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Liberalism and the Objectivity of Ethics - Beyond Subjective Morality: Ethical Reasoning and Political Philosophy. By James S. Fishkin.* New Haven : Yale University Press, 1984. Pp. vii, 201. $14.95.

George C. Freeman III

BOOK REVIEW

LIBERALISM AND THE OBJECTIVITY OF ETHICS

Beyond Subjective Morality: Ethical Reasoning and Political Philosophy. By James S. Fishkin.* New Haven : Yale University Press, 1984. Pp. vii, 201. $14.95.

*George C. Freeman, III***

"What is the aim of your philosophy?—To show the fly the way out of the bottle."

Ludwig Wittgenstein[1]

James Fiskin's latest book, *Beyond Subjective Morality*, focuses on a question of profound significance: "Independent of particular religious and metaphysical assumptions—assumptions among which a modern liberal state must presumably maintain a certain neutrality—can there be a nonarbitrary basis for making moral judgments?"[2] Fishkin argues that, "without a positive answer to this question, liberalism must self-destruct as a coherent moral ideology."[3] It is easy, he says, to understand why:

> If, in order to maintain neutrality among religious and metaphysical assumptions, a liberal state must be constrained from any rational basis for values at all, then its foundational assumptions are *self-delegitimating*, that is, they undermine their own moral legitimacy by entailing the arbitrariness, the sheer subjectivity, of all moral claims, including any claims that can be made on behalf of the liberal state itself.[4]

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1. L. Wittgenstein, Philosophical Investigations § 309 (G. Anscombe trans. 1953).
2. J. Fishkin, Beyond Subjective Morality: Ethical Reasoning and Political Philosophy 2 (1984).
3. Id.
4. Id. (emphasis in original).

The evil here is "subjectivism" and, although Fishkin doubts subjectivism can be refuted, he is confident it can be defused.[5] He is confident, that is, that he can show the fly the way out of the bottle.[6] His strategy for doing so is to demonstrate that subjectivism rests on an unnecessarily narrow view of objectivity in ethics or, what amounts to much the same thing, on an unnecessarily narrow view of what is required to ground or support our ethical judgments. Anyone who accepts this narrow view, says Fishkin, will find the route to subjectivism "virtually inescapable."[7] As a substitute, Fishkin recommends what he calls "minimal objectivism."[8] According to this view of objectivity, while the foundations of morality are not beyond dispute, they are not beyond reason either, and so are not really arbitrary or subjective at all.

Beyond Subjective Morality is an ambitious work. It is elegantly written and, for the most part, vigorously argued. Unfortunately, the argument is not always vigorous enough. At certain points, Fishkin fails to discuss obvious objections to his arguments; at others, he relies more on assertion than on argument. Still, despite these shortcomings, the book contains many valuable insights. Indeed, anyone who reads *Beyond Subjective Morality* is likely to hope that in the future Fishkin will return to this topic and treat it more comprehensively.

I. SUBJECTIVISM: FISHKIN'S DESCRIPTION AND DEFENSE

According to Fishkin, subjectivists of every persuasion generally agree on at least one thing: moral facts and moral truths are illusory.[9]

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5. Id. at 86, 139-40. For a similar effort to defuse subjectivism, see D. Lyons, Ethics and the Rule of Law 1-22 (1984); B. Williams, Morality: An Introduction to Ethics 17-52 (1972). For notable discussions of subjectivism that have a broader focus, see G. Harman, The Nature of Morality (1977); J. L. Mackie, Ethics: Inventing Right and Wrong (1977); B. Williams, Ethics and the Limits of Philosophy (1985); Morality and Objectivity: A Tribute to J. L. Mackie (T. Honderich ed. 1985); Morality, Reason and Truth: New Essays on the Foundations of Ethics (D. Copp & D. Zimmerman eds. 1985) [hereinafter Morality, Reason and Truth]; Relativism: Cognitive and Moral (M. Krausz & J. Meiland eds. 1982); Brink, Moral Realism and the Sceptical Arguments from Disagreement and Queerness, 62 Aust. J. Phil 111 (1984); Coburn, Morality, Truth, and Relativism, 92 Ethics 661 (1982); Harsanyi, Does Reason Tell Us What Moral Code to Follow and, Indeed, to Follow Any Moral Code at All?, 96 Ethics 42 (1985); Moore, Moral Reality, 1982 Wisc. L. Rev. 1061; Quinn, Truth and Explanation in Ethics, 96 Ethics 524 (1986); compare W. Quine, On the Nature of Moral Values, in Theories and Things 55 (1981), with Flanagan, Quinean Ethics, 93 Ethics 56 (1982); compare Stick, Can Nihilism be Pragmatic?, 100 Harv. L. Rev. 332 (1986), with Singer, The Player and the Cards: Nihilism and Legal Theory, 94 Yale L.J. 1 (1984); compare Werner, Ethical Realism, 93 Ethics 653 (1983), with Postow, Werner's Ethical Realism, 95 Ethics 285 (1985), and Werner, Ethical Realism Defended, 95 Ethics 292 (1985); see generally R. Bernstein, Beyond Objectivism and Relativism (1983); T. Nagel, View From Nowhere (1986).

6. L. Wittgenstein, supra note 1.

7. J. Fishkin, supra note 2, at 26.

8. Id. at 129.

9. Fishkin divides subjectivists into four different groups and objectivists into three.

They do not exist. Morality, unlike science, is nothing more than a matter of personal preference or social convention.[10] One person might think that racism and speciesism are morally reprehensible, and that abortion and capital punishment are, too. Another person, agreeing on the relevant facts and subscribing to principles that are internally consistent, might think just the opposite. When such disputes arise, there is no rational way to resolve them, just as there is no rational way to resolve similar disputes about food or fashion. Some people like oysters; others do not. Some people like bow-ties; others do not. The simple fact is, people have different tastes, and tastes, as we all know, are arbitrary. They are not subject to rational assessment. In all such cases—whether the dispute be about food, fashion, or morals—one view is ultimately just as good, just as defensible, as any other. Arthur Leff's

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Id. at 15-23. Approximately one-third of the book contains sketches and summaries of interviews Fishkin conducted with people who fall into these seven groups. Id. at 24-81. Since the interviews shed little light on the problem of subjectivism or Fishkin's critique of it, I discuss them here only in passing.

10. Few remarks on the subject have been more influential than the following by Hume:

> Take any action allow[e]d to be vicious: Wilful murder, for instance. Examine it in all lights, and see if you can find that matter of fact, or real existence, which you call *vice*. In which-ever way you take it, you find only certain passions, motives, volitions and thoughts. There is no other matter of fact in the case. The vice entirely escapes you, as long as you consider the object. You can never find it, till you turn your reflexion into your own breast, and find a sentiment of disapprobation, which arises in you, towards this action. Here is a matter of fact; but 'tis the object of feeling, not of reason. It lies in yourself, not in the object. . . . In every system of morality, which I have hitherto met with, I have always remark[e]d, that the author proceeds for some time in the ordinary way of reasoning, and establishes the being of a God, or makes observations concerning human affairs; when of a sudden I am surpriz'd to find, that instead of the usual copulations of propositions, *is*, and *is not*, I meet with no proposition that is not connected with an *ought* or an *ought not*. This change is imperceptible; but is, however, of the last consequence. For as this *ought*, or *ought not*, expresses some new relation or affirmation, 'tis necessary that it shou'd be observ[e]d and explain'd; and at the same time that a reason should be given, for what seems altogether inconceivable, how this new relation can be a deduction from others, which are entirely different from it. But as authors commonly do not use this precaution, I shall presume to recommend it to the readers; and am persuaded, that this small attention would subvert all the vulgar systems of morality . . . .

D. Hume, A Treatise of Human Nature, bk. III, pt. 1, § 1 (Modern Library ed. 1911). Many of the subjectivists Fishkin interviewed expressed similar views. J. Fishkin, supra note 2, at 35-81. For insightful discussions of Hume's views, see The Is-Ought Question (W. Hudson ed. 1969). For other formulations of subjectivism and discussions about the problem of formulating it, see Morality, Reason and Truth, supra note 5, at 1-24; Moore, supra note 5, at 1071-1105; Peterson, Remarks on Three Formulations of Ethical Relativism, 95 Ethics 887 (1985); Singer, Moral Scepticism, in Scepticism and Moral Principles 77 (C. Carter ed. 1973).

haunting description of this predicament, despite its familiarity, is still striking:

> As things now stand, everything is up for grabs.
> Nevertheless.
> Napalming babies is bad.
> Starving the poor is wicked.
> Buying and selling each other is depraved.
> Those who stood up to and died resisting Hitler, Stalin, Amin, and Pol Pot—and General Custer too—have earned salvation.
> Those who acquiesced deserve to be damned.
> There is in the world such a thing as evil.
> [All together now:] Sez Who?
> God help us.[11]

Fishkin claims subjectivism is "a common part of our contemporary moral culture."[12] His point is not that most people are avowed subjectivists, or even closet subjectivists; most, undoubtedly, are not. His point is that most people, or many of them, are logically committed to subjectivism even though they might be emotionally repulsed by it. Most people are so committed because they begin where subjectivists begin—with an attractive but unnecessarily narrow view of what is required for moral values to be objectively valid. Most people think: either moral values satisfy at least one of the traditional requirements of objective validity or moral values are subjective. But, says Fishkin, what most people fail to realize is that the traditional requirements are so stringent that no moral values are ever likely to satisfy any of them. Thus, most people are logically committed to subjectivism, not because they want to be and not because they believe it to be true, but because they hold a view of objectivity that is, ironically, self-defeating.

Fishkin identifies six traditional requirements of objective validity in ethics:

> (1) An objectively valid moral position must have a basis that is rationally unquestionable.[13]
> (2) [It] must consist in principles that hold without exception.[14]
> (3) [It] must determine answers to *any* moral problem.[15]
> (4) [It] must be justifiable from the perspective of a strictly unbiased observer, that is, one who was completely neutral between alternative possible moral perspectives and initial as-

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11. Leff, Unspeakable Ethics, Unnatural Law, 1979 Duke L. J. 1229, 1249.

12. J. Fishkin, supra note 2, at 2. Alasdair MacIntyre has reached much the same conclusion. A. MacIntyre, After Virtue 7-8, 18 (1981).

13. J. Fishkin, supra note 2, at 52.

14. Id. at 56.

15. Id. at 61 (emphasis in original).

sumptions.[16]

(5) [It] must be consistent with truly *conscientious* moral decisions (that is, those motivated only to determine what is morally right).[17]

(6) [It] must determine obligations with *strict impartiality*, that is, it must determine obligations with no special regard for the agent's interests, situation, or relations with others.[18]

A subjectivist rejects the possibility of objectivity in ethics because he rejects one or more of these six requirements. Fishkin summarizes the structure of the subjectivist's argument as follows:

(1) An objectively valid moral position must have characteristic X (specified by one of the six requirements).

(2) Any credible moral position I can reasonably expect to arrive at lacks characteristic X.

(3) Therefore, any credible moral position I can reasonably expect to arrive at cannot be objectively valid (and, hence, must be 'subjective' or 'arbitrary').[19]

Ordinarily, says Fishkin, debates about the objectivity of ethics focus on the validity of Step 2 in this argument. The subjectivist argues that Step 2 is valid; the objectivist argues that it is not. Neither disputes the validity of Step 1. In Fishkin's view, this is a mistake. He maintains that, if we define the debate solely in terms of the validity of Step 2, we guarantee the success of subjectivism. To avoid this result, he recommends that we redefine the debate by challenging the validity of Step 1. Logic dictates that, if we need not accept Step 1, we need not accept Step 3, and Fishkin is confident we need not accept Step 1.[20] In essence, then, Fishkin has two aims: first, to show that acceptance of Step 1 guarantees the success of subjectivism; and, second, to show that Step 1 need not be accepted. Stated less abstractly, Fishkin's aims are to provide subjectivism with the strongest defense possible and then to defuse it.

Fishkin offers three arguments in support of subjectivism. The first is based on what he calls the "jurisdiction problem."[21] This problem

16. Id. at 70.

17. Id. at 74 (emphasis in original).

18. Id. at 81 (emphasis in original). Anyone familiar with the categorical imperative will recognize Kant's influence here. See I. Kant, Groundwork of the Metaphysics of Morals (H. J. Paton trans. 1964). In fact, as Fishkin rightly notes, "Kant offers an account of morality based on the rational moral law — the Categorical Imperative — which conforms to all six [requirements.]" J. Fishkin, supra note 2, at 86.

19. J. Fishkin, supra note 2, at 85.

20. Id. at 85-86.

21. Id. at 89-111.

reveals that three of the six requirements of objectivity—requirements 1, 4, and 5—cannot be satisfied. More specifically, it requires us to conclude that no moral position is rationally unquestionable (requirement 1), that no moral position is justifiable from the standpoint of a strictly unbiased observer who is neutral between alternative moral perspectives and initial assumptions (requirement 4), and that no moral position must be adopted by all who are truly conscientious (requirement 5).

To oversimplify slightly, the "jurisdiction problem" pertains to the different strategies that can be used to justify a moral position. Fishkin suggests there are two such strategies—one "external," the other "internal."[22] An "external" strategy is based on religious or metaphysical beliefs—beliefs "about God or the structure of the universe or human destiny."[23] These beliefs serve as the foundation of a moral system and it is from them that particular moral principles are derived. No such beliefs, however, are rationally unquestionable, even if one or more of them is ultimately true. All are open to reasonable disagreement.[24] Hence, no external strategy can satisfy requirement 1. Nor can any such strategy satisfy requirement 4. By definition, a strictly unbiased observer cannot subscribe to a particular religious or metaphysical belief system and, at the same time, remain neutral between alternative initial assumptions. Indeed, the neutrality requirement is so stringent that "it completely eliminates bias toward any particular position only by eliminating, in the end, any basis for any particular position."[25] Similarly, no external

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22. Id. at 106-07.

23. Id. at 107.

24. For example, if the belief in question is a belief about the existence of God, it can reasonably, even if mistakenly, be challenged either on the ground that it is false or on the ground that it is unintelligible or vacuous. See, e.g., J. L. Mackie, The Miracle of Theism: Arguments For and Against the Existence of God (1982) (arguing that statements affirming belief in the existence of God are false); K. Neilsen, Philosophy and Atheism (1985) (arguing in part that statements affirming belief in the existence of God are unintelligible or vacuous); Braithewaite, An Empiricist's View of the Nature of Religious Belief, in Philosophy of Religion 72 (B. Mitchell ed. 1971) (same). Even leading defenders of belief in the existence of God acknowledge that the subject is open to reasonable disagreement. See, e.g., B. Mitchell, The Justifications of Religious Belief (1973); R. Swinburne, The Coherence of Theism (1977); Rationality and Religious Belief (C. Delaney ed. 1979). As to the larger problem:

> [H]ere, I think, . . . lies a real hogchoker: *the reasons that people have for attributing value to things are always ultimately arbitrary*; that is, if the question *why?* is asked often enough, it will be discovered that the ultimate end (which, remember, gives the whole chain its value) is rationally indefensible, logically unjustifiable. . . . The reason for which people assign value to things are always ultimately (though not necessarily immediately) arbitrary, irrational. In short, there is no ultimate reason for calling anything important or valuable; no ultimate reason for preferring one thing to another.

J. Barth, The Floating Opera 216-17 (1st ed. 1956).

25. J. Fishkin, supra note 2, at 111.

strategy can satisfy requirement 5. The reason: "[A] man's conscience may tell him to do the vilest things."[26]

The result is the same for "internal" strategies. Such strategies "depend on a characterization of morality or the moral point of view itself."[27] Examples include Rawls's "original position,"[28] Ackerman's "neutral dialogue,"[29] and the perfectly sympathetic observer of classical utilitarianism.[30] All such strategies share a common characteristic: they "define a perspective of *impartiality for the equal consideration of relevant claims or interests*, and this perspective is offered as the foundation for social choice in a just society (or at least in the liberal version of a just society)."[31] The objective of such strategies, in other words,

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26. G. Anscombe, Modern Moral Philosophy, in Ethics, Religion and Politics: Collected Philosophical Papers Volume III 27 (1981). See also J. Fishkin, supra note 2, at 111; P. Nowell-Smith, Ethics 216 (1954) (noting the world would have been far better off had Robespierre "given his conscience a thorough rest and indulged his taste for roses and sentimental verse").

27. J. Fishkin, supra note 2, at 107.

28. Id. at 95, citing J. Rawls, A Theory of Justice 17-22 (1971). Rawls argues that we can determine what a just society would be like by imagining individuals in a hypothetical "original position" choosing the principles that are to govern their institutions. When in this position, individuals choose out of self-interest but from behind a "veil of ignorance," with no knowledge of what position they will eventually occupy in society; in short, with no knowledge of their own talents, tastes, goals and luck in life. Rawls contends that, in following this impartial procedure, all individuals would choose two particular principles of justice: first, equal maximum liberty; and second, the difference principle, according to which inequalities in wealth and income are acceptable only insofar as they benefit the least advantaged.

29. J. Fishkin supra note 2, at 95, citing B. Ackerman, Social Justice in the Liberal State 11 (1980). Ackerman's "theory . . . begins with a commitment to a process of constrained conversation," B. Ackerman, supra, at 49, to a process of "neutral dialogue," id. at 8-12. This impartial process limits what can count as a justification for the distribution of benefits and burdens in a society. No justification is acceptable if it is based on the notion that some people are intrinsically superior to others or on the notion that one conception of the good is intrinsically better than another. Id. at 11. The view of a just society that emerges from the "neutral dialogue" is what Ackerman calls "undominated equality." Id. at 18, 24.

30. J. Fishkin, supra note 2, at 95, citing P. Singer, Practical Ethics 1-13 (1979). Singer starts with the classical utilitarian ideas that everyone is to count for one and no one for more than one and that the interests of all are to count equally. He next states:

> Suppose I then begin to think ethically, to the extent of [simply] recognizing that my own interests cannot count for more, simply because they are my own, than the interests of others. In place of my own interests, I now have to take account of the interests of all those affected by my decision. This requires me to weigh up all these interests and adopt the course of action most likely to maximize the interests of those affected. Thus I must choose the course of action which has the best consequences, on balance, for all affected. This is a form of utilitarianism.

P. Singer, Practical Ethics at 12.

31. J. Fishkin, supra note 2, at 95 (emphasis in original).

is to define an appropriate decision procedure for the selection of moral principles.

No decision procedure, however, without more, is sufficiently conclusive to satisfy requirement 1. Different procedures lead to the adoption of different moral principles and to different substantive outcomes. Under certain circumstances, for example, utilitarianism supports slavery; Rawls's theory of justice, on the other hand, never supports it. Consequently, "[t]he issue of which procedure to adopt cannot be settled by the procedure itself."[32] Likewise, no decision procedure can satisfy either requirement 4 or requirement 5. None can satisfy requirement 4 because the demands of neutrality deprive the strictly unbiased observer of any basis for choosing between different procedures.[33] None can satisfy requirement 5 because an individual's conscience can just as easily dictate that he follow one procedure as it can dictate that he follow another.[34] Thus, in sum, since neither an internal nor an external strategy can satisfy requirements 1, 4, and 5, the subjectivist will prevail if any or all of these requirements are essential to moral objectivity.

Fishkin's next argument in support of subjectivism is based on what he calls the "foreseeability problem."[35] This problem pertains to requirements 2 and 3. These requirements provide, respectively, that a valid moral position must consist of principles that hold without exception and must prescribe a solution for every moral dispute.[36] The problem these requirements raise is methodological. It arises because future moral disputes, by their very nature, are "inherently unforeseeable."[37] We cannot possibly know today what new moral issues we will face in the future and, given this, we cannot reasonably say today whether the moral position we now adhere to will in the future apply without exceptions and in a sufficiently determinate way. Fishkin summarizes the problem as follows:

> Unanticipated factors of moral relevance can be expected to crop up as new cases present themselves (a) so as to require exceptions to the prescriptions required by any general moral position, as already constructed, and (b) so as to support new prescriptions for issues about which the moral position, as already constructed, says nothing. Revisions of type [a] violate the expectation that the position will not require exceptions; revisions of type [b] violate the expectation that the position will be sufficient to determine answers to any moral question.[38]

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32. Id. at 102.
33. See text accompanying supra note 25.
34. See text accompanying supra note 26.
35. J. Fishkin, supra note 2, at 111-19.
36. See text accompany supra notes 14-15.
37. J. Fishkin, supra note 2, at 113.
38. Id. at 114.

Thus, no moral position can credibly satisfy requirements 2 and 3 because exceptions and indeterminacies are unavoidable. Objectivity in ethics is possible, therefore, only if these requirements are not essential to it.

Fishkin's final argument in support of subjectivism is based on what he calls the "overload problem."[39] This problem pertains to requirement 6, which provides that a moral position is objectively valid only if it determines obligations with strict impartiality.[40] Simply stated, strict impartiality demands that we treat the interests of others in the same way we treat our own. Anyone who is strictly impartial "must view himself . . . as just one person among others."[41] As Fishkin points out, the implications of this requirement are "radically disturbing."[42]

Consider the problem of starving refugees. Consider, too, a moral decision procedure that determines obligations with strict impartiality—the Golden Rule, for example. "If I apply the Golden Rule to the problem of starving refugees, then I must put myself in the place of those affected by my action (or inaction) in the decision to contribute."[43] Not surprisingly, complying with this rule requires substantial sacrifices. Indeed, the sacrifices required are so substantial—in terms of time, money, and effort—that in complying with the rule I would have to abandon my entire way of life. Contributing generously, even very generously, would not be enough, for "a strictly impartial consideration of interests disconnects an agent's present obligation from his own past history of action."[44] So long as any refugee in the world were starving, my obligation would be clear: place myself in the shoes of the person starving and contribute accordingly. What I have contributed in the past is irrelevant. The result is much the same, moreover, for other moral decision procedures that determine obligations with strict impartiality.[45]

The subjectivist argues that the demands of strict impartiality "overload" us with obligations and therefore are unreasonable. Rational people will agree, he says, that moral obligations must be limited by the following two rules:

1. *The Cutoff for Heroism*: Certain levels of sacrifice cannot be morally required of any given individual.
2. *The Robustness of the Zone of Indifference*: A substantial proportion of any individual's actions fall appropriately within

39. Id. at 119-28. Fishkin discusses the "overload problem" in more detail in J. Fishkin, The Limits of Obligation (1982).

40. See text accompanying supra note 18.

41. J. Fishkin, supra note 2, at 112.

42. Id. at 123.

43. Id. at 122.

44. Id. at 127.

45. Id.

the zone of indifference or permissibly free personal choice.[46]

These rules suggest that requirement 6 is unreasonable, at least intuitively, both because it demands that we always act heroically or, better yet, saintly and because it fails to allow us "an area of permissibly free personal choice where we can, morally speaking, do as we please."[47] This being so, we cannot reasonably be expected to determine all of our obligations with strict impartiality, even if doing so is essential to making them objectively valid.[48]

Fishkin's three arguments are designed to provide subjectivism with the strongest defense possible. They do so, in his view, by showing that acceptance of Step 1 in the subjectivist's argument guarantees the success of subjectivism. Fishkin is not prepared, however, to concede defeat. He contends we can reject Step 1 without abandoning our hope that moral values are objectively valid. What we need, he says, is an alternative conception of objectivity.

II. Subjectivism: Fishkin's Critique and Alternative

As a substitute for the traditional view of objectivity, Fishkin recommends what he calls "minimal objectivism."[49] This view resembles the traditional view in many respects but, in one critical respect, the two are different. On the traditional view, moral judgments are said to be subjective because they are based on arbitrary personal preferences; at the same time, moral judgments are said to be based on arbitrary personal preferences because no credible position we can reasonably expect to adopt satisfies the six traditional requirements of objective validity. In short, subjectivism = arbitrary personal preferences = failure to satisfy traditional requirements.

Minimal objectivism, by contrast, occupies a "middle ground."[50] It preserves the link between subjectivism and arbitrary personal preferences but severs the link between arbitrary personal preferences and the six traditional requirements. Like the traditional view, it suggests that moral judgments are subjective unless they are based on something more than arbitrary personal preferences. Unlike the traditional view, however, it denies that moral judgments are based on arbitrary personal preferences simply because no credible position we can reasonably expect to adopt satisfies any of the traditional requirements. In short, subjectivism =

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46. Id. at 123.

47. Id. at 124.

48. It is worth noting that, as Fishkin describes them, requirements 1, 4 and 5 cannot be satisfied, whereas requirements 2, 3 and 6 can be satisfied but only in a way that purportedly makes these requirements unreasonable for us to adopt.

49. J. Fishkin, supra note 2, at 129.

50. Id. at 149.

arbitrary personal preferences ≠ failure to satisfy traditional requirements.

According to Fishkin, the "something more" that objective validity requires can be found in the "notion of reasonable choice from an appropriately impartial perspective."[51] Fishkin describes this notion in these terms: "One's moral judgments are objectively valid [whenever] their consistent application to everyone is supported by considerations that anyone should accept, were he to view the problem from what is contended to be the appropriate moral perspective,"[52] that is, the moral perspective which is "valid for anyone."[53] Reasonable people will invariably disagree, of course, about which moral perspective is appropriate. That they will do so, however, does not mean that moral judgments are necessarily subjective. Only a committed subjectivist would insist that it does. Only he would insist that, to be objectively valid, moral judgments must be rationally unquestionable. Yet the subjectivist offers no "proof" that this or any of the other traditional requirements are essential to objective validity. He merely assumes as much. Fishkin recommends that we reject this assumption and assume instead, absent some compelling proof to the contrary, that "the foundations of morality are [themselves] unavoidably open to reasonable disagreement."[54] If we start with this assumption, Fishkin argues, and then further assume that moral judgments are based on something more than arbitrary personal preferences whenever they are based on reasonable choice from an appropriately impartial moral perspective, "the route to subjectivism is no longer inescapable."[55]

Fishkin contends minimal objectivism has two virtues. The first is that "it does justice to the force of the subjectivist arguments against fulfillment of the six [traditional requirements]."[56] More precisely:

> Its principles do not lay claim to being rationally unquestionable; they do not necessarily hold without exception; they do not presume to resolve every moral question; they do not lay claim to the neutral perspective of an external observer; they do not have to agree with every conscientious moral decision; and finally, they do not have to determine individual obligations with strict impartiality.[57]

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51. Id. at 140.
52. Id. at 12 (emphasis in original).
53. Id.
54. Id. at 2.
55. Id. at 129.
56. Id. at 149.
57. Id. at 129.

Fishkin maintains that, with only slight modifications, all of the recent liberal theories of social justice—including Rawls', Ackerman's, and the utilitarian's—fit this description.[58]

Each of these theories qualifies as a form of minimal objectivism because each is "based on impartiality or the equal consideration of relevant claims or interests."[59] If each theory is viewed as "lay[ing] claim to objective principles that are weak or *prima facie*, that hold only *certeris paribus* and hence are capable of being overridden or traded off, one for another,"[60] each can avoid demanding that our moral judgments be rationally unquestionable (requirement 1), that they apply without exceptions (requirement 2), and that they provide solutions to every moral dispute (requirement 3). Furthermore, none of the theories even purports to demand that our moral judgments be strictly neutral (requirement 4) or compatible with all conscientious decisions (requirement 5). Hence, the first five requirements present no problem.

Only the sixth—the requirement of strict impartiality—presents a problem. As we saw above, this requirement "overloads" us with obligations and, at first glance, each of the liberal theories seems to do the same. Fishkin contends, however, that we can avoid the "overload" problem, first, by distinguishing between individual and institutional obligations and, second, by applying each theory to institutional obligations only:

> This can be accomplished by a two-tiered strategy in which strict impartiality applies to the design of social institutions in a just society—yielding, indirectly, individual obligations to uphold the results of this social choice. But the route from strict impartiality directly to the obligations of each isolated individual would not be employed in this two-tiered strategy. Individuals may be insulted from an overload of obligations by social institutions that enforce more perfect moral cooperation, making sure that everyone does his share. And if everyone does his share, then the seemingly irresistible route to overload, in which each isolated individual is forced, too quickly, to take on all the burdens of the world, can be avoided.[61]

Thus, each of the liberal theories is objective in a modest, but important, way. None satisfies the traditional requirements of objective validity, yet each is based on something more than arbitrary personal prefer-

58. Id. at 130-31.
59. Id.
60. Id. at 17 (emphasis added).
61. Id. at 136-37.

ences—"on impartiality or the equal consideration of relevant claims or interests."[62] This is the first virtue of minimal objectivism.

The second is that minimal objectivism "avoids both horns of the subjectivist dilemma."[63] The dilemma is easy to describe: either the subjectivist applies his moral values to others, which he can only do arbitrarily and without justification, or he declines to do so and, in declining, makes it impossible even to formulate fundamental moral disagreements.[64] The first horn of the dilemma arises because

> [t]he imposition of values on those with contrary preferences would seem to require some justification. It shifts the burden of proof onto those who would do the imposing. The difficulty . . . is that . . . subjective positions rule out any justification responding to this burden of proof. [Subjectivists] cannot respond to this burden of proof precisely because they are subjectivists.[65]

The subjectivist can avoid the first horn of the dilemma, but only by declining to apply his moral values to others. Now, however, he faces the second horn of the dilemma—the impossibility of formulating moral disagreements. Once the subjectivist declines to apply his moral values to others, he can no longer sensibly say "X is right" or "X is wrong" for everyone similarly situated. All he can sensibly say is "X is right" or "X is wrong" from a particular point of view. The result is that moral judgments are reduced to simple expressions of personal preferences or social conventions, coupled with an injunction. Mary says "X is right." Martha says "X is wrong." These two statements are neither incompatible nor contradictory, for neither Mary nor Martha is expressing a view about the attributes of "X." Each is merely expressing her own attitude about "X" and urging the other to adopt that attitude. Mary is saying "I like X; do so as well," while Martha is saying "I dislike X; do so as well." There is no disagreement between them about "X" itself. Indeed, in any dispute that purports to be a moral dispute, the participants *cannot* disagree about "X." They can only disagree about how they feel about "X."

As Fishkin suggests, this seems highly implausible, not to mention deeply disturbing. If morality is nothing more than a matter of personal preferences or social conventions, "we cannot even state our dramatic moral disagreement with Hitler and the Nazis about whether they ought to have exterminated millions of Jews."[66] We cannot reasonably say of

62. Id. at 130.
63. Id. at 149.
64. Id. at 148.
65. Id. at 143-44.
66. Id. at 147.

them that they ought to have acted otherwise. For "if their acts conform to their own understandings and conventions, they can support their conclusion that they were required to act in that way, without our having any basis, within [the subjectivist's] theory, for disputing the conclusion."[67] We can only "wish that they had adopted different conventions [and] argue that *their* values really prescribe different actions[.]"[68] The subjectivist can escape this horn of the dilemma, but only by affirming that he and the Nazis are governed by the same moral values, only that is by using an escape route that leads directly back to the first horn of the dilemma—to the arbitrary imposition of values.

Fishkin contends subjectivism "can [best] be interpreted as the residue left over from a failed Kantianism."[69] Kant once declared, "'Anyone . . . who takes morality to be something and not merely a Chimerical Idea without truth, must at the same time admit the principles we have put forth [i.e., the validity of the traditional requirements].'"[70] The subjectivist responds, "Morality must be 'merely a Chimerical Idea without truth' because the traditional requirements cannot be satisfied."[71] According to Fishkin, Kant was wrong but the subjectivist is only half right. The subjectivist is right in believing the traditional requirements cannot be satisfied but wrong in attaching significance to this fact. His error, says Fishkin, lies in his commitment to Kant's view of objectivity. This view, which is pervasive, must be rejected; otherwise, the subjectivist will prevail. "Only through a basic revision in moral culture, through an adjustment in our expectations about what a nonsubjective morality might be like, can we hope to escape [the subjectivist's] arguments."[72] Minimal objectivism offers us the hope we need. It shows us that, while "[c]laims to moral reasonableness . . . are not beyond dispute[,] . . . they are not entirely beyond reason [either]."[73] The key is "learn[ing] to expect less of an objective morality[.]"[74] Once we learn that lesson, "we can reasonably endow our most cherished convictions with the seriousness they have always appeared to require."[75]

One of our most cherished convictions is that liberal democracies deserve our respect and support. Early on, perhaps, at the time of Locke's *Two Treatises* and on into the nineteenth century, liberalism could rely for its justification on a religious or metaphysical consensus.[76]

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67. Id.
68. Id. (emphasis in original).
69. Id. at 88.
70. Id. (quoting I. Kant, Groundwork 112 (1964)).
71. Id.
72. Id. at 26.
73. Id. at 150.
74. Id. at 149.
75. Id. at 149-50.
76. Id. at 153.

Today, no such consensus exists. All religious and metaphysical assumptions are "controversial."[77] Consequently, "were a state to base itself today on [any such assumptions], that would in itself be illiberal."[78] The proper response for a liberal democracy, according to Fishkin, is neutrality, albeit not a neutrality based on or linked to Kant's view of objectivity.[79] Any neutrality linked to Kant could not possibly escape subjectivism, and any "Moral ideology that . . . supports claims to its own subjectivity . . . strips itself of legitimacy and authority. In that sense liberalism self-destructs as a coherent moral ideology in a culture imbued with [Kantian] expectations."[80] What is needed, again, is "a change in our common expectations about the character of an objective morality," a commitment to "the theoretical availability of a middle ground."[81]

III. Minimal Objectivism: Fishkin's Problems

Fishkin's description and defense of minimal objectivism are in the end unconvincing. Part of the problem is Fishkin only tells half the story he promises to tell. He begins by saying he intends to "insulate both liberal theory and individual morality from the constraining assumptions that otherwise trap both in subjectivism."[82] He ends by saying, "In many ways this entire book can be read as a proposal [that] . . . would not only permit subjectivism to be avoided by individuals, it would also permit self-destruction, or self-delegitimation, to be avoided by liberal theory . . . ."[83] In between, however, Fishkin equates minimal objectivism with the "[r]ecent liberal theories of social justice[.]"[84] This move is unexpected. Indeed, it is odd because the recent liberal theories, to use Fishkin's own words, "typically aspire to resolve moral issues only within a restricted sphere—the problem of distributive justice within

77. Id. at 154. "Science has undermined crucial religious and metaphysical claims. Furthermore, the ethnic and cultural diversity of modern pluralistic societies brings disagreement about religious and metaphysical assumptions into sharper relief." Id. See also supra note 24.

78. Id. at 154.

79. For insightful discussions about the relationship between modern liberalism and neutrality, compare Dworkin, "Liberalism," in Public and Private Morality 113 (S. Hampshire ed. 1978), with West, Liberalism Rediscovered: A Pragmatic Definition of the Liberal Vision, 46 U. Pitt. L. Rev. 673 (1985).

80. J. Fishkin, supra note 2, at 157; see also id. at 135.

81. Id. at 157.

82. Id. at 3.

83. Id. at 157.

84. Id. at 130.

a given society under ideal conditions."[85] "[T]hey are *not* proposed for problems of individual moral choice."[86]

These remarks, standing alone, suggest that minimal objectivism offers guidance to governments only, and not to individuals. Elsewhere, however, Fishkin says minimal objectivism does offer guidance to individuals, but only indirectly. It instructs them to adopt a theory of "*social* choice [regarding] the distribution of goods and the design of institutions in a just society."[87] It instructs them, in other words, to adopt a recent liberal theory of social justice and then to "uphold the results of this social choice."[88] Unfortunately, this is essentially all Fishkin says on the subject. Even though he recognizes that the "problems of individual moral choice" raise "a host of new issues,"[89] he neither identifies these issues nor addresses them.

Problems remain even when we focus solely on Fishkin's promise to defend liberal theory. Even then, minimal objectivism is still dismayingly inconclusive. Each liberal theory contains "two essential elements"[90]: "(a) the account of impartiality or equal consideration; [and] (b) the account of the interests or other relevant claims that are given equal consideration under (a)."[91] These elements are problematic for two interrelated reasons. First, as Fishkin himself acknowledges, "[e]ven slight modifications in (a) or (b) can produce enormous variations in the resulting principle."[92] Second, as Fishkin again acknowledges, no satisfactory method exists for showing that one account of "impartiality" or "interests" is in any way superior to any other: "The basic difficulty is that there is no basis for adjudicating among alternative claims to comparative supremacy."[93]

Any moral theory that permits "enormous variations" (that permits the Rawlsian to say "Slavery is never permissible" and the utilitarian to retort "Sometimes it is") and provides "no basis" for adjudicating between such claims seems suspect. Perhaps Fishkin would object that the variations are not so enormous. The point is certainly debatable.[94]

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85. Id. at 134.

86. Id. at 132 (emphasis added). This statement, although it refers in particular to Rawls's theory, applies to the others as well.

87. Id. at 136 (emphasis in original).

88. Id. at 137.

89. Id. at 132.

90. Id. at 99.

91. Id.

92. Id.

93. Id. at 102.

94. It is not even clear, in fact, that Fishkin would object. At one point, he states that "[t]here are conditions under which utilitarianism will justify slavery." Id. at 115. Elsewhere, he states that all of the recent liberal theories would legitimate "instance[s] of simple tyranny." J. Fishkin, Tyranny and Legitimacy 42 (1979).

The problem is, Fishkin does not make this objection and, what is worse, offers the reader no clue how to make and develop it himself.

To be sure, Fishkin does discuss what he calls the "inevitable inconclusiveness" of minimal objectivism.[95] He says "[t]his kind of inconclusiveness means only that the results of any given procedure [or liberal theory] are not rationally unquestionable[.]"[96] It means that alone and nothing more "precisely because the availability of rival procedures yielding divergent conclusions is, in itself, a specification of alternative senses of moral reasonableness, of alternative notions of the impartial consideration of relevant claims, that yield rational grounds for disagreeing with any particular results."[97] What Fishkin is saying here, in part, is that recent liberal theories are minimally objective, even though inconclusive, because they are morally reasonable. Not surprisingly, then, the soundness of Fishkin's view turns largely on the soundness of the distinction he draws between what is morally reasonable and what is morally arbitrary. Nowhere, however, does Fishkin defend, or even carefully delineate, this distinction.

Fishkin says minimal objectivism is a form of "intuitionism."[98] Arguably, "[i]ntuitionism is nearly always a form of subjectivism."[99] Fishkin's version is not an exception. All of the theories minimal objectivism supports are based on our intuitions, which are based in turn on our upbringing, as well as our wants, needs, interests, and desires. We all have intuitions about what are acceptable principles (e.g., torturing the innocent is evil). Similarly, we all have intuitions, or considered judgments, about what should or should not be done in a given case (e.g., Baby M should not literally be divided between her natural father and her surrogate mother). Sometimes our principles conflict with each other. Sometimes they conflict with our considered judgments. When conflicts arise, the intuitionist tells us to revise either our principles or our considered judgments or, sometimes, both. The goal, in his view, is to harmonize the two, to achieve the best possible fit between them. Thus, when asked to justify a moral principle, the intuitionist offers what is commonly called a "coherence argument."[100] For him, justification is "a matter of the mutual support of many considerations, of everything fitting together into one coherent view."[101]

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95. J. Fishkin, supra note 2, at 106.
96. Id.
97. Id.
98. Id. at 17.
99. Hare, Rawls' Theory of Justice, in Reading Rawls 81, 83 (N. Daniels ed. 1975).
100. For a detailed and far more sophisticated account of coherence arguments, see Hanen, Justification as Coherence, in Law, Morality and Rights 67 (M.A. Stewart ed. 1983).
101. J. Rawls, supra note 28, at 21.

David Lyons has explained why we should be skeptical of such arguments:

> [T]he justificatory force of coherence arguments is unclear. Suppose one assumes that there are such things as valid principles of Justice which can be justified in some way; suppose one believes, moreover, that a coherence argument explicates our shared sense of justice, giving precise expression to our basic moral convictions: one may still doubt whether a coherence argument says anything about the validity of such principles. For pure coherence arguments seem to move us in a circle, between our current attitudes and the principles they supposedly manifest. We seem to be "testing" principles by comparing them with given "data." Because the latter (our shared, considered moral judgments) are impartial, confidently made, and so on, we can indeed, regard them as reliably reflecting our basic moral convictions. But we can still wonder whether they express any more than arbitrary commitments or sentiments that we happen now to share. To regard such an argument as *justifying* moral principles thus seems to assume either a complacent moral conventionalism or else a mysterious "intuitionism" about basic moral "data."[102]

Fishkin does not discuss this objection. In fact, he does not discuss the problem at all. As a result, we are never told how minimal objectivism itself escapes the two "horns of the subjectivist dilemma,"[103] or at least the first horn of the dilemma—the arbitrary imposition of values. On this score, what Shaw said about the Golden Rule might just as easily be said, with slight modifications, about every other theory that is compatible with minimal objectivism. Shaw advised: "Do not do unto others as you would that they should do unto you. Their tastes may not be the same."[104]

Fishkin offers no counter to this advice. Of course, in any given case it might be prudent or reasonable for us to impose our values on someone who did not share them. It would be, for example, if we benefitted by doing so.[105] Yet this merely means we sometimes have a license for imposing our values on others; it does not mean we ever have what we need or seem to need—a justification for doing so. By failing to resolve or dissolve this problem, as well as the others discussed

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102. Lyons, Nature and Soundness of the Contract and Coherence Arguments, in Reading Rawls 141, 146-47 (N. Daniels ed. 1975) (emphasis in original).

103. See text accompanying supra notes 63-68.

104. G.B. Shaw, "Maxims for Revolutionists," in Man and Superman (Airmont ed. 1965).

105. See Harsanyi, supra note 5.

above, Fishkin has failed to establish the "theoretical availability of a middle ground."[106]

IV. CONCLUSION

According to Fishkin, subjectivism causes us problems only because of a "knot in our thinking."[107] Fishkin's aim is to untie the knot. Unfortunately, although his arguments often are insightful and provocative, they are far too sketchy to be convincing. Worse, many of the same arguments Fishkin makes against the traditional view of objectivity can also be made against his own alternative view. Still, Fishkin clearly demonstrates the need for a "middle ground," and for this reason alone *Beyond Subjective Morality* is a valuable effort.

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106. J. Fishkin, supra note 2, at 157.

107. Fishkin's view is similar to Wittgenstein's: "Philosophy unties knots in our thinking; hence its results must be simple, but philosophy has to be as complicated as the knots it unties." L. Wittgenstein, Zettel § 452 (G. Anscombe trans. 1967).