CW, 18: 257, 285). That principles of political right are founded on reciprocity is, of course, fundamental to political liberalism.³⁵

Taken together, these two arguments are a compelling, very broadly neutral, *consensus* justification of the harm principle. In Rawlsian terms, by argument 2, all reasonable people — those who seek to live social life on reciprocal terms — must accept that harm to others is a basic political principle that justifies legislation.³⁶ And, by argument 1, recognition of the basic facts of government failure provides a case

that only harm to others — not self-regarding harms — can justify public intervention in the lives of citizens.

V CONCLUSION

In the first chapter of *Liberty* Mill proclaims that “I forego any advantage which could be derived to my argument from the idea of abstract right, as a thing independent of utility. I regard utility as the ultimate appeal on all ethical questions; but it must be utility in the largest sense, grounded on the permanent interests of man as a progressive being” (CW, 18: 224). But this does not mean that one must be a utilitarian to be reasoned into accepting liberty, only that a utilitarian such as Mill (thought himself to be), need not worry that his utilitarianism failed to endorse the doctrine. But, as Mill suggests, a contract view also should be led to the harm principle (CW, 18: 276). Millian liberalism (as a view based on a strong principle of liberty and the harm principle) has been the subject of what Rawls would call an “overlapping consensus”: utilitarians, contract theorists,³⁷ and less systematic liberalisms³⁸ have all embraced its strongly neutralist theory of justified legislation.

On Liberty is filled with arguments. Throughout Mill appeals to a variety of possible objecting positions, trying to show *them* that they should embrace liberty. Larmore’s dictum that political liberals should retreat to common ground in the face of disagreement is in many ways the method of argument in of most of *On Liberty*. Because Mill also presents his own favored, controversial, defense of freedom he has come to be seen as resting his neutralist liberalism on the narrow foundation of a controversial “comprehensive” theory. I have challenged this reading by surveying some of Mill’s most important arguments. I hope it is clear how the foundations of his neutralist liberalism are neither narrow nor sectarian.

Notes

¹ Charles Larmore, “Political Liberalism” in his *The Morals of Modernity* (Cambridge: Cambridge University Press, 1996), pp. 127-128.

² Ibid., p. 128.

³ Ibid., p. 132. See also John Rawls, *Political Liberalism* (New York: Columbia University Press, 1996), pp. xlv-xlv, 78.

⁴ Larmore, *Patterns of Moral Complexity* (Cambridge: Cambridge University Press, 1987), p. 51.

⁵ Ibid., p.53. Emphasis added.

⁶ Although this view is almost a commonplace today, it has not gone unchallenged. See, for example, John Patrick Rudisill, “The Neutrality of the State and its Justification in Rawls and Mill,” *Auslegung*, vol. 23 (2000): 153-168.

⁷ Larmore, “Political Liberalism,” p. 133.

⁸I note the diversity of conceptions of neutrality in “Liberal Neutrality: A Radical and Compelling Principle” in *Perfectionism and Neutrality*, George Klosko and Steven Wall, eds. (Lanham, MD: Rowman & Littlefield, 2003), pp. 137-165.

⁹ Jeremy Waldron also applies neutrality constraints to laws (rather than, say, actions). “Legislation and Moral Neutrality,” in his *Liberal Rights* (Cambridge: Cambridge University Press, 1993), pp. 149ff.

¹⁰ I have defended this characterization of liberal neutrality in “The Moral Necessity of Liberal Neutrality” in *Contemporary Debates in Political Philosophy*, Thomas Christiano and John Christman, eds. (Oxford: Blackwell, forthcoming).

¹¹ Woodrow Wilson, *Message to Congress, 63rd Cong., 2d Session*, Senate Doc. No. 566 (Washington, 1914), pp. 3-4.

¹² <http://lawofwar.org/Neutrality.htm>

¹³ On these distinctions see Larmore, *Patterns of Moral Complexity*, pp. 43ff; Will Kymlicka, “Liberal Individualism and Liberal Neutrality,” *Ethics*, vol. 99 (July 1989): 833-905; Simon Caney, “Consequentialist Defenses of Liberal Neutrality,” *The Philosophical Quarterly*, vol. 41 (January 1991): 457-477; George Sher, *Beyond Neutrality: Perfectionism and Politics* (Cambridge: Cambridge University Press, 1997), ch. 2.

¹⁴ See Michael Pendelbury, “In Defense of Moderate Neutralism,” *Journal of Social Philosophy*, vol. 33 (Fall 2002): 360-276.

