

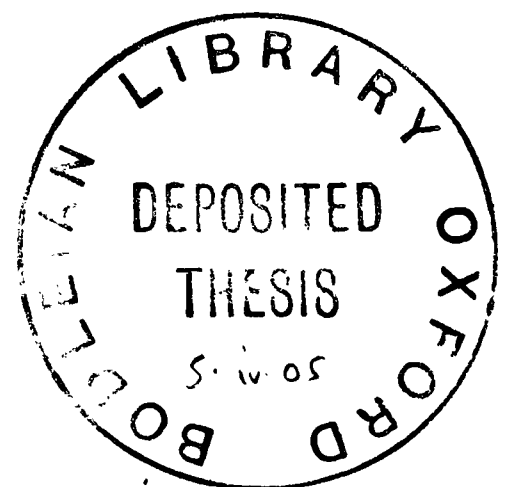
MAKING A DIFFERENCE: THE USE OF META-ETHICS IN ADJUDICATION

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Moral philosophers have long debated whether moral utterances can be objectively true or false (or objectively valid or appropriate). Many legal philosophers have also participated in this debate (which I shall call ‘the meta-ethical debate’). Recently, however, there has been a trend among legal philosophers – led by Ronald Dworkin and Jeremy Waldron – towards regarding the meta-ethical debate as irrelevant to the adjudication of legal disputes (and possibly to legal practice and theory more generally). This thesis explores the reasons underlying this trend, and argues that the trend is misguided. After outlining several versions of objectivism and anti-objectivism, and arguing that there is a genuine debate between these positions, I seek to establish the relevance of those positions to adjudication in two ways. Firstly, I consider the arguments offered by Dworkin and Waldron to show that the truth or falsity of moral objectivism is irrelevant to adjudication. I seek to show that both Dworkin's and Waldron's arguments fail to establish the irrelevance of the meta-ethical debate. Secondly, I seek to trace the implications of the meta-ethical debate for a particular issue relevant to adjudication – namely, the legitimacy of judicial review. I argue that, while both objectivists and anti-objectivists can regard judicial review as legitimate, one's meta-ethical position should affect one's attitude towards judicial review in a

variety of sometimes subtle ways. I conclude that the truth or falsity of moral objectivism does have implications for adjudication, although those implications are not as great as has been suggested by some opponents of the trend towards regarding the meta-ethical debate as irrelevant to adjudication. In doing so, I seek to tread a middle path between the two most popular views of the relationship between the meta-ethical debate and adjudication – that the former is either irrelevant to the latter or else has *radical* implications for it.

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INTRODUCTION

For thousands of years, moral philosophers have debated the philosophical status of our moral judgments. They have asked whether there is a God or common human nature from which moral requirements can be derived, whether what is morally appropriate for one person may be inappropriate for others and even whether moral ‘beliefs’ are really beliefs at all or are instead simply expressions of approval or disapproval. In particular, there has been an often fiery conflict between ‘moral objectivists’ (who claim that moral truth is ultimately independent of our moral beliefs and/or that a rational convergence upon certain moral beliefs is possible), and ‘moral anti-objectivists’ (who deny both of these claims).¹ It is this last dispute that I shall focus on in this thesis, and that I shall refer to as the ‘meta-ethical debate’.

Many legal philosophers have participated in this debate. Indeed, an entire school of jurisprudence – classical natural law theory – is premised upon certain answers to the philosophical questions mentioned in the previous paragraph. At the other end of the jurisprudential spectrum, the legal philosophies of Hans Kelsen and Oliver Wendell Holmes – while differing markedly in some respects – were both strongly influenced by the assumption that moral judgments can be only ‘relatively’ true. And one of the many bones of contention between ‘analytic’ legal philosophers (such as Joseph Raz and John Finnis) and – at least some – critical legal scholars (such

¹ This way of drawing the distinction between objectivism and anti-objectivism is defended in Chapter I.

as Joseph Singer²) is precisely the question of whether moral judgments can be objectively true.

However, perhaps *because* the meta-ethical debate has raged unabated for thousands of years, it is becoming increasingly popular among legal philosophers to dismiss that debate as irrelevant to their concerns. As we shall see in this thesis, the arguments to this effect take a variety of forms. However, they share in common the claim that one need not become embroiled in the debate between moral objectivists and anti-objectivists in order to develop an adequate legal philosophy. If this claim is correct, then the meta-ethical debate is a red herring in jurisprudence, a needless source of controversy, confusion and consternation.

The purpose of this thesis is to explore, in some detail, whether this recent trend in legal philosophy is misguided. However, because it cannot be assumed that what is true of one jurisprudential issue is automatically true of others, I shall focus on just one topic in legal philosophy – namely, the issue of adjudication. Indeed, in the last two chapters of the thesis, I shall narrow my focus even further, considering only whether the meta-ethical debate makes a difference to the legitimacy of judicial review.³

² J Singer (1984).

³ The fact that my focus is on adjudication (rather than the basic political structure of society) provides one reason why I shall not consider the views of John Rawls in this thesis. A further reason is that, if Rawls really does regard the meta-ethical debate as irrelevant to politics (and I believe that it is far from clear that he does), any consideration of his views on this matter would go to the very heart of his political liberalism. It would be impossible to do these issues justice in a thesis that must be primarily concerned with those writers who clearly do regard the meta-ethical debate as irrelevant to adjudication (such as Jeremy Waldron and Ronald Dworkin).

There are several reasons for focusing on the topic of adjudication when discussing the relevance of the meta-ethical debate to legal philosophy. At a purely ad hominem level, this is the topic considered by many people in the vanguard of the trend discussed above (such as Jeremy Waldron), as well as by some of the most trenchant critics of that trend (such as Michael Moore). It is helpful to test their competing claims by reference to the jurisprudential issue that they themselves have in mind. Secondly, the topic of adjudication is sufficiently central to jurisprudence that any implications that the truth or falsity of moral objectivism might have for adjudication cannot be dismissed as affecting a matter of only minor concern to legal philosophers. Finally, adjudication is one area of legal philosophy to which moral reasoning is particularly pertinent, since a thorough examination of the practice of adjudication would have to consider (inter alia) how judges should decide cases. It is generally accepted that, in deciding cases, judges should sometimes engage in moral reasoning.⁴ Given that the meta-ethical debate concerns the status of moral reasoning, a consideration of the topic of adjudication is likely to be particularly well suited to uncovering any implications that the meta-ethical debate may have for legal philosophy (assuming, of course, that it has any such implications).

The conclusion that I shall reach by the end of this thesis is that the trend towards dismissing the relevance of the meta-ethical debate to legal philosophy is mistaken. The truth or falsity of moral objectivism has a range of implications for issues concerning adjudication in general and judicial review in particular. However, while I shall argue that it is wrong to regard the meta-ethical debate as irrelevant to adjudication, I will also

⁴ Even ethical positivists concede that judicial decision-making cannot be kept completely uncontaminated by moral reasoning: eg Campbell (1996) 4, 90-91, 125. And Posner opposes only the use of moral *theory* by judges, not the use of moral intuition or 'commonsense': Posner (1999) viii.

seek to show that the implications of that debate are not as radical as many opponents of this trend have suggested. What consequences the choice between moral objectivism and anti-objectivism has for adjudication depends upon which versions of objectivism and anti-objectivism one is comparing. This means that blanket claims like ‘no form of anti-objectivism is compatible with the legitimacy of judicial review’ are likely to be false. A more fine-grained comparison between the competing meta-ethical positions is required, and this suggests that the differences made by the meta-ethical debate are likely to be more subtle than is sometimes supposed.

Therefore, this thesis seeks to tread a middle path between two extremes. On the one hand, there is the claim that the truth or falsity of objectivism is completely irrelevant to issues concerning adjudication. On the other hand, there are overblown assertions about the difference that the meta-ethical debate makes to judicial decision-making, including suggestions that it is very difficult (if not impossible) for any anti-objectivist to support judicial review. I shall argue that both of these claims are mistaken: the truth or falsity of objectivism makes a difference to adjudication, but that difference is more nuanced than some people have suggested.

In Chapter I, I set out in more detail the opposing positions within the meta-ethical debate. I begin by suggesting, and briefly defending, a particular way of distinguishing objectivist meta-ethical theories from anti-objectivist ones. I then introduce two specific versions of moral objectivism and one version of anti-objectivism, whose implications for adjudication I shall compare in subsequent chapters.

Chapter II seeks to defuse a particular type of objection that might be offered to my overall project. It might be considered a waste of time to compare the implications of versions of objectivism and anti-objectivism, on the basis that there is a particular version of objectivism (which I shall call ‘ecumenical pluralism’) that is clearly correct. Given that it is clearly correct, we should explore *its* implications for adjudication (if it in fact has any), but there is no point considering the implications that *other* meta-ethical theories might have.

I respond to this objection by suggesting that the proper outcome of the meta-ethical debate is not as evident as this objection supposes. To that end, I argue that there is a significant problem confronting anyone who wishes to defend ecumenical pluralism. This problem concerns its ability adequately to explain the existence of widespread and persistent moral disagreement. I also suggest responses to some obvious objections to the version of anti-objectivism outlined in Chapter I. However, my purpose in this chapter is not to resolve the meta-ethical debate, something that could not possibly be done in the space of a single chapter. Rather, my goal is merely to offer the reader some reasons why it might be worthwhile keeping an open mind as to which meta-ethical position is correct. This conclusion helps to explain why the project undertaken in this thesis is important. If the meta-ethical debate is not easily resolvable, then the question of whether that debate has implications for adjudication becomes that much more pressing. If it has no such implications, then legal philosophers can safely ignore the difficulties posed by the meta-ethical debate. However, if the meta-ethical

debate does have implications for adjudication, then the role of the legal philosopher who seeks to provide an account of adjudication becomes that much more difficult.

In Chapters III & IV, I begin examining the trend towards regarding the meta-ethical debate as irrelevant to legal philosophy. In these chapters, I discuss the arguments offered by Ronald Dworkin and Jeremy Waldron to support the claim that the meta-ethical debate has no implications for adjudication. While these two commentators hold quite different views, both hold prominent positions in the vanguard of the movement to divorce meta-ethics from legal philosophy, and so their views require extensive discussion.

In Chapter III, I discuss two different arguments offered by Ronald Dworkin. The first regards the debate between objectivism and anti-objectivism as intelligible, but seeks to show that it has no bearing upon legal practice or theory. The second dismisses the meta-ethical debate as nonsensical (unless it is understood as a debate between two *moral* positions). I seek to show that neither of these arguments is valid.

In Chapter IV, I consider the views of Jeremy Waldron, who argues that – while the meta-ethical debate is intelligible – it should have no influence upon our views concerning adjudication. I seek to show that Waldron's argument for this conclusion is flawed, and tentatively suggest two differences that the truth or falsity of objectivism might make to adjudication. However, the conclusions reached in Chapter IV are only provisional. I offer an abstract refutation of Waldron's position, but make only a very preliminary attempt to show that the truth or falsity of moral objectivism makes

concrete differences to any particular aspect of the adjudicative process. In the last two chapters of the thesis, I seek to fulfil the latter task, by showing that the meta-ethical debate makes a significant difference to the legitimacy of judicial review. However, I also seek to demonstrate that the differences made by the meta-ethical debate are not as far-reaching as some of Waldron's opponents have suggested.

It is in pursuit of this latter goal that Chapter V strives to show that there is at least one type of anti-objectivist who is free to support judicial review. In doing so, I criticise several people (including the earlier Dworkin) who have suggested that any anti-objectivist will find it difficult – if not impossible – to endorse judicial review. I argue that at least some anti-objectivists are free to use certain arguments commonly propounded by objectivists in favour of judicial review.

Yet, if both objectivists and anti-objectivists are able to support judicial review, what difference does the truth or falsity of objectivism make to the legitimacy of this institution? Chapter VI is devoted to answering this question. I argue that – while some objectivists and some anti-objectivists can support judicial review – there are a variety of differences that the meta-ethical debate makes to the desirability of judicial review. For example, while some types of anti-objectivist can support judicial review, others cannot (at least not on the grounds that are commonly offered in favour of judicial review). Anyone who holds the latter sort of position is precluded *by her meta-ethical views* from regarding judicial review as legitimate. Moreover, even when we consider those forms of anti-objectivism that *can* support judicial review, whether we accept such a meta-ethical position may affect the *circumstances* under which we should

support judicial review. I seek to show that these types of differences are sufficient to expose the fallacies of the recent trend towards treating the truth or falsity of moral objectivism as irrelevant to adjudication.

CHAPTER I: INTRODUCING THE META-ETHICAL DEBATE

This thesis examines the recent trend towards viewing the dispute between moral objectivism and anti-objectivism as irrelevant to adjudication.¹ Before I am in a position to embark upon this project, however, I must first explain what I mean by moral objectivism and anti-objectivism. Therefore, the first purpose of this chapter is to introduce the debate between these two positions, and to suggest a way of distinguishing them. The second goal of this chapter is to outline some specific forms of objectivism and anti-objectivism that we can compare in subsequent chapters to see if they have different implications for adjudication. Firstly, I will briefly introduce two forms of objectivism – the ‘moral realism’ of Michael Moore, and a pluralist, non-realist version of objectivism that I shall call ‘ecumenical pluralism’. Secondly, I shall present a particular form of anti-objectivism, which I shall label ‘perspectival relativism’. Since this form of anti-objectivism will be less familiar to most readers than the two forms of objectivism that I consider, I will need to describe perspectival relativism in some depth, as well as distinguishing it from better-known versions of moral relativism.

A. Distinguishing Objectivism and Anti-Objectivism

¹ I shall label the debate between moral objectivism and anti-objectivism ‘the meta-ethical debate’. I use the word ‘moral’ to cover what Mackie (1977) 106 calls ‘morality in the narrow sense’ – namely, a system of constraints on conduct whose central task is to protect the interests of people other than the agent, and which present themselves to the agent as checks on her ‘natural’ inclinations or tendencies to act. I leave to one side whether Raz (1986) 214-216 is right in claiming that we cannot ultimately distinguish what I call morality from what is standardly called ethics (which Raz defines as the precepts instructing people how to live and determining what makes for a successful and worthwhile life: 213). My comments apply at least to morality, but may also apply to ethics (possibly because there is no tenable distinction between them).

There are many different versions of both objectivism and anti-objectivism. For reasons that will become apparent, these are best seen as points on a spectrum, rather than as members of opposing camps separated by a wide gulf. This means that there may be no foolproof test for distinguishing objectivist from anti-objectivist theories – at a certain point, it may be unclear which category a particular theory belongs to. Nevertheless, I shall suggest a way of distinguishing objectivist from anti-objectivist theories that, although imperfect, is still useful. In doing so, I shall be guided by two criteria. Firstly, the distinction should be drawn in such a way that there is a meaningful disagreement between the two positions, and neither is committed to anything that is obviously untenable or that unnecessarily limits the argumentative resources available to proponents of that position. Secondly, the distinction should be drawn in such a way that writers *generally* fall into the camp to which they claim to belong. Obviously, if someone is mistaken regarding how the distinction should be drawn, they may also be mistaken as to which side of the line they fall. However, a way of drawing the distinction that jars radically with the way that participants in the debate see the distinction is (at least *prima facie*) suspect.

1) What the meta-ethical debate is *not* about

First, however, I shall consider two ways of drawing the distinction that are *not* helpful. It is sometimes suggested that objectivism is equivalent to cognitivism, and that anti-objectivism is equivalent to non-cognitivism. Cognitivists claim that moral judgments purport to represent *knowledge* and aim at *truth* (as opposed to being merely expressions of emotion or the endorsement of a norm), and that these aspirations can

sometimes be fulfilled.² Therefore, on this way of phrasing the distinction, objectivists claim that there can be moral knowledge and truth, whereas anti-objectivists assert that moral statements merely express emotions or endorse norms.

However, many people who call themselves anti-objectivists allow that moral statements can be true or false (and that, when someone says that a moral statement is true, she is not *simply* expressing emotions or endorsing norms). The truth or falsity that anti-objectivists ascribe to those statements may not be the same as that ascribed by objectivists, but this means that the difference between (these forms of) anti-objectivism and objectivism is in the *type* of truth they allow that moral statements can attain, rather than the latter claiming (and the former denying) that moral statements can be true at all.³ Indeed, it may be possible for both an objectivist and an anti-objectivist to accept the *same* account of truth (eg a deflationary account). Moreover, just as there are some anti-objectivists who claim that moral statements aim at truth, there are some objectivists who deny this. Some objectivists (eg Kant and Hare) treat moral utterances as *imperatives* or *prescriptions*, which (arguably) can be neither true nor false.⁴

Another way in which one might seek to distinguish objectivism from anti-objectivism is to say that the former claims, and the latter denies, that there are universally true moral principles (that is, principles that are true for everyone, no matter

² Wiggins (1990-91) 62; Tasioulas (2002) 218.

³ See Williams (1995b) for a type of truth that could be ascribed to moral statements consistently with a denial of objectivism.

⁴ Tasioulas (2002) 219. Whether Hare is an objectivist is controversial. I believe that he is, since he accepts the rational convergence thesis set out at 16-20 below.

what their circumstances).⁵ Alternatively, one might suggest that anti-objectivism asserts, and objectivism denies, that what is true for one person may be false for another.

The latter formulation is inadequate. Objectivism, too, can allow that what is true for one person may be false for another, provided that their circumstances differ in certain ways. Any adequate definition of objectivism must allow that an objectivist can claim that (for example) it is true that a good swimmer is obliged to jump into a river to save a drowning child, but false that a bad swimmer is.⁶ While any such discrimination may need to be based on a more general principle that *does* apply to everyone regardless of their circumstances (such as that one is obligated to save another person's life if the risk to one's own life is not too great), this is not enough to rescue this way of phrasing the distinction, in the absence of a way of specifying *which* principles the objectivist can allow to be true for one person and false for another.⁷

Even if one could overcome this problem, there is a further difficulty, which is also fatal to the first formulation of the distinction (that objectivism claims, and anti-objectivism denies, that there are universally true moral principles). There is a sense in which some anti-objectivists (such as the perspectival relativist introduced in Part C), too, can allow that there may be moral principles that are true for everyone, regardless

⁵ Wong (1991a) 442.

⁶ M Singer (1963) 14.

⁷ A proponent of this way of distinguishing between objectivism and anti-objectivism might wish to make use of a manoeuvre analogous to the one that I employ in setting out the 'mind-independence thesis': 14-15 below. Even if this were successful, however, the problem in the next paragraph would remain.

of their circumstances. For example, the perspectival relativist can allow that, *relative to Catholic morality*, there are moral principles that are valid for everyone, regardless of their circumstances. I explain how a perspectival relativist can make statements like this in Part C.

2) What the meta-ethical debate *is* about

How, then, should the distinction between objectivism and anti-objectivism be drawn? I suggest that an objectivist holds one or both of the ‘mind-independence’ or ‘rational convergence’ theses, whereas an anti-objectivist rejects both theses. These theses are not intended to provide necessary and sufficient conditions for a theory to be objectivist, but rather (between them) to reflect the central claims of paradigmatically objectivist theories. To keep them as ecumenical as possible, I shall discuss these theses at a fairly high level of abstraction. In particular, I shall say little about the relationship between them, beyond noting that some objectivists accept both theses while others accept only one of them.

a) the mind-independence thesis

The first objectivist thesis is that the truth of moral statements is ‘mind-independent’.⁸ While this concept is often left unexplicated, the idea seems to be that objectivism claims (and anti-objectivism denies) that whether a moral statement is true is independent of psychological states such as beliefs and desires. However, this way of

⁸ eg Sturgeon (1986) 117; Finnis (1983) 22-24 (though Finnis defines objectivism partly in terms of universality).

phrasing the distinction is unsatisfactory. An objectivist should be permitted to claim that the truth of a moral statement may depend (partly) on our beliefs about the *physical* characteristics of the situation in question. For example, whether I have a duty to jump into a river and retrieve your body from raging rapids may depend not just on whether you are still alive, but also on whether I *believe* that you are.

The distinction could be re-phrased so that objectivists claim that moral truth does not depend on any *moral* beliefs or desires. However, this, too, is inadequate. Even an objectivist could allow that the truth of certain moral statements depends on certain people's moral beliefs and desires. Firstly, she could allow that whether one should act upon a particular moral belief in one's dealings with another person depends (partly) on whether they *accept* that belief. For example, there may be some issues regarding which it is better to allow someone to hold their *own* belief on the matter than it is to ensure that they hold the *correct* belief,⁹ and this may affect the moral beliefs upon which we should act in our dealings with that person. Secondly, take the statement 'I am blameworthy for doing X'. Surely, the objectivist can allow that one consideration relevant to the truth of this statement is whether I believed at the time that doing X was *right*.

A better way of drawing the distinction is to say that the objectivist claims, and the anti-objectivist denies, that whether a moral statement is true can depend on someone's moral beliefs or desires only if there is a further moral principle that sets forth this dependence and that does not depend on anyone's moral beliefs or desires for

⁹ Raz (1990) 13.

its truth. Most objectivists claim that the truth of most moral statements does not depend on anyone's moral beliefs. For example, they claim that whether cruelty is wrong does not depend on anyone's moral beliefs or desires concerning cruelty (or anything else, for that matter). However, they may allow that there are some moral statements whose truth *does* depend on certain people's moral beliefs (such as the examples given in the previous paragraph). Nevertheless, according to the objectivist, the moral belief in question is relevant to the truth of the statement only because there is a further moral principle stating the *way* in which that belief is relevant, and the truth of this further principle does *not* depend on anyone's moral beliefs or desires.¹⁰ The anti-objectivist, on the other hand, may accept that there is a higher-order principle stating the way in which the moral belief is relevant, but will claim that the truth of this principle, too, depends on certain people's moral beliefs and desires.

This formulation of the distinction is consistent not only with objectivist theories that base moral truth on something entirely independent of human beings (or rational creatures generally),¹¹ but also with the claim of many objectivists that the truth of moral statements depends on certain human characteristics (but not – ultimately – on people's moral beliefs and desires).¹² Moreover, while the reference to truth in the revised definition renders objectivism incompatible with non-cognitivism, this can be remedied by stating that it is the *validity*, not the *truth*, of moral statements whose mind-independence is in question. The non-cognitivist must have *some* notion of validity

¹⁰ This way of dealing with the blameworthiness example was suggested by John Tasioulas.

¹¹ Michael Moore may hold such a view: 24 below.

¹² eg Foot (1995) 12, who distinguishes her claim that moral reasons depend on facts about human needs, capabilities, etc from the 'non-cognitivist' claim that moral reasons depend on human feelings or desires.

(even if she wishes to distinguish it from truth) if she is to be able to assess *any* actions or assertions for appropriateness. Similarly, while the non-cognitivist may wish to speak of moral *prescriptions*, rather than *statements*,¹³ this requires only minor changes to my formulation of the mind-independence thesis.

b) the rational convergence thesis

The second objectivist thesis is that, in certain circumstances, everyone will converge upon certain moral beliefs. The reference to ‘certain circumstances’ is necessary for two reasons. Firstly, the objectivist need not claim that convergence will occur in any situation whatsoever, only that it will occur if certain conditions are satisfied. Conversely, objectivism cannot be defined in terms of just *any* convergence of beliefs. Convergence could be produced by brainwashing, yet this would not provide evidence of moral objectivity. Thus, proof that everyone held the same moral beliefs would not be enough to establish the correctness of objectivism. We would also have to examine how people arrived at this convergence, and whether it can withstand rational scrutiny.

This suggests that only a *rational* convergence of beliefs would support objectivism. What does ‘rational’ mean here? Let us start with an example. If, as each of us rendered our moral beliefs more coherent,¹⁴ we converged upon a *single* set of fully coherent moral beliefs (and if this was true not just locally, but of all rational creatures), then those beliefs would be objective. To borrow a phrase from Wiggins, there would

¹³ Or moral *attitudes*, rather than *beliefs*: Blackburn (1993) 168.

¹⁴ Coherence requires more than just consistency: 37-39 below.

be ‘nothing else to think’.¹⁵ This suggests that there are procedures that, if they produced a convergence of moral beliefs, *would* establish the objectivity of those moral beliefs. Objectivism can therefore be construed as the claim (and anti-objectivism as the denial) that there are principles of rationality (in the example given above, the requirement of coherence) the application of which would produce convergence on certain moral beliefs.¹⁶

Different objectivists advocate different principles of rationality as capable of producing moral convergence. For example, RM Hare claims that convergence would be achieved if everyone applied his universalisability principle (which he regards as logical, not moral, in nature),¹⁷ whereas Michael Smith suggests that, if we each reflect on our current desires in order to make them maximally informed, coherent and unified, then we will all converge on the same desires (and moral facts are a sub-set of facts about these desires).¹⁸ However, for the rational convergence thesis to separate objectivist from anti-objectivist theories, these principles of rationality must be either non-moral in nature or mind-independently valid.¹⁹ This is because – as we shall see in Chapter II – perspectival relativists, too, can allow that there would be a rational convergence on particular moral beliefs if the relevant standards of rationality can be

¹⁵ Wiggins (1990-91) 71.

¹⁶ Anti-objectivists need not deny that there could be a rational convergence upon *tautological* moral principles (eg ‘all wrongful killings are wrong’). Like the mind-independence thesis, the rational convergence thesis is meant to be a claim about non-tautological moral statements. However, any convergence upon *non*-tautological moral principles must be regarded by the anti-objectivist as purely contingent, rather than as being a necessary result of the application of principles of rationality.

¹⁷ Hare (1997) 24, 133-134.

¹⁸ M Smith (1999) 58.

¹⁹ Or amount to what Wiggins (1990-91) 76 calls ‘a pre-existing universal notion of rationality’.

moral in nature and need not be mind-independently valid. In other words, a perspectival relativist can embrace moral standards of rationality,²⁰ and could argue that everyone who applied those standards would arrive at the same moral beliefs (eg because the moral content of those standards entails certain further moral statements). Thus, if the objectivist is to distinguish herself from this anti-objectivist position, she must adopt one of two stances. The first is that, while the ‘raw data’ on which the principles of rationality operate are obviously moral in nature (being our existing moral beliefs), those principles themselves are not. The second is that, while the principles of rationality are moral in nature, they are mind-independently valid. (Though these may be the *only* principles that are mind-independently valid; other moral principles may be valid only by reference to the rational convergence thesis.)

This restriction on what counts (for present purposes) as a principle of rationality is not without cost. A number of self-identified objectivists claim that we will converge on the truth only if we engage in a certain type of moral inquiry *while possessing certain moral virtues*, or that the procedures required to produce convergence cannot be specified independently of moral considerations. Moreover, these objectivists do not explicitly concede that the moral virtues or considerations in question are mind-independently valid. However, an objectivist who says that a rational convergence on certain moral beliefs is possible, but who ascribes moral content to rationality, has said nothing that a perspectival relativist must deny. If she is indeed an objectivist, and she continues to maintain that convergence is possible only by applying principles of rationality with a moral content, then she must subscribe to the mind-independence

²⁰ Though she must concede that they are valid only relative to a ‘moral perspective’: Part C.

thesis to distinguish herself from anti-objectivists. (Or she may combine the two theses, by claiming that the moral principles of rationality are mind-independently valid, but the objectivity of other moral statements is determined by reference to the rational convergence thesis.) In other words, while not everyone who purports to accept the rational convergence thesis would accept the requirement that the account of rationality be either non-moral in nature or mind-independently valid, this requirement is needed to retain a workable distinction between objectivism and anti-objectivism.²¹

Nevertheless, many high-profile objectivists (including Hare, Smith and Wiggins²²) could accept my interpretation of the rational convergence thesis. Moreover, I believe – though I cannot establish this here – that those who could not accept it can be interpreted as embracing the mind-independence thesis instead.²³ Not all objectivists need accept the rational convergence thesis, any more than all

²¹ John Tasioulas has suggested that we can distinguish objectivism from anti-objectivism by reference to a rational convergence thesis that does *not* require the relevant principles of rationality to be non-moral or mind-independent. On this view, a rational convergence on certain moral beliefs exists where there is a convergence on those beliefs and the best explanation of this convergence is that people have come to recognise the overwhelming moral reasons in favour of those beliefs. However, much work would have to be done to explain why an *anti-objectivist* cannot make such a claim. From the viewpoint of an anti-objectivist who considers those beliefs to be correct, the best explanation of a convergence on those beliefs may be that people have come to recognise the overwhelming reasons in favour of those beliefs, even though those reasons are not *objectively* sound. Until it is shown that an anti-objectivist *cannot* say this (or that she will mean something different from the objectivist when she does say it), the suggestion in the text remains the best way of interpreting the rational convergence thesis.

²² 17 above; Wiggins (1990-91) 76-77.

²³ McDowell is one commentator who is often labelled an objectivist, but who rejects the rational convergence thesis: McDowell (1998) 101-102, 106-107. However, he accepts at least a watered-down version of the mind-independence thesis: see 108-109, 146, where he argues that moral truth is independent of any particular moral belief, though not of our moral sensibility as a whole. (If this is only a watered-down version of the mind-independence thesis, then his theory is only partially objectivist, falling somewhere in the grey area separating objectivism from anti-objectivism).

objectivists need accept the mind-independence thesis. It is enough if those who reject the former accept the latter (and vice versa²⁴).

3) Objectivism, realism and pluralism

The distinctions between those objectivists who hold the mind-independence thesis and those who hold the rational convergence thesis, and between those who hold one of these theses and those who hold both, are not the only important distinctions internal to objectivism. A distinction is also commonly drawn between *objectivism* and *realism*. Realism is generally thought to be related to objectivism, but how they are related depends on which objectivist thesis one has in mind. If one focuses on the rational convergence thesis, it is natural to equate that thesis with objectivism, and to call the mind-independence thesis ‘realism’. On this view, objectivists claim that there are procedures for generating a rational convergence of beliefs, whereas realists claim that truth is mind-independent.²⁵

On the other hand, if we focus on the mind-independence thesis (that is, the denial that moral truth ultimately depends on people's moral beliefs or desires), this raises the question of what moral truth *does* (ultimately) depend upon. Realism can then be seen as claiming that it depends on something completely independent of any rational creature (such as ‘the furniture of the universe’), whereas a non-realist objectivist may

²⁴ An example of a rational convergence theorist who rejects the mind-independence thesis is Wiggins (1990-91) 70-71, 76.

²⁵ Williams (1995a) 557, 561. ‘Mind-independence’ is a key element in the definitions of realism offered by Railton (1986) 172 and Sturgeon (1994) 95, n 51.

claim that it *is* based on certain characteristics of rational creatures (just not on their moral beliefs and desires).²⁶

I shall adopt this second way of drawing the objectivism/realism distinction. If the distinction was drawn in the first way, we would need a *further* pair of terms to distinguish between those versions of the mind-independence thesis that base moral truth on something completely independent of human beings, and those that do not. This distinction is important, if only because the latter view is far more plausible than the former. Also, realism is commonly believed to be a sub-category of objectivism,²⁷ yet the mind-independence thesis is not a sub-category of the rational convergence thesis. We have seen that, just as some objectivists believe in the possibility of rational convergence without believing that this will be convergence on a mind-independent reality, others believe that moral truth is mind-independent without believing that there are principles of rationality that are capable of producing convergence upon this truth.

Another important distinction internal to objectivism is between those objectivists who claim that there is a single right answer to every moral question, and those who allow that some moral questions have either *no* right answer (indeterminacy) or *more* than one right, yet incompatible, answer (pluralism).²⁸ It might be thought that pluralism, at least, is inconsistent with the rational convergence thesis, because convergence by its very nature involves arriving at a *single* answer. However, pluralists

²⁶ cf 15 above.

²⁷ Marmor (1995) 183, though cf Williams (1995a) 561.

²⁸ These views are discussed in greater depth in Chapter II.

need not claim that *all* moral questions would be the subject of a rational convergence. For example, Wiggins claims that there could be a rational convergence on the central core of morality, but there are other cases in which the answer is under-determined or indeterminate.²⁹ Moreover, some objectivists would be content with convergence on a limited *range* of acceptable answers to many moral questions, rather than on a single right answer.

B. Two Forms of Objectivism

Having suggested a basis on which to distinguish objectivist from anti-objectivist theories, I shall now briefly outline two forms of objectivism with which I shall be particularly concerned in this thesis. Part of my aim in doing so is to illustrate the distinctions drawn in Part A. However, my primary motivation is that I shall frequently return to these two versions of objectivism in later chapters, when comparing the implications of objectivism and anti-objectivism for adjudication.

1) Moore's moral realism

The first objectivist theory that I shall consider is Michael Moore's form of moral realism. This might seem like a strange choice. However, not only does this theory help to illustrate the distinctions between different types of objectivism, but it will be particularly useful in teasing out the implications of the meta-ethical debate in subsequent chapters. A further reason for considering Moore's version of objectivism is

²⁹ Wiggins (1990-91) 76-77.

that he is one of the leading opponents of the claim that meta-ethics has no implications for adjudication.

I shall begin by locating Moore's theory in terms of the distinctions introduced in Part A. I will then explain how he believes that we can identify objective moral truths, since it will be this aspect of his theory with which I shall be particularly concerned in later chapters.

Firstly, Moore explicitly subscribes to the mind-independence thesis. His form of moral realism claims that moral properties exist, and that their existence is independent of our beliefs about their existence.³⁰ This means that whether a moral assertion is true or false is independent of our moral beliefs. On the other hand, Moore's attitude towards the rational convergence thesis would be more ambivalent. His form of realism claims that even an ideally rational human agent could be mistaken about moral matters, since it is possible that there are moral truths that cannot be grasped by the human mind.³¹ Thus, he is certainly not committed to the possibility of a rational convergence upon *all* moral truths. However, he does concede that any interesting version of moral realism would allow that *some* moral truths are rationally discoverable.³² Since I defined the rational convergence thesis as the claim that there could be a rational convergence upon *some* moral truths, Moore could accept that thesis. Nevertheless, the rational convergence thesis does not capture what he considers to be the most important

³⁰ Moore (1992) 2433. Moore's characterisation of that independence differs slightly from mine, but these differences are not important for the purposes of this thesis.

³¹ Moore (1992) 2437.

³² Moore (1992) 2439-2440.

features of his moral realism. His focus when explicating his form of moral realism is firmly upon the mind-independence thesis, with only passing reference to the rational accessibility of moral truths.

Despite Moore's label for his preferred version of objectivism, whether he is a moral realist in my sense of the term is not straightforward. He is certainly a realist in the sense of accepting the mind-independence thesis. However, he is not necessarily committed to the other reading of 'moral realism' that I suggested – that is, he need not claim that moral truths are independent, not just of our moral beliefs and desires, but of all characteristics of rational creatures. On the other hand, while he is keen to define moral realism *as a general position* in a way that leaves open the possibility that moral truth depends on certain characteristics of rational creatures,³³ his explication of his own form of moral realism suggests that moral truth is fixed by a purely external 'moral reality'. Certainly, this seems to be the upshot of his discussion of examples such as the wrongness of needlessly inflicting suffering upon cats, in which he makes no reference to human needs, capabilities, etc (beyond claiming that moral reality can exert a causal influence upon us).³⁴

When we turn our attention to the last distinction internal to objectivism – between those objectivists who claim that there is a single right answer to every moral question and those who deny this – things become more clear-cut. Moore explicitly embraces the view that there is a single right answer to every moral question, no matter

³³ Moore (1992) 2443-2444.

³⁴ Moore (1992) 2511.

how difficult that question might be. In other words, moral reality is ‘gap-less’ – every moral proposition is either true or false.³⁵ Thus, Moore rejects both pluralism and indeterminacy with regard to moral truths.

Having seen where Moore stands with regard to the issues canvassed in Part A, I shall now flesh out his theory by considering how he believes that we identify moral truths. Moore claims that moral properties are intimately related to non-moral properties. Rather than needing some ‘sixth sense’ (such as a faculty of direct intuition) to perceive moral properties, we instead use our ordinary five senses to detect the non-moral properties to which moral properties are intimately related, and thereby detect the moral properties as well.³⁶

However, this does not help us to determine which moral properties are ‘intimately related’ to which non-moral properties. To borrow an example from Moore,³⁷ we may be able to use our normal five senses to detect the deliberate and needless infliction of pain upon a cat, but how do we know that this amounts to cruelty? Moore claims that our best theory about the nature of cruelty *tells* us that deliberate and needless infliction of pain upon a cat is cruel.³⁸ However, how do we develop such a theory?

³⁵ Moore (1992) 2437-2438.

³⁶ Moore (1992) 2479-2480, n 166; Moore (1982) 1133. The exact relationship between non-moral and moral properties on Moore's theory is somewhat complicated. Put briefly, he claims that a moral property such as wrongness supervenes upon a disjunctive set of non-moral properties: Moore (1992) 2521ff.

³⁷ Moore (1992) 2517.

³⁸ Moore (1982) 1133.

One way in which Moore suggests that we develop such a theory is that our moral judgments are guided by moral reality.³⁹ In other words, moral reality has a causal effect on our moral beliefs. This includes the ‘causal regularities’ that Moore claims underlie our emotional responses to events in the world. For example, when we see pain being needlessly inflicted on a cat, the wrongness of this action tends to cause certain emotional responses in us, which in turn leads us to believe that needlessly inflicting pain on a cat is immoral. This causal effect provides us with the evidence necessary to develop our theories about the nature of moral reality. ‘Emotions are thus connected to the real world in a sufficiently structured way that one may use one’s emotional reactions as the basis for legitimate inferences about how the moral world really is.’⁴⁰ In this way, our emotional responses provide us with insight into moral truths.⁴¹

Despite Moore’s denial that we need a special faculty of direct intuition to access moral reality, intuitions play a significant role in his explanation of how we obtain such access. Moral intuitions provide us with knowledge of particular moral facts.⁴² Indeed, Moore suggests that our best strategy for accessing moral reality is to achieve ‘reflective equilibrium’. This involves taking our moral intuitions about specific cases and our

³⁹ Moore (1982) 1135-1136; Moore (1992) 2447, 2473.

⁴⁰ Moore (1982) 1136.

⁴¹ Moore (1992) 2456, n 97. Moore concedes that the causal relationship between moral reality and our moral beliefs is fragile, since many other factors may intervene to cause us to hold false moral beliefs: Moore (1992) 2473. Nevertheless, he maintains that this causal relationship is an important source of insight into moral truths.

⁴² Moore (1982) 1150. Presumably, these moral intuitions are produced by the causal process discussed in the previous paragraph.

beliefs about general moral principles, and seeking to eliminate any inconsistencies between them so that they form a coherent body of considered opinions.⁴³

How does attaining a consistent set of moral beliefs (which is all that reflective equilibrium is meant to produce) give one access to moral reality? After all, there are many possible consistent sets of moral beliefs, and they cannot *all* correspond to moral reality. This is where Moore's other views on how to access moral reality come into play. The causal effect that moral reality has on our beliefs, together with our ability to perceive the non-moral properties to which moral properties are closely linked, ensures that our initial set of beliefs bears some relation to moral reality. Achieving reflective equilibrium simply involves weeding out the incorrect beliefs in our initial set of moral beliefs.⁴⁴

2) Ecumenical pluralism

Having set forth Moore's moral realism, I shall now outline a quite different version of moral objectivism. I shall label this view 'ecumenical pluralism' since it is (with one qualification, to be noted in the next paragraph) meant to be an umbrella term that covers a range of objectivist theories, including those of Wiggins, Smith and Hare mentioned in Part A. There is some danger in seeking to outline a form of objectivism

⁴³ Moore (1982) 1112-1113, 1150; Moore (1992) 2509.

⁴⁴ This picture is implicit in Moore (1992) 2509, where he claims that – once the moral realist shows that beliefs about the moral status of particular acts or events connect in a reliable way to moral features of the world – then the rest of our moral beliefs can be justified through the technique of reflective equilibrium. Moore is free to maintain that not everyone will be in this advantageous epistemic state. For some people, the causal link between moral reality and their moral beliefs may be blocked by self-interest, prejudice, etc: n 41 above.

that is acceptable to a range of different objectivists, since such an approach runs the risk of either being too vague to be useful or else ignoring the important differences between the various objectivist theories that are meant to fall within its scope. However, there are two reasons why this risk is worth taking in the present context. Firstly, my primary purpose in outlining this form of objectivism is so that I can compare its implications for adjudication with the implications of anti-objectivist theories (especially perspectival relativism). To achieve this goal, this form of objectivism does not need to take sides with regard to certain controversies between objectivists. Given this, there is good reason to keep the theory as ecumenical as possible, so that it may shed light on the implications for adjudication of a *range* of objectivist theories, not just the theory of a single objectivist writer. There seems little point in favouring, say, Smith's theory over Wiggins' when this is unnecessary for my project and may alienate readers by unnecessarily eliminating their favoured objectivist position.

The second reason for not focusing on a single writer's version of objectivism is that, when we turn our attention (in Chapter II) to the issue of whether ecumenical pluralists can explain the existence of moral diversity, I shall argue that the ecumenical pluralist's best explanation of moral diversity involves combining explanations offered by a number of different objectivists, in a way that (as far as I am aware) no single objectivist has adopted. Since the ecumenical pluralist's best explanation of moral diversity is developed by pooling the resources of different objectivist theories, this provides a further reason for defining ecumenical pluralism in a way that covers a range of different objectivist views, rather than by reference to a single objectivist writer.

For these reasons, I shall not specify whether ecumenical pluralism accepts the mind-independence or rational convergence thesis (or both), since – with one qualification – this will not affect my aims in this thesis. The qualification is that, if this theory does accept the mind-independence thesis, it accepts a non-realist version of it. Even if it holds that moral truth is ultimately independent of our moral beliefs and attitudes, it still accepts that moral truth depends upon certain other characteristics of rational creatures. This stipulation is motivated partly by the fact that Moore's moral realism may already fill the niche of an objectivist theory that adopts a realist reading of the mind-independence thesis, and partly because it is generally believed that (given my definition of realism) non-realist versions of objectivism are much more plausible than realist versions. It is one thing to claim that moral truth is ultimately independent of people's moral beliefs and attitudes; it is quite another thing to say that it is ultimately independent of all human needs, capacities, etc. Very few, if any, of the people whose theories I intend to fall within the umbrella of ecumenical pluralism would seek to argue that objectivism should be realist in *this* sense of 'moral realism'.

Therefore, ecumenical pluralism should be acceptable to a non-realist mind-independence theorist such as Philippa Foot (who holds that moral truth is independent of our moral beliefs and desires but is not independent of other facts about us⁴⁵). It should also be acceptable to rational convergence theorists such as Michael Smith (who believes that everyone would converge upon a certain set of desires if they succeeded in making their existing set of desires maximally informed, coherent and unified) and

⁴⁵ At least in Foot (1995).

David Wiggins (who believes that, with regard to some moral issues, there is only one thing to think given the requirement that we should strive for a point of view that could be common to all rational creatures).⁴⁶

There are, however, limits on how ecumenical this version of objectivism is. To be an ecumenical pluralist, one must reject the claim that all moral questions have a single right answer. As we saw in Part A, there are two ways to do this. Firstly, one might accept pluralism. On this view, there are certain moral truths (such as that slavery is wrong) upon which we could achieve a rational convergence, or whose truth does not ultimately depend upon any moral belief or desire. However, there are other moral questions that have more than one valid yet incompatible answer. For example, there may be two forms of representative government, each of which is better than the other in some respects, yet neither of which is better – or equally good – overall. In such cases, morality permits us to adopt either option. Alternatively, one might claim that there are some moral questions that have *no* determinate answer. For example, there may be no determinate answer to the question of whether the top marginal income tax rate in Australia ought morally to be set at 47% or 50%. Again, these are situations in which morality does not tell us precisely how to act, though it still provides some guidance (for example, it would be objectively unjust to set the income tax rate at either 100% or 0%).

Since a discussion of ecumenical pluralism shall occupy much of Chapter II, I shall wait until then to elaborate it in greater detail. In particular, I shall consider in the

⁴⁶ M Smith (1999) 58 and Wiggins (1990-91) 71 respectively.

next chapter why this version of objectivism embraces pluralism (or indeterminacy), what is involved in this commitment, how this version of objectivism seeks to explain moral diversity, and some of the ways in which it claims that we can access objective moral truths.

C. Perspectival Relativism

In this Part, I introduce a version of anti-objectivism to compare with the two versions of objectivism outlined in Part B. This anti-objectivist theory is a particular form of moral relativism, which I shall label ‘perspectival relativism’. Since it is likely to be less familiar to most readers than the two forms of objectivism outlined in Part B, I shall need to go into more detail when characterising perspectival relativism. Nevertheless, since the primary aim of the thesis is to consider whether the meta-ethical debate is relevant to adjudication, rather than to engage in that debate, I shall seek to keep my discussion of perspectival relativism to a manageable length.

1) Some core commitments

Perhaps the best way to introduce perspectival relativism is in terms of its four core commitments:⁴⁷

- 1) the rejection of the mind-independence and rational convergence theses;
- 2) the commitment to the existence of moral truth and falsity;

⁴⁷ I am indebted to Patrick Emerton for suggesting this way of presenting perspectival relativism.

3) the claim that moral statements can be true or false only relative to a ‘moral perspective’; and

4) the claim that moral beliefs are not infallible (in other words, one’s moral beliefs can be mistaken, even relative to one’s own ‘moral perspective’).

I shall discuss each of these core commitments in turn in the present Section, before considering an important implication of those commitments in the next three Sections. Section 5 will then compare perspectival relativism with a better known version of moral relativism.

Firstly, as a form of anti-objectivism, perspectival relativism is committed to denying both that moral truth is mind-independent and that there are rational procedures for generating moral beliefs that will produce convergence on those beliefs.⁴⁸ Nevertheless, perspectival relativism is cognitivist, since it claims that there are moral *beliefs* that are capable of being *true* or *false* (and of being the object of moral *knowledge*). It does not deny that moral statements can be true, only that they can be *objectively* true.

As a form of moral relativism, perspectival relativism is also committed to claiming that the truth or falsity of a moral statement is *relative to* something. What makes perspectival relativism a distinct version of moral relativism is that it claims that moral statements are true or false relative to a ‘moral perspective’, rather than relative to an individual or culture. The phrase ‘moral perspective’ is meant as shorthand for a set

⁴⁸ Although convergence may be produced in other ways, such as brainwashing, and there are rational procedures for generating moral beliefs that do not produce convergence: Sections 3 & 4.

of *correct* moral beliefs, plus the desires and dispositions that help to determine the truth of those beliefs. (Thus, to say that a moral belief is true ‘relative to’ a moral perspective is to say that it is a member of that perspective.) We shall see that which moral beliefs are correct relative to one’s perspective depends on one’s *current* beliefs, and these vary between individuals. Hence, different individuals almost invariably hold different moral perspectives, and no moral perspective is objectively preferable to another perspective.⁴⁹

This third commitment of perspectival relativism again entails the rejection of both objectivist theses. Since moral truth is relative to a perspective, which is based on one’s current moral beliefs and desires, it is not mind-independent. Moreover, the fact that different people hold different perspectives, and there is no rational basis for preferring one perspective to another,⁵⁰ precludes the possibility of a rational convergence.

In understanding this third commitment, it is important to note that perspectival relativism is not (in itself) a thesis about the meaning of moral statements, but rather a thesis about the type of truth to which moral statements aspire (whether the utterers of those statements realise this or not). Thus, perspectival relativists are not committed to claiming that ‘true’, at least in a moral context, *means* ‘true relative to X’s perspective’. Admittedly, a full account of perspectival relativism would include an account of the meaning of moral statements that is compatible with the core commitments of

⁴⁹ See 35-36 below for more on moral perspectives.

⁵⁰ If we limit ourselves to non-moral standards of rationality: 17-19 above.

perspectival relativism. However, a consideration of this issue would take me too far afield from my primary concerns in this thesis.⁵¹

The third commitment of perspectival relativism should also be distinguished from a view sometimes called ‘relativism of scope’, which is simply the denial of the universality thesis.⁵² Relativism of scope claims that a moral statement that is true for one person may be false for another.⁵³ At one level, relativism of scope is entailed by perspectival relativism. If perspectival relativism is correct, then what is true for an adherent of one perspective may not be true for an adherent of a different perspective. However, this leaves open the question of whether relativism of scope is correct from *within* a perspective. Relative to *my* perspective, for example, can a particular moral statement be true for some people but not others?⁵⁴ Perspectival relativism need not take sides on this issue, yet we can easily see how an affirmative answer is possible. For example, relative to my perspective, someone who is able-bodied and not a conscientious objector may have a moral duty to sign up to fight a just war, but someone who differs in either of these respects may have no such duty. (In Chapter V, I consider the claim that a perspectival relativist *must* accept relativism of scope within

⁵¹ I consider what a perspectival relativist account of moral semantics might look like in D Smith (1999) 39-65. See also Harman (1996) 176-179 for a brief discussion that may be congenial to perspectival relativism.

⁵² 11-13 above.

⁵³ Wong (1991b) 179-180. Raz (1986) 146 calls a similar view (namely, that different people may have different moral reasons) ‘agent relativism’.

⁵⁴ Since we can ask whether relativism of scope is correct either across perspectives or within a single perspective, there are two different senses of the phrase ‘true for’. ‘True for X’ either can be used as shorthand for ‘true relative to X’s perspective’ or, when operating within a particular perspective, it can be used to indicate that – when applied to X – the moral statement in question is true relative to that perspective. (This is the difference between saying that it is true relative to X’s perspective that murder is wrong and saying that it is true relative to Y’s perspective that murder is wrong when committed by X.) The context will usually make it clear in which sense the phrase is being used.

her perspective and that this has significant implications for the legitimacy of judicial review.)

Indeed, *objectivism* is also compatible with relativism of scope. We shall see in Chapter II that an ecumenical pluralist can explain some differences in moral opinion in terms of differences in empirical circumstances or in terms of the plurality of moral values. The former clearly could result in a moral statement being true for some people and false for others,⁵⁵ and so may the latter (once people have made a choice between incommensurable options).

What about perspectival relativism's fourth core commitment (that one's moral beliefs may be mistaken even relative to one's own perspective)? As defined above, a moral perspective is a set of true moral beliefs, together with the desires and dispositions that help to determine the truth of those beliefs. Thus, we must distinguish a person's perspective (which is the set of moral beliefs and desires that are *true* for her) from her belief-set (which is the set of her *current* moral beliefs and desires). One's moral perspective can be viewed as an ideal version of one's current belief-set, in which all errors have been eradicated. This distinction allows for a gap between what one believes and what is true relative to one's perspective. The nature of this gap is explored in Sections 2 & 3.

The distinction between one's perspective and one's belief-set also provides the perspectival relativist with a way of individuating moral perspectives. Any difference

⁵⁵ Raz (1986) 146 gives the example of promises. It may be true that A, but not B, should do X, if X is something that A promised to do but B did not.

in two belief-sets that is not due to a mistake⁵⁶ constitutes a difference in moral perspective. I shall suggest in Chapter II that such differences exist between virtually everyone's belief-sets. The differences in moral beliefs that render relativism plausible exist within, not just between, groups and cultures. Therefore, perspectival relativism ascribes perspectives to individuals, not to groups or cultures. While it is possible that two individuals could have belief-sets that are so similar that they share the same perspective, this rarely – if ever – occurs.

This is not to deny that one's social environment influences one's moral beliefs, and hence one's perspective. *One* determinant of one's perspective is one's social environment. However, it is not the *only* determinant. Experiences and choices unique to an individual also help to determine her perspective. Nevertheless, the fact that one's social environment is one influence on one's perspective, and the social environments of members of the same society are similar, means that there is likely to be some overlap between the perspectives of any two members of a given society. Nothing that I have said precludes this. However, since one's social environment is only *one* influence on one's perspective, this overlap will be limited. While any two members of a society are likely to agree on many moral issues, there will also be numerous matters on which they disagree, and there will be very little (if anything) on which *everyone* agrees. Or so I shall suggest in Chapter II.

2) The notion of coherence

⁵⁶ See Section 3 for the perspectival relativist's account of error.

Prima facie, there is a tension between the various core commitments of perspectival relativism described above. On the one hand, perspectival relativism claims that moral statements can be true or false, and that their truth or falsity depends upon our moral beliefs and attitudes. On the other hand, perspectival relativism claims that moral beliefs can be mistaken. Yet how can our moral beliefs be mistaken if moral truth depends upon our moral beliefs?

The perspectival relativist responds to this concern by developing a certain account of moral truth. She claims that a moral statement is true relative to one's perspective if it coheres best with one's belief-set (for example, if it is consistent with more important members of one's belief-set than its negation, or is a logical entailment of such a belief). This claim requires fleshing out. I shall begin by elaborating in more detail what is meant by 'coherence', before explaining how truth and coherence are related under perspectival relativism and how this renders compatible the various core commitments of perspectival relativism.

The concept of coherence is a contested one, and I cannot hope to do justice to the debate concerning coherence merely in passing. Nevertheless, because this concept is central to perspectival relativism, I need to say something about what I take coherence to be. Coherence embraces a number of logical and epistemological principles, the most obvious of which is the principle of non-contradiction. A set of beliefs cannot be coherent if it contains logically inconsistent beliefs. Nor can a belief-set be coherent if it refuses to accept the logical entailments of those beliefs contained within the belief-set. However, coherence involves more than just logical consistency. It also requires

that our beliefs be mutually supporting.⁵⁷ In other words, our beliefs should form a unitary whole, with each belief being logically or evidentially supported by other beliefs.

To see why this is a requirement of coherence, imagine someone whose moral belief-set contained only the following three beliefs (I shall refer to this as ‘the minimalist belief-set’):

- 1) cruelty is bad
- 2) abortion is morally permissible
- 3) killing people is wrong

There is no logical inconsistency between these three beliefs (that is, someone could consistently hold all three beliefs). However, this belief-set is deficient – possibly morally deficient, but certainly epistemologically deficient. It makes no attempt to examine the potential implications that each of the three beliefs has for the others. People may disagree about what those implications are. For example, some people would claim that accepting 3) requires one to reject 2), while others deny this. The point, however, is that the failure to consider how these beliefs relate to each other means that they are deficient qua belief-set.⁵⁸

⁵⁷ Raz (1995) 281. Raz suggests (287-288) that characterising coherence in terms of mutual support may be appropriate only for coherence theories of justified belief, not for coherence theories of truth. However, his reasons for this suggestion do not apply in the context of perspectival relativism. See further 46-47 below.

⁵⁸ See Marmor (1991) 385 for a similar explanation of why coherence must involve more than mere consistency.

The requirement that our beliefs be mutually supporting is not satisfied merely by considering the relationship between our existing beliefs. It also requires that we hold those beliefs *for reasons* (and these reasons will be reflected in further beliefs that will also be part of our belief-set). A large part of what it is to have a belief logically or evidentially supported by other beliefs is to hold the belief *for reasons*, since these reasons provide logical or evidential support for the belief in question. Again, this requirement is not satisfied by the minimalist belief-set.

The minimalist belief-set is deficient in another way, which highlights a further requirement of coherence. One's moral beliefs could be perfectly consistent, and even mutually supporting, and yet not deal with many of the pressing moral issues that one encounters in daily life. For example, the minimalist belief-set outlined above addresses issues of cruelty, abortion and homicide, but offers no answer to an enormous range of other moral problems. It lacks the requisite degree of comprehensiveness.

This requirement of comprehensiveness should be viewed as part of the notion of coherence. Not only is it treated in this way in a number of discussions of coherence,⁵⁹ but a lack of comprehensiveness will typically involve overlooking aspects of a person's belief-set, since most people will have at least some (however under-developed) dispositions or attitudes towards any pressing moral issue that they encounter in daily life.

3) The coherence theory of truth

⁵⁹ eg Rescher (1973) 32.

Now that we have some idea of what coherence involves, let us return to the perspectival relativist's account of truth. She claims that a moral statement is true relative to one's perspective if it coheres, better than its negation, with one's belief-set. For example, the statement 'murder is immoral' is true relative to one's perspective if it coheres with one's belief-set better than the statement 'murder is *not* immoral'. This is not meant to be merely a test that one can use to identify moral truths (though it can also play that role). Rather, it is an account of what truth *consists of* within the moral realm. What it *is* for a moral statement to be true relative to one's perspective is for it to cohere (better than its negation) with the rest of one's belief-set.⁶⁰

The main reason that the perspectival relativist adopts this coherence theory of truth is that it resolves any tension that might otherwise exist between her first and fourth core commitments. In other words, it enables her to claim that what is true relative to one's perspective depends upon one's moral beliefs and desires, while also claiming that one's moral beliefs may be mistaken (relative to one's own perspective). I shall briefly outline how the coherence theory of truth works, and then explain how it advances these core commitments of perspectival relativism. (We shall see in Chapter II that the coherence requirement also prevents perspectival relativism from collapsing into moral nihilism. In other words, the coherence theory of truth also enables the perspectival relativist to hold onto her second core commitment – namely, that moral statements can be true or false.)

⁶⁰ See Rescher (1973) 23 regarding the distinction between those coherence theories of truth that treat coherence as constitutive of truth and those that treat it as a criterion of truth.

The requirement of coherence places certain constraints on what can be true relative to one's perspective. For example, one must accept logical entailments of other beliefs that one wishes to retain, and one cannot retain every member of an inconsistent set of moral beliefs. It also gives us some guidance in deciding which of two inconsistent beliefs to keep, by telling us to retain the one that coheres best with the *rest* of our belief-set. However, what if each of the inconsistent beliefs coheres with some of the beliefs in our belief-set, but not others? For example, belief X may cohere with beliefs A, B & C, but belief not-X may cohere with beliefs D, E & F. In this case, we must decide which of the two inconsistent beliefs coheres with the *more important* beliefs in our belief-set, and so we must decide whether beliefs A, B & C are more important than beliefs D, E & F.⁶¹ At this point, the guidance provided by the coherence theory of truth runs out. If we have not already decided how important those beliefs are, then we must do so now, and (ex hypothesi) this decision cannot be determined by reference to our existing belief-set. In such cases, our belief-set underdetermines our (choice of) perspective, leaving us free to *choose* which of the inconsistent beliefs to retain. In making that choice, we render our (choice of) perspective more determinate.

The coherence requirement also means that belief-sets like the minimalist one introduced in Section 2 are defective, because they breach the requirement that our moral beliefs be mutually supporting. There is no attempt in the minimalist belief-set to consider how the three moral beliefs in question are related to each other. Nor are those

⁶¹ Roughly, what it means to say that one belief (or group of beliefs) is more important than another is that we are less willing to abandon the former than the latter (though this decision must itself cohere with the rest of our belief-set).

beliefs held *for reasons* (since this would require holding further moral beliefs that set out why, for example, abortion is morally permissible). If perspectival relativism is correct, which putative reasons are valid depends upon the moral perspective in question, and so different perspectives will specify different ways of satisfying the requirement that one's beliefs be held for reasons. However, there will also be conceptual constraints upon what can count as even a *putative* reason, and the minimalist belief-set would seem to breach these conceptual constraints (since there is nothing in that belief-set that can be pointed to as amounting to a reason for holding the three beliefs contained in that belief-set).⁶² Similarly, if I find myself unable to offer a reason to support a particular moral intuition that I have, I must either abandon the intuition or else continue searching for reasons to support it. Either way, my *present* belief-set will be defective. Moreover, that defect cannot be removed simply by choosing a reason at random. It must be one that coheres with the rest of my belief-set, and one that I am willing to act in accordance with. This requirement provides a further constraint upon whether one's beliefs are true relative to one's own perspective.

We also saw in Section 2 that the minimalist belief-set breaches the requirement of comprehensiveness. This represents a further way in which the coherence theory of truth places constraints upon acceptable belief-sets. To be acceptable, one's belief-set must address all the pressing moral issues that one encounters in daily life. Again, whether something amounts to a 'pressing moral issue encountered in daily life' depends at least partly upon one's perspective. However, one's belief-set may still be flawed relative to one's own perspective, since it may fail to address all the moral issues

⁶² The perspectival relativist must show that these conceptual constraints can be satisfied without having to accept objectivism. I consider this issue in Section 4.

that one is committed to regarding as pressing. Whether one is committed to regarding a particular moral issue as pressing is not a matter of unconstrained choice. For example, one may have a disposition to regard that issue as pressing, a disposition that one cannot consistently reject or overlook. If so, a failure to address that issue in one's belief-set – perhaps due to laziness or weakness of will – amounts to a flaw in that belief-set (relative to one's perspective). This suggests a further way in which a gap can open between one's belief-set and one's perspective, explaining how one's beliefs may be mistaken even relative to one's own perspective.

Finally, the coherence requirement means that we cannot adopt a new belief if it cannot be integrated into our existing set of beliefs, since this would also breach the requirement that our beliefs be mutually supporting. To take a non-moral example, if I were deciding whether to abandon my belief that the earth is spherical, I could not make this choice without considering its impact on my other beliefs (such as the belief that there are satellites orbiting the earth that take photographs of the earth showing it to be spherical). This does not mean that I cannot adopt a new belief that the earth is flat, but rather that – in order to do so – I must reject all other beliefs that are inconsistent with that belief, and perhaps also adopt some new beliefs (such as that there is a massive government conspiracy that seeks to convince us that the earth is round, by – inter alia – doctoring satellite photographs). In other words, the requirement that my beliefs be mutually supporting does not place constraints upon individual beliefs, but it does impose constraints on my *set* of beliefs, because a change in one of my beliefs may require modification of the surrounding beliefs.⁶³

⁶³ See Quine (1960) 43 for a similar view of beliefs about the *physical* world.

Hopefully, this brief sketch is sufficient to give the reader an idea of how the perspectival relativist's account of truth is meant to function. The basic idea behind that account is that the moral beliefs that are true relative to one's perspective are those contained in one's belief-set once all breaches of the coherence requirement (inconsistency, lack of mutual support among beliefs, missed logical entailments, etc) have been rectified. This means that the mere fact that someone holds a moral belief does not mean that the belief is true, even relative to her own perspective, because that belief may fail to cohere with the rest of her belief-set. For example, it may conflict with a more important moral belief that she holds, or it may conflict with a logical entailment of such a belief. Nor is this the only way in which one may be mistaken relative to one's own perspective. One's belief-set may be flawed (again, relative to one's own perspective) because one's beliefs are not mutually supporting, or because one's belief-set lacks the requisite degree of comprehensiveness. Finally, one may have made an *empirical* error. For example, one's belief that Joseph Stalin was a good person would be mistaken (relative to one's own perspective) if that belief depended crucially on one's ignorance of the fact that Stalin was responsible for the deaths of millions of people.

This explains how the coherence theory of truth promotes the fourth core commitment of perspectival relativism, since it provides a basis on which we can regard some moral beliefs (indeed, some moral belief-sets) as mistaken or flawed. It also helps to uncover the *rationale* for perspectival relativism's fourth core commitment. An important reason for insisting on the gap between what X believes and what is true

relative to X's perspective is that X may hold *inconsistent* beliefs, and there are obvious difficulties with the claim that two inconsistent beliefs are both true (relative to the same perspective).⁶⁴

However, how does the coherence theory of truth advance the first core commitment of perspectival relativism? How does it enable moral truth to depend upon one's moral beliefs (in a way that is consistent with the possibility that one's moral beliefs may be mistaken)? The answers to these questions should now be evident. Under the coherence theory, moral truth depends upon one's moral beliefs because what is true relative to one's perspective depends upon which moral statements cohere best with (the rest of) one's moral beliefs and desires. In other words, it is one's moral beliefs that one must render coherent in order to discover the truth relative to one's own perspective. While this means that one's *entire* belief-set cannot be mistaken relative to one's perspective, it is perfectly compatible with the possibility that any *particular* moral belief may be mistaken, since that belief may fail to cohere with the rest of one's beliefs.

Conversely, perspectival relativism's first core commitment helps to support the coherence theory of truth, by explaining why it is the *contents of one's belief-set* that one should render coherent, rather than something else. If moral truth ultimately depends in some way upon one's moral beliefs and desires, it makes sense to apply the requirement of coherence to those beliefs and desires, rather than to something else. Moreover, since those beliefs and desires are connected in some way to the truth, there

⁶⁴ Another reason for insisting on that gap is the possibility that one's moral beliefs may be infected by empirical error, in the way discussed in the previous paragraph.

is reason to believe that achieving coherence among those beliefs and desires may produce *the truth* (relative to one's own perspective, of course). Since moral truth ultimately depends upon our moral beliefs, it makes sense to look to our moral beliefs in order to find the truth, and this is exactly what the coherence theory requires. Yet the fact that any particular moral belief may be mistaken (relative to one's own perspective) explains why one should apply the requirement of coherence to one's existing moral beliefs, rather than simply accepting them as they are.

There are, of course, a number of well-known objections to coherence accounts of truth. While my goal is not to defend perspectival relativism, I do hope to portray it as being sufficiently plausible that one might be motivated to consider whether it has distinctive implications for adjudication (when compared with the forms of objectivism outlined in Part B). Also, adopting a coherence theory of truth can be the best way of reconciling perspectival relativism's core commitments only if that theory is in fact defensible. Therefore, I shall briefly consider whether some standard criticisms of coherence theories of truth are valid in the present context, whilst acknowledging that I cannot provide a complete assessment of this issue in the space allotted.

The fact that the coherence theory of truth is being used in conjunction with a version of moral relativism provides the perspectival relativist with at least the beginnings of a response to several popular criticisms of coherence theories of truth. For example, one common objection is that there are many possible coherent sets of beliefs, and these belief-sets cannot all be true (which they would be if coherence was

the appropriate test of truth).⁶⁵ However, while the possibility of multiple true (but incompatible) sets of beliefs may be too much to stomach in other contexts, in the present context it is precisely what the perspectival relativist needs. It is central to perspectival relativism that a moral statement can be true relative to one perspective and false relative to another – in other words, that there can be more than one true (but incompatible) set of moral beliefs.

One may, of course, regard the possibility of multiple true belief-sets as no more tolerable with regard to morality than with regard to any other field of inquiry. However, this would be an objection to perspectival relativism more generally, not merely to its use of a coherence theory of truth. For example, if one's concern is that two coherent sets of moral beliefs could contain contradictory propositions, and that a pair of contradictory propositions cannot both be true, perspectival relativism is *already* committed to the possibility that a proposition could be true relative to one perspective and false relative to another.⁶⁶ Accepting a coherence theory of truth does not create any *new* problem for the perspectival relativist.

Alternatively, one might claim that we can criticise other people's moral belief-sets even though they are coherent, and this shows that the coherence of a belief-set does not make that belief-set true. For example, Raz suggests that utilitarianism might

⁶⁵ Rescher (1973) 27-29 explores this objection in depth.

⁶⁶ The concern that moral relativism produces either contradictions (if the same moral proposition is true relative to one perspective and false relative to another) or solipsism (if what appears to be the same moral proposition in fact differs depending upon the perspective in question) is an important line of objection to moral relativism. However, I seek to show in D Smith (1999) 39-65 that it is not necessarily a *fatal* objection.

be coherent, but is nevertheless misguided.⁶⁷ However, perspectival relativism can endorse this view without abandoning the coherence theory of truth. Relative to a non-utilitarian perspective, utilitarianism is indeed both coherent and misguided. The fact that it is coherent, however, means that it cannot be criticised relative to the *utilitarian's* perspective. In other words, one can criticise a coherent belief-set from outside that belief-set, but the coherence of a belief-set is enough to render it immune to *internal* challenge. (The distinction between internal and external challenge is elaborated upon in Chapter II.)

Andrei Marmor offers a third objection to coherence theories of truth. If we accept that there is a link between our moral beliefs and the truth (and a coherence theorist must accept this, in order to explain why we should achieve coherence *among our moral beliefs*), should we not retain *all* of our moral beliefs, rather than abandoning some in order to achieve coherence?⁶⁸ Again, however, the core commitments of perspectival relativism suggest a response to this objection (or at least show that the perspectival relativist would need to confront a similar objection even if she did not adopt the coherence theory of truth). Perspectival relativism claims that there is a link between our moral beliefs and the truth, but it also claims that we may have to abandon some of our moral beliefs because any moral belief may prove to be mistaken. In other words, the link between our moral beliefs and the truth is defeasible, and so it is always possible that we may need to abandon a particular moral belief. This at least leaves

⁶⁷ Raz (1995) 298.

⁶⁸ Marmor (1991) 388-389.

room for the possibility that we should seek coherence among our existing moral beliefs, rather than just accepting them as they are.⁶⁹

Perspectival relativism also explains why we should not go to the other extreme, abandoning all our moral beliefs and starting again from scratch. The first core commitment of perspectival relativism means that we cannot abandon all our moral beliefs and start from scratch if we wish to identify the truth relative to our perspective, since this would be to overlook the fact that the truth relative to our perspective depends ultimately upon our moral beliefs. (While we may be able to abandon our current perspective and adopt a new perspective, such ‘conversions’ between perspectives are likely to be fairly rare, given the psychological difficulty of abandoning one’s current moral outlook and starting afresh. Furthermore, when a genuine conversion does occur, the coherence requirement will then apply within the *new* perspective.)

Finally, the fact that the perspectival relativist treats coherence as constitutive only of *moral* truth means that she is free to treat the logical and epistemological principles contained within the coherence requirement as true without fear of circularity. A potential problem with coherence theories of truth is that they must presuppose the truth of certain logical and epistemological principles (namely, those necessary for the application of the coherence requirement). If the coherence theory of truth is meant to be global in its reach, this creates a danger of circularity, since the theory is meant to be used to determine the truth of the very principles that are necessary for its operation.⁷⁰

⁶⁹ See Rescher (1973) 53-59 for a more general response to this sort of objection.

⁷⁰ Again, this argument is considered in depth by Rescher (1973) 44-46.

However, since the perspectival relativist's coherence theory applies only to morality, she does not have to show that logical and epistemological principles satisfy the requirements of that theory.⁷¹

While the context in which the coherence theory of truth is presently being used may assist in dealing with some common objections to coherence theories, it might be thought to exacerbