

## *A Theory of Impartial Justice\**

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Some writers appear to believe that a theory of justice must somehow pick people up by the scruff of the neck and force them to behave justly, regardless of their beliefs or inclinations. This is an absurd demand . . . (B. Barry, *Justice as Impartiality*)

### 1. *Introduction*

The publication of *Impartiality, Neutrality and Justice* will be welcomed by students of political theory for providing the oppositional matrix for a second reading of Brian Barry's *Justice as Impartiality*.<sup>1</sup> It is no doubt in itself some measure of the significance that has been attached to this second book of Barry's projected four-volume *Treatise on Social Justice*<sup>2</sup> that this collection of essays appears in such advantageously short order. The contributors to *Impartiality, Neutrality and Justice* (*INJ*) come from a range of theoretical starting points, each of them—with the obvious exception of Barry himself whose own essay forms the last chapter in the book—to a greater or lesser extent at variance with the ideas in *Justice as Impartiality* (*JaI*). The result is a book whose strength derives not just from the force of the individual essays, but from the manner of their combining to elaborate and challenge a number of the core aspects of Barry's theory.

### 2. *The Idea of Justice—Terms and Motivation*

What Barry means by 'justice' emerges most fully in his consideration of theories other than his own. 'Justice as mutual advantage' is the term that he uses to describe the various contractarian theories in the Hobbesian tradition which equate justice with a social agreement which enhances the position of all the participants. Whether 'advantage' is considered, with Hobbes, the mere avoidance of violent death and 'the foresight [by men] of their own preservation, and of a more contented life thereby',<sup>3</sup> or a fuller idea of self-advancement incorporating

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<sup>1</sup> B. Barry, *Justice as Impartiality* (1995).

<sup>2</sup> The first volume, *Theories of Justice* appeared in 1989. Two further volumes are in progress.

<sup>3</sup> *Leviathan* (1651; this edition 1998) 223.

the individual's more complete achievement of their conception of the good, justice as mutual advantage digs itself in on the terms of an agreement whereby everybody can achieve it more fully than they otherwise could.

Barry argues that justice as mutual advantage fails as a theory of justice because there is an inconsistency between the criterion of justice and the motivation which would be necessary to make it work. In relation to any theory of justice Barry says that there are three pertinent questions: (a) what is the motive for behaving justly? (b) what is the criterion for a just set of rules? and (c) how are the answers to these two questions connected? 'A theory that cannot answer the third question satisfactorily fails on the ground of internal inconsistency' (*Jal* at 46). Barry argues that justice as mutual advantage is inherently unstable because once the agreement has been made, the dictates of self-advancement, far from tending to support the agreement, soon begin to operate against it. Purely self-interested individuals will post-contractually look for ways to breach the agreement without getting caught, in order to reap free-rider benefits. It is Barry's view in other words that the alleged motivation for behaving justly in justice as mutual advantage—self-advancement—fails to provide the necessary support for the theory's criterion of justice.<sup>4</sup>

David Gauthier,<sup>5</sup> a supporter of justice as mutual advantage, argues that Barry is wrong in his insistence on the instability of the theory deriving from its appeal to self-advancement. Whereas Barry believes that the momentum upon which the theory relies is inevitably and fatally centrifugal, Gauthier argues that this is based on a misapprehension of the way in which self-advancement works in a mutual advantage context. In Gauthier's view, rather than being increased, the overall levels of non-compliance are kept firmly in check by the participants' interest in self-advancement. He believes that individuals are more likely to be successful and to advance their interests to the greatest extent in the long run if they are perceived by others to be trustworthy. And by far the best way to be seen to be trustworthy is actually to be trustworthy, to be the type of person who keeps to the terms of their agreement. Because people have this overall view, says Gauthier, their interest in self-advancement encourages them to stick to the terms of the mutual advantage agreement (*INJ* at 121, 124).

It is difficult of course to say which of these two views is nearer the truth. Where will the critical masses come out? With enough individuals seeing their best interests lying in actually being trustworthy to render the arrangements stable, or with the number of individuals attempting to 'get away with' as much infractive behaviour as possible being large enough to render it unstable? It seems an open enough question. More to the point it seems strange ground on which to decide the matter of justice. It looks as if Barry has got himself up

<sup>4</sup> A variant of justice as mutual advantage is justice as reciprocity. This posits a motivation to act fairly on the part of participants. This is rejected by Barry on the grounds again of inconsistency between criterion and motivation. If the criterion of justice, mutual advantage, can give rise to demonstrably unfair social arrangements, as it can, then the motivation to act fairly by definition cannot make it work.

<sup>5</sup> D. Gauthier, 'Mutual Advantage and Impartiality' *INJ* ch 8.

against the rock that whether or not it is justice depends upon whether or not it works.

Jonathan Wolff<sup>6</sup> thinks that while Barry may be correct in identifying a potential instability in a society based on justice as mutual advantage, this is only threatening if the failure is sufficiently widespread and accumulating. ‘And this depends on contingent matters of fact. Accordingly I do not accept that justice as mutual advantage is doomed to fail the test Barry sets for it’ (*INJ* at 41). Wolff’s real issue with Barry, however, is at a deeper level. He believes that Barry’s three requirements are an arbitrary imposition and that there is no cogent reason why it should be necessary for a theory of justice to satisfy them. He wonders why Barry thinks it necessary for a theory of justice to say anything about motivation at all (*INJ* at 40).

The clue to answering this lies in something that Barry says in the context of a discussion of classical and Humean mutual advantage arguments about justice lying in obedience to the polity, the observance of property rules, etc. His comment is that ‘it is clear that “justice” is doing no real work here’ (*JaI* at 44). This, it seems to me, is the key to understanding Barry; the ‘justice’ label can be applied to lots of things—the edicts of a tyrant, the accumulated decisions of the courts, those social arrangements which are to everyone’s advantage—but to this extent it is just a question of words. The thing about justice for Barry is that we expect something of it. We expect it to be able to do things. Justice to have meaning should have the potential to take us beyond ourselves—or at least beyond our self-interest.

It is with precisely this in view and not for anything else that Barry identifies his three requirements. A theory of justice needs consistency between the criteria of justice and the motivation for adhering to its terms, not to satisfy some misplaced aesthetic urge, nor, *pace* Gauthier, to ensure that the theory works in practice, but because this is necessary if the theory is to do work. What makes justice important for Barry is its effective impact. The only way that it can have such impact is on the basis of an appropriate combination of prescriptive and motive forces. It must, if it is to do work, both provide the criteria of just behaviour and access a human motivation to behave in accordance with those criteria.

Nor, however, does the fact that a theory meets Barry’s three requirements mean that it amounts to a satisfactory theory of justice. They are necessary but not sufficient conditions for justice to do work.<sup>7</sup> And that is why ultimately it is not the determinative issue in respect of justice as mutual advantage whether there is a breakdown between the criteria it prescribes and the motivation for adhering to that prescription. Because justice as mutual advantage, regardless of consistency or inconsistency, is a theory doomed to quietism. The work to be expected of justice is precisely the work of overcoming self-interest. No-one will deny that self-interest will get things done. Nor that organizing self-interest

<sup>6</sup> J. Wolff, ‘Rational, Fair and Reasonable’ *INJ* ch 3.

<sup>7</sup> *JaI* at 46.

as mutual advantage will get things done more effectively and efficiently. But it cannot be justice, because the work that justice does is work in relation to, and not, if it is to have meaning, the work of such forces.<sup>8</sup>

### 3. *Justice as Impartiality*

Barry seeks to provide us with a theory which, by coupling the motivation of individuals to act fairly with criteria of justice that are consistent with fairness, is able to do real work. Barry's idea of fairness is constructed around three premises.<sup>9</sup> Firstly, there is the notion of the fundamental moral equality of human beings. Secondly, a demand that inequalities in the distribution of rights and resources be capable of being justified to those who stand to get the least of whatever is being distributed. And, thirdly, the concept of the 'separateness of persons . . . the operational significance of [which] is that we cannot justify a policy to those who do badly under it *simply* by saying that others are doing very well under it' (original emphasis) (*INJ* at 188). Ultimately the success of Barry's theory depends on the force of these three imperatives; his theory works only if they are accepted as valid premises upon which to proceed.

They are embodied in the central device adopted by Barry as a means of unearthing the demands of social justice. This device—originally developed by T.M. Scanlon in the context of identifying principles of moral behaviour<sup>10</sup>—comprises a hypothetical original position in which individuals are to agree the principles and rules which should govern their society. Significantly, these individuals are deemed to be motivated not solely by the desire to further their own aims, but also 'by a desire to find principles that others similarly motivated could also accept' (*Jal* at 67). However, unlike people agreeing behind the Rawlsian veil of ignorance, the individuals in the Barry–Scanlonian original position are taken to be aware of their particular personal circumstances, their attributes, their position in society, their conception of the good life, happiness etc. The central operational rule imposed is that only those principles and rules may be adopted which no-one could reasonably reject.

It is Barry's argument that the terms for co-existence that would be agreed in such an original position would satisfy the criteria of fairness and thus provide a workable blueprint for a just society. Because no conception of the good can be demonstrated to be more valid than any other conception, for individuals to be treated equally, in Barry's view, requires that their conceptions of the good

<sup>8</sup> Barry is in fact prepared to accept that justice as mutual advantage can appropriately be called a 'kind of justice'. This is because it does impose constraints on our behaviour, even if these constraints are ultimately simply the constraints necessary for maximum advancement, at least from an *ex ante* point of view (*Jal* at 44–6). This is no more than a semantic concession, similar to allowing that a child's plastic hammer could, at a stretch, be called a hammer.

<sup>9</sup> The same three premises that, in Barry's view, Rawls sought, ultimately unsuccessfully, to incorporate into his original position (*INJ* at 190).

<sup>10</sup> T.M. Scanlon, 'Contractarianism and Utilitarianism' in A. Sen and B. Williams (eds), *Utilitarianism and Beyond* (1982) ch 5 at 103–28.

be treated equally. This combination of 'scepticism'<sup>11</sup> and equality indicates that just rules for co-existence require impartiality between competing conceptions of the good. The Scanlonian original position captures this aspect by requiring that a rule only be adopted if it could not reasonably be rejected by any individual. The effect of this will be that no rule will emerge which would have the effect of enshrining any one conception of the good as pre-eminent over others.

The reason why individuals are taken to be aware of their personal circumstances etc. is that Barry believes that the mechanism of agreement is centrally important in getting at the content of justice. The action of agreement implements the premise of separateness of persons. Ninety-five per cent of individuals might benefit from a given system at the expense of the other five per cent. The requirement of agreement eliminates this possibility. Without individuals knowing their circumstances, their abilities, their interests, however, there cannot be agreement in any real sense. It is for this reason that Barry rejects Rawls's veil of ignorance as defeating the contractualist method (*Jal* at 58).

It is important in understanding Barry's theory not to overestimate the function of the original position device. One of the criticisms that is made in *INJ* of Barry's approach is that his contractarian device is so closely tied to the premises underlying it that it serves no real purpose, that it is, in the words of Albert Weale, an 'unnecessary theoretical epicycle'.<sup>12</sup> For Weale, such a mechanism to be convincing needs to add some real substantive value to the outcomes, not just the process. He says that Barry's mechanism lacks the crucial transformative 'element of surprise' (*INJ* at 29). For this contractarian approach to work, he says, it needs to have an effect something akin to receiving a colour signal from a black and white broadcast. This, however, is to misconstrue Barry's purpose. He is quite explicit that the original position should be considered simply as an assistive methodology. It amounts to no more than a useful way of handling the rather slippery material of justice. Everything it helps us to do, we could do anyway. It is merely a mechanism for achieving structure and clarity.

#### 4. *The Requirement of Reasonableness*

The core moving part in Barry's arrangement is, then, the requirement that principles be found which could not reasonably be rejected by any of the participants. Given the retention of personal knowledge by the participating individuals in the Barry–Scanlonian original position, the reasonableness modulation is clearly necessary if the achievement of agreement is to be a realistic outcome. However, this in turn gives rise to one of the most problematic issues for the theory of justice as impartiality. A number of the contributors to *INJ* are

<sup>11</sup> Barry uses 'scepticism' as connoting the view that no conception of the good can be held with a sufficient degree of certainty to warrant its imposition on others (*Jal* at 169).

<sup>12</sup> A. Weale, 'From Contracts to Pluralism?' *INJ* ch 2 at 12.

doubtful as to whether the theory can survive the level of indeterminacy introduced by the incorporation of the concept of reasonableness.

Richard Arneson, for example, argues that Barry's Scanlonian test amounts to no more than 'one ought to conform to the moral rules that are best supported by moral reasons' and that accordingly Barry is bound to fail in his attempt to derive substantive outcomes from the test.<sup>13</sup> Although any theory of justice must face more towards the openness of structured discourse than the closure of prescriptive conclusion, it must none the less provide a convincing framework for that discourse if it is to be of real practicable use. Arneson argues that its reliance on reasonableness leaves justice as impartiality falling short of the necessary minimum in this regard. Similarly, Paul Kelly, in his response to Barry's argument that a 'liberal' utilitarianism can only be arrived at by an appeal to 'stylized' facts (*Jal* at 135–6), argues that the latter's reliance on reasonable agreement for accessing the terms of a just society gives rise to similar difficulties.<sup>14</sup>

On its face, Barry's direct reply to this argument of indeterminacy deriving from the reasonableness requirement is slightly unhelpful. He states in his contribution to *INJ* that the original position is a purely hypothetical construct and the idea of reasonableness is imputed. '[The participants'] search can be successful only if they have a common standard of reasonableness, so the theory imputes this to them' (*INJ* at 191). While it is valid for Barry to make the point that his theory is designed to articulate directly with the reader in relation to the question of reasonableness, by itself this would leave him open to a charge of stalemating. But this would be to misrepresent his position. For the question of reasonableness in Barry is deeply influenced by the underlying premises of the theory.

It is important to understand how the reasonableness requirement interacts with another central feature of the construction—that which imputes to participants the motivation to reach agreement with each other. This motivation, arising from the deepest underpinning of the theory of justice as impartiality, the belief that a basis for co-existence can be established which does not appeal to any disputable conception of the good—and all conceptions of the good are disputable—implies an adopted scepticism on the part of the participants as to the trumping effect of their own theory of the good.<sup>15</sup> This in turn leads to an engagement with the question of reasonableness which does not invoke individual conceptions of the good. The participants having divested themselves of the otherwise powerful right of appeal to their individual substantive theories, the tractability of the issue of reasonableness is critically improved. Once negotiations take place in the absence of a willingness to break off on the basis that participants' views of the good life are not being given precedence, the issue of reasonableness becomes centred on the moral equality of individuals, with a resulting significant reduction in the levels of indeterminacy in the situation.

<sup>13</sup> R. Arneson, 'The Priority of the Right over the Good Rides Again' *INJ* ch 5 at 62.

<sup>14</sup> P. Kelly, 'Taking Utilitarianism Seriously' *INJ* ch 4 at 46–8.

<sup>15</sup> In relation to the agreement motive and scepticism, see *Jal* at 164–73.

### 5. *Justice and the Good*

An important theme in a number of the contributions to *INJ* is the question of the relationship between justice as impartiality and conceptions of the good. It is central to Barry's theory of justice that the right is distinguishable from, neutral between, and prior to, individual theories of the good. Barry's commitment to the Scanlonian original position as a device for identifying just terms for social co-existence derives, as we have seen, from the premise that humans need to be able to justify to each other the social rules that they require each other to live by. He argues that there is nothing particularly controversial in this, in that most individuals, whatever their particular conception of the good, will accept the importance of being able to justify the rules for social co-existence they would wish to see established. In other words, his 'argument presupposes the existence of a certain desire: the desire to live in a society whose members all freely accept its rules of justice and its major institutions' (*Jal* at 164). As no conception of the good can hope to achieve the kind of agreement from other individuals which would satisfy such a requirement (*Jal* at 170–3), the basis of social co-existence must be found in a theory of justice which is neutral as between competing conceptions of the good.

The issue raised by Matt Matravers is whether justice as impartiality remains sufficiently value-free to resist claims that it itself amounts to a version of the good.<sup>16</sup> He believes that it is not. He argues that the central idea of justice as impartiality can only stand up to alternative theories such as justice as mutual advantage, by virtue of a 'thick' commitment to the idea of the fundamental equality of human beings. Diemut Bubeck<sup>17</sup> makes a similar but different point. She says that Barry's theory cannot get off the ground unless the participants in the original position adhere to prior conceptions of the good. She argues that his reliance on the agreement motive and thereby on the acceptance of a belief in the fundamental equality of individuals and his requirement that people in the original position act reasonably, is only workable in reality if those individuals are in 'the habit of restraining and justifying their behaviour on the basis of moral, ethical or religious considerations' (*INJ* at 169–70). Of course to say that the thing will be more practically effective if the participants hold conceptions of the good is not the same as Matravers' point that a commitment to equality amounts to a conception of the good. We can of course adhere to equality and reasonableness without a commitment to any substantive theory of the good, that is to say, a theory which is derived from a belief in some desirable outcome—be it the implementation of divine will, the maximization of utility, the common ownership of the means of production, or whatever. Every theory has to have its premises—but this is not the same as having a commitment to substantive outcomes. Matravers says that 'it may be the case . . . that Barry would be happy to accept much of what I have said above; what *Justice as*

<sup>16</sup> M. Matravers, 'What's "Wrong" in Contractualism?' *INJ* ch 7.

<sup>17</sup> D. Bubeck, 'Care, Justice and the Good' *INJ* ch 10.

*Impartiality* is about is convincing people of what follows if they accept “fundamental equality”’ (*INJ* at 116). Barry acknowledges in his contribution to *INJ* that this is indeed his position (*INJ* at 214).

One of Richard Arneson’s concerns is that justice as impartiality is insufficiently determinative at the political level and accordingly leaves too much to chance and, more worryingly, to the ability of adherents of particular conceptions of the good to establish an ascendancy based on their ability to achieve electoral success. He believes that by restricting the mandate of justice at the political level and leaving a wide range of issues to be determined by argumentation from the good, Barry is in effect sanctioning, or at least leaving the way open for, the use of state power for sectarian ends (*INJ* at 66).

Three levels at which justice operates are identified in *Jal*—the constitutional, the political, and the personal. All issues at the constitutional level, it is clear, will fall to be determined in accordance with the principles of justice. The constitution establishes the social and political framework and must, accordingly, eschew all appeals to the good. It is required to be neutral and, in Barry’s view, the only available coherent neutral basis for organizing society is provided by justice as impartiality. Enshrined at the constitutional level will be those issues which are appropriate to be ‘administered’ subsequently by the courts—for example, principles of religious and sexual freedom.<sup>18</sup> Other principles such as those, say, of economic justice will not be dealt with at the constitutional level because the working out of such principles is wholly unsuited to be dealt with by the courts.

What is at stake in any given society includes . . . the form of economic organization (private ownership, public ownership, workers’ cooperatives, and so on), the system of taxes on income, inheritance, and gifts, and the basis on which cash transfers are made. These are, if anything is, the stuff of politics. (*Jal* at 95)

At the political level there is a mixed situation—some issues are to be determined by reference to the requirements of justice, while others are not and may be dealt with on the basis of substantive argumentation from the good. Barry argues that the participants in the original position would conclude that there is a range of matters—both at the political and the personal level—which should be determined by reference to the principles of justice and a range of matters—a wide range of matters as it happens—which should not be determined in this way but on the basis, rather, of arguments from the good. He states that ‘only a very small fraction of the work of a contemporary legislature and government deals with matters where justice is of the essence’ (*Jal* at 109). It is his view that while issues such as the distribution of income and wealth are properly determined as issues of justice, ‘social justice does not determine the level or organizational form of health care, education, or social security. In a modern

<sup>18</sup> It is not Barry’s position that issues which are appropriate to be dealt with at the constitutional level actually have to be enshrined at that level—what ultimately matters is that the freedoms or rights should exist, ‘the means by which this is achieved are of no significance in themselves’ (*Jal* at 94).



society, social justice certainly does require that all of these should be provided, but it leaves a good deal of scope for variation beyond that' (*Jal* at 97–8). In relation to such matters as are not required to be determined by reference to the demands of justice, they are appropriately decided on the basis of differing conceptions of the good contesting the issue within the framework of a just and fair political system.

While the precise reasoning underpinning Barry's view that there is a large tranche of issues at the political level that do not fall to be determined by neutral justice is not set out in *Jal*, but is left to be provided in forthcoming volumes of the *Treatise* (*Jal* at 97), we can be fairly certain that the reasoning will involve a combination of the general indeterminacy of justice in relation to the detailed elaboration of social policy on the one hand, and the importance to participants in the original position of the play of the good being allowed sufficient scope at the political level to provide for meaningful political activity.

If, however, justice as impartiality is silent as to the substantive outcomes in relation to such issues, it is very far from being so about how political issues of both types should be handled—that is, about the political processes and institutions to be adopted in a just society (*Jal* at 99–115). A central requirement of just political institutions is that they replicate the original position notion of desire to reach agreement on the basis of reasonableness. As Barry puts it:

[t]he most important and at the same time perhaps the most elusive of the circumstances of impartiality is a motivational one: the willingness to accept reasonable objections to a proposal regardless of the quarter from which they come. (*Jal* at 100)

What this involves is the idea of a political process based not upon group membership or vested interest but upon informed and reasoned argument. Moreover, it is essential that there is fair and meaningful access for all to the political process. The proposition that the political process should be fair, providing access to all on the basis of reasoned argument, could not reasonably be rejected by any participant in the original position (*Jal* at 110).

It is just these procedural imperatives deriving from the original position agreement, that Arneson ignores in his assertion that justice as impartiality sanctions a situation in which the adherents of any particular conception of the good can collect a majority of votes in a fair election to entrench a given social policy regardless of its sectarian or other nature (*INJ* at 65–6). This suggests an interpretation on Arneson's part of the procedural imperatives of justice as impartiality as reducible to a formalized set of rules for vote-gathering. Any reading of the relevant passages of *Jal* makes it abundantly clear that this is not the case. The requirements of justice as impartiality in this regard operate at a much deeper level. As Barry says 'what is required is as far as possible a polity in which arguments are weighed and the best argument wins, rather than one in which all that can be said is that votes are counted and the side with the most votes wins' (*Jal* at 103). A commitment to justice as impartiality requires a

commitment to substantively meaningful political procedures not merely formal ones.

Barry spends much time and effort attempting to demonstrate that justice does not operate in an overweening way. Specifically, that it is not to such an extent determinative that it leaves little scope for conceptions of the good. While this is seen as important at the political level, it may be argued to be even more fundamental at the personal or first-order level. He is on the other hand quite explicit that the relationship between second-order and first-order impartiality has to be established within the theory of second-order impartiality itself (*Jal* at 11). ‘Second-order’ in this context refers to those principles and rules which would be agreed by participants in the Barry-Scanlonian original position to govern them in their social, political etc relations. ‘First-order’ refers to the principles and rules governing personal behaviour in everyday life (*Jal* at 11, 192, 194). For Barry, the extent to which issues at the personal level require to be determined by the requirements of justice or are left to be determined in accordance with held conceptions of the good is itself a question to be determined by higher level justice.

The division between justice- and good-determined questions at the personal level can be seen in the context of the question of the responsibilities of adults towards children. Barry suggests that while justice would require impartiality (drawn at an appropriately high level) on the part of parents in relation to their own children, it would not impose obligations of impartiality in relation to the way one deals with other people’s children *vis-à-vis* one’s own (*Jal* at 14–15). Similarly, justice cannot be allowed to impose obligations on us in relation to the way we choose our friends. We must if we are to be happy be able to choose our friends on whatever basis we like and not by reference to some justice-driven rules of impartiality. The point of justice is, we must remember, to allow individual conceptions of the good to be pursued in circumstances of fairness—an aim that would be defeated entirely if the remit of justice extended to an undue extent into the first-order level. As Barry puts it ‘the people in a Scanlonian original position could reasonably reject a norm that did not leave sufficient scope for individual discretion’ (*Jal* at 200).

Diemut Bubeck takes issue with the lexical priority which Barry accords to justice. She argues that

Barry’s position . . . fails to confront one of the most central questions that feminists and other anti-impartialists have raised, namely why impartial rules or principles—in this case principles of first- and second-order justice—should always overrule other moral considerations.<sup>19</sup>

Bubeck stands on the proposition that care represents ‘a genuine new ethical epistemology with which to reconceive the moral realm, including justice’ (*INJ* at 163). There can accordingly be ‘genuine dilemmas involving considerations

<sup>19</sup> Above n 17 at 158.

of justice and care—dilemmas which can only be generated if justice and care are posited theoretically as on a par’, with ‘the ethic of care as a genuine competitor in the field of moral theory’ (*INJ* at 164). It is not enough in other words that justice as impartiality leaves large scope for conceptions of the good to operate. For Bubeck it remains overreaching in that such scope is itself determined by the principles of impartial justice—which for her amounts to an unjustifiable pre-eminence of justice over care.

Barry argues in *Jal* that universal first-order care would give rise to ‘amoral familism’ which would represent even more of a threat than pure egoism (*Jal* at 253). Bubeck points out that even if care theorists were arguing for unlimited pre-eminence of care, the consequences suggested by Barry would be ruled out by the fact that the care imperative extends in potential to all other individuals and not only to those with whom we are in direct personal relations. Accordingly, the ruthless interaction which Barry foresees could not arise. Bubeck, however, is not arguing for such universal first-order care but rather for a situation where neither justice nor care would have lexical priority *per se*. She conceives a situation where the relationship between conceptions of the good and justice is dynamic. ‘Participants may have to reconstruct some aspects of their conceptions of the good on the basis of the rules of justice they have come to agree to’ (*INJ* at 173).

Bubeck mounts an effective assault on what she perceives to be the underlying Hobbesian premise of justice as impartiality. Barry needs justice as impartiality to have priority at both the political and the personal level because the question that he is asking is what are the appropriate principles and rules for co-existence. And co-existence takes place of course at both the political level where society’s governing rules are made, and at the personal where we actually do the living and make our moral and ethical choices. In Barry’s theory the reason why justice as impartiality is indicated is that the interaction of fundamental equality and scepticism as to the good leave us with no choice but to seek our rules of justice in impartiality. As Bubeck points out, however, this analysis holds up only if you accept the premise that conceptions of the good at the last cannot talk to each other and need governance by pre-eminent rules of justice in order to avoid descent into at best disorganization and at worst Hobbesian conflict. While for her, conceptions of the good are socially beneficial in restraining people’s conduct, ‘according to Barry they are recipes for disaster’ (*INJ* at 168).

She makes two important distinctions. Firstly, between on the one hand the pursuit of self-interest which will inevitably give rise to conflict, and on the other the pursuit of conceptions of the good which, by virtue of their behaviour-constraining attributes, need not. The very fact that people try to live their conceptions of the good actually constrains the means by which they would choose to do so (*INJ* at 167). Secondly, she distinguishes between conceptions of the good held, as it were, for themselves and the same conceptions when they become mixed with political and power interests. It is when this happens that the potential for conflict arises. It is precisely this mixing of conceptions of the

good and political and power interests which, in Bubeck's view, explains much of our history of conflict. On this basis she is prepared to concede to Barry the need for impartiality by political regimes as they currently exist. This, however, is a practical conclusion and has no implications, for example, for personal ethics (*INJ* at 168).

The difference in underlying premise—conceptions of the good as essentially conflictual on the one hand, and colloquial on the other—emerges dramatically in Barry's and Bubeck's respective prescriptions for handling the problem of co-existence in the face of multiple and divergent goods. Barry, fixed by conflict, seeks the external (high) ground of impartiality as providing the only basis of productive co-existence. Bubeck on the other hand, because she sees conceptions of the good in their true form as essentially beneficent, suggests a 'transformative' strategy. This strategy would seek, through a type of ideal discussion situation, to:

[a]chieve enough common ground between the various participants with their differing conceptions of the good and interests so as to arrive at a conception of justice. This discussion would induce the participants to modify their originally held conceptions of the good so as to at least accommodate, if not support, the agreed upon principles of justice. (*INJ* at 171)

In the end it may be thought that Bubeck is too optimistic—both in her belief that distinctions can be drawn between individuals' pursuit of their self-interest, their happiness, and their conception of the good to achieve the non-conflictual background necessary to her analysis, and in her view that deeply held conceptions of the good with their embedded systems of worth can converse without a governing framework of impartiality to regulate the conversation and establish the parameters of loss and gain. None the less Bubeck's approach offers a real challenge to justice as impartiality in that it provides a coherent line of attack on a central underpinning of Barry's theory. Barry's response is interesting: 'If they [the 'care theorists'] are right, I am wrong, and that is all there is to it' (*INJ* at 255).

## 6. *Contractarianism v Utilitarianism*

Utilitarianism has long been not only the most influential impartialist political theory, but also the pre-eminent one of Western socio-political organization. More recently the resurgence of the neo-liberal socio-economic project has derived considerable theoretical support from the idea of justice as utility-maximization.<sup>20</sup>

Utilitarianism of course—due to the malleability of its core concept utility—takes a variety of forms and does not inevitably connote a catallactic socio-economic order. Barry criticizes utilitarianism for its lack of determinacy, and

<sup>20</sup> See, for example, F. Hayek, *Law, Liberty, and Legislation* (1982; originally published in 3 vols, 1973–9) vol. II, ch 10, and *The Constitution of Liberty* (1960) at 158–9.

for the necessity for liberal utilitarians to resort to the ‘stylization’ of facts—by which he means to refer to the effects produced by such concepts as diminishing marginal utility<sup>21</sup> and considered preference satisfaction.<sup>22</sup> His main attack on utilitarian theory, however, relates to the manner in which it attempts to reconcile second-order (political level) and first-order (personal level) issues.

It is central to Barry’s analysis that while for the most part the second-order demands of utilitarianism are consonant with the pursuit of first-order conceptions of the good, a tension remains between the two and emerges tellingly—and ultimately fatally to the coherence of utilitarianism—in certain situations. Accepting that the constitutional and political structures derived from a utilitarian theory could—on the basis of an appropriate interpretation and application of the utility concept—amount to a system of redistributive liberal democracy very close to that emerging from his own contractarianism, Barry considers the relative internal coherence of the two theories in the context of a hypothetical liberal democratic decision process. He takes as his example an imaginary referendum on the issue of whether or not to approve the construction of a dam, the result of which will be to cause the extinction of the rare snail-darter fish (*Jal*, 145–51). Under both theories, each neutral with regard to competing first-order theories of the good, participants are free to campaign and participate so as to advance the outcome which they consider most desirable according to their individual conceptions of the good. Barry considers the situation of an ecologically concerned individual participating in the referendum. Imagining her first of all to adopt the theory of justice as impartiality, he argues that such an individual, though obviously disappointed and regretting the outcome as undesirable, experiences no critical philosophical tension in the event that the decision is made to proceed with the construction. For there is no conflict between her belief that this decision clashes with the good and her overall understanding of the purpose of a just society. Justice as impartiality makes no claims in relation to the good; it leads to institutions and political structures whose sole justification is that they are fair as between individual conceptions of the good and within which people are free to advance those conceptions. So while the eco-activist may firmly believe that the wrong decision has been made and that the good has been thereby retarded, she will not experience any disjunction between this outcome and the theoretical justification of the social order.

A similar person accepting a utilitarian justification of the social order on the other hand would, according to Barry, be in a very different situation. Like the justice as impartiality theorist, she believes that the good has been diminished by the decision to proceed with the dam. However, simultaneously her utilitarianism requires her to believe that the good is being enhanced by this decision as it is

<sup>21</sup> See, for example, R. M. Hare, ‘Ethical Theory and Utilitarianism’ in Sen and Williams, above n 10, ch 1.

<sup>22</sup> See, for example, *ibid* at 28; and J.C. Harsanyi, *Utilities, Preferences, and Substantive Goods* (1992).

to be taken as maximizing overall utility in that society.<sup>23</sup> The difficulty here is that utilitarianism, unlike justice as impartiality, retains at its core a substantive objective in the maximization of overall welfare and, as a result, speaks ultimately to the good rather than the right. So, according to Barry, the defeated eco-activist is faced with an irreconcilable tension—being on the one hand convinced that the good will be defeated by the construction of the dam, but believing on the other that it is being enhanced by the maximization of overall utility.

Kelly confronts Barry head-on in relation to this issue (*INJ* at 48–54). He argues that there are two distinct levels of question, which Barry fails to keep separate. On the second level is the question: what is the appropriate way in which to order society? The utilitarian believes that the appropriate way is to create a structure that stays neutral between competing conceptions of the good by aiming simply to maximize overall utility. On the first level, and entirely separate, is the personal-action question: what does my conception of the good require in any given set of sub-constitutional circumstances? Kelly sees no reason why the utilitarian should feel any critical philosophical tension between her commitment to a form of society which maximizes overall well-being and her simultaneous commitment to the preservation of the snail-darter. In Kelly's view commitment to utilitarianism at the second-order level entails no more than a belief that state neutrality between competing conceptions of the good can be best achieved by means of a substance-blind utility-maximizing approach, and that far from conflicting with first-order conceptions of the good, this approach by definition gives such conceptions maximum play and their adherents minimum interference in their pursuit of them. Both justice as impartiality and utilitarianism in Kelly's view depend on a similar willingness of individuals who subscribe to them to attach priority to the foundational social objective—be that utility maximization or the implementation of the outcomes of the original position—expressed in the second-order theory (*INJ* at 51).

It seems to me, however, that this does not provide a sufficient answer to Barry's argument. The second-order/first-order dichotomy in utilitarianism would seem ultimately to be able to penetrate no further than the issue of how one structures society so that the objective of utility maximization can be achieved. So, it is entirely valid for the utilitarian political theorist to concede that for this goal to be more largely achieved it may be necessary to have a system whereby in many situations it will be defeated, and to be unconcerned as to whether utility-maximization is internalized as an end by participants in the system. In respect of the utilitarian participant in society, however, it is hard to avoid the conclusion that in the hypothetical case we have been discussing she does in fact of necessity hold two conceptions of the good and that those two conceptions are directly in conflict and impossible to reconcile. Kelly's argument that the position is a tenable one on the basis that the individual is willing to attach priority to the foundational social objective seems doubly difficult—appearing

<sup>23</sup> Accepting for the purposes of the discussion the effectiveness of the particular decision process as an implementation of utilitarianism.

both to accept that the conflict Barry identifies does arise and to carry the implication that it is resolved on the basis of a principle the general application of which would require that on every issue of public significance in which she participates the citizen should be more concerned that the outcome is the one that will maximize overall utility rather than the one that will implement her own held convictions about the best course of action. This may be a logically coherent position but it appears grossly to misrepresent the reality of political participation and at the same time to demonstrate the philosophical dissonance which arises when it is sought to derive a first-order neutral theory of justice from a second-order conception of the good.

The only way around this contradiction would seem to be for the utilitarian to argue that her second-order theory is not in fact based on a conception of the good properly so called and accordingly does not give rise to any conflict with individually held first-order conceptions. This is not a sustainable position. The essential difference between the structure of utilitarianism and the structure of the contractarian approach is that faced with the problem of many competing first-order theories of the good, utilitarianism seeks to resolve the problem by cardinalizing it; by dealing with conceptions of the good in terms of their numerical values, weights, intensity, and so on. Unfortunately, no matter how far this process of cardinalization or abstraction is taken, the alchemy it seeks does not occur; it never succeeds in transmuting its basic substance—the good—into something entirely different—the right. It always comes back to utility-maximization being a desirable end.

Contractarianism on the other hand, by accepting the incommensurate nature of competing conceptions of the good and seeking accordingly an entirely other basis of proceeding—one which lays its claim on the capacity of moral beings to step away from their individual conceptions of the good life and acknowledge a separately standing idea of justice—is able to cut the knot and escape the infinite regression of the substantive goal. Its success in this regard is achieved by adopting the fairness principle identified by utilitarianism, that everybody's interests are to be weighed equally, and merging it with the separateness principle that nobody's interests are to be sacrificed on the basis of resulting compensatory benefits to others. In place of the substantive good of overall well-being that marks utilitarianism, it substitutes the procedural imperative of the fundamental moral equality of human beings and yields an approach to social ordering that can rightly be said to be located purely in the right and without reference to any substantive goal.

The problem for utilitarianism as a theory capable of founding a social order which is both just and impartial between competing conceptions of the good is that being a theory of the good itself—albeit a second-order theory—it fails to provide adequate grounds with which to respond to the priority claims of first-order theories. Its best response is that it is essential that an order be established which achieves neutrality as between first-order conceptions. This, however, will carry no motive weight for the proponent of a first-order theory by virtue of its

failure to appeal outside of substantive outcomes to some other source of order which, for the sake of convenience, we may call the right or, again, justice. The utilitarian claim to represent the approach that will achieve the best outcome for society has no power against the controverting claims of, say, first-order Thomism or Marxism to be themselves the representatives of optimum outcome. Justice as impartiality on the other hand positing in itself no substantive outcomes whatever, but appealing purely to the fundamental moral equality of human individuals and to the impetus to arrive at arrangements justifiable to all, is able to circumvent the ever-decreasing circle of substantive dispute and provide a cogent basis upon which to found a social structure neutral as to the good.

### 7. *Conclusion*

In the same way that Rawls's *Theory of Justice* has, since 1975, been read in the context of the cumulative critique provided by the essays brought together by Norman Daniels in *Reading Rawls*,<sup>24</sup> it is difficult to imagine that future readers of Brian Barry's *Justice as Impartiality* won't have *Impartiality, Neutrality and Justice* close to hand. The book is without question therefore a success. As to the arguments. Well for my money, for what that is worth, Barry has just about the best of it.

<sup>24</sup> N. Daniels, *Reading Rawls* (1975; reprinted 1989).