¹⁵ Lawrence M. Solan, “Private Language, Public Laws: The Central Role of Legislative Intent in Statutory Interpretation,” *Georgetown Law Journal*, vol. 93 (January, 2005), pp. 427-485.

¹⁶ Neutrality of aim or intent is not, as we shall see, to be equated with neutrality of justification. There can be a neutral justification of non-neutral aim, as I explain in the text. Cf. Sher, *Beyond Neutrality*, p. 4.

¹⁷ See also Sher, *Beyond Neutrality*, p. 34. But compare Pendelbury, “In Defense of Moderate Neutralism.”

¹⁸ Mill, *On Liberty* in *The Collected Works of John Stuart Mill*, J.M. Robson, ed. (Toronto: University of Toronto Press, 1977), vol. 18: p. 223, emphasis added. Hereafter all references to Mill’s writings are in the text, and to the *Collected Works*, by volume and page (e.g., this reference is CW, 18:223).

¹⁹ I am putting aside here important complications, such as whether the harm principle only concerns *causing* harm to another, or also allows *preventions* of harms. There is also a question whether Mill thinks that causing mere offense to others can ground

legitimate intervention; if so, harm to others is not, in the end, a necessary condition for intervention. On these important issues, see C.L. Ten, Mill, *On Liberty* (Oxford: Clarendon Press, 1980), pp. 61-67, 102-107.

²⁰ See S.I. Benn, *A Theory of Freedom* (Cambridge: Cambridge University Press, 1988), pp. 87-90. See also my *Justificatory Liberalism* (New York: Oxford University Press, 1996), pp. 162-66.

²¹ I analyze this claim in *Political Theory and Political Concepts* (Boulder, CO: Westview, 2000) chs. 1-5.

²² Robert Paul Wolff, *The Poverty of Liberalism* (Boston: Beacon Press, 1968), pp. 23-34.

²³ Larmore, *Patterns of Moral Complexity*, p. 53.

²⁴ In a similar way, Mill argues that the only principle he can discern in proposals to conduct a “civilizade” against the Mormon practice of polygamy is a principle of tyranny (CW, 18: 280-291).

²⁵ A conception of harm that appeals to the basic welfare interests of citizens does not take sides in religious or other disputes about how to live, therefore such interpretations of the harm principle are neutral. I argue for this claim in my *Social Philosophy* (Armonk, NY: M.E. Sharpe, 1999), ch. 8.

²⁶ Mill bases this restriction on an appeal to individuality — but that is a matter of second-level neutrality that we shall consider in section IV.

²⁷ Bernard Bosanquet, *The Philosophical Theory of the State* in *The Philosophical Theory of the State and Related Essays*, Gerald F. Gaus and William Sweet, eds. (Indianapolis: St. Augustine Press, 2001), p. 190.

²⁸ T.H. Green, “Lecture on ‘Liberal Legislation’ and Freedom of Contract” in *Lectures on the Principles of Political Obligation and Other Writings*, Paul Harris and John Morrow, eds. (Cambridge: Cambridge University Press, 1986), p. 210.

²⁹ A view that Mill explicitly criticizes at CW, 18: 240-241n.

³⁰ See Allen Buchanan, “Social Moral Epistemology.” *Social Philosophy & Policy*, vol.19, 2 (Summer 2002). I have greatly benefited from discussions with Piers Norris Turner about social epistemological issues.

³¹ On this issue see John Gray, *Two Faces of Liberalism* (Cambridge: Polity Press, 2000).

³² I have explored this ideal of individuality at some length in my *Modern Liberal Theory of Man* (London: Croom-Helm 1983), ch. 1. I argue there that Rawls concurs in endorsing this ideal.

³³ Rudisill, “The Neutrality of the State and its Justification in Rawls and Mill,” pp. 161ff.

³⁴ It also includes what might be called “the public harm principle” which concerns provision of public goods. See my *Social Philosophy*, ch. 10.

³⁵ This is clearest in John Rawls, “The Idea of Public Reason Revisited” in his *Collected Papers*, Samuel Freeman, ed. (Cambridge, MA: Harvard University Press, 1999), ch.26.

³⁶ See Rawls, *Political Liberalism*, pp. 58ff.

³⁷ See my *Social Philosophy*, ch. 6.

³⁸ Most famously, of course, Joel Feinberg’s *The Moral Limits of the Criminal Law* (New York: Oxford University Press, 1984-1990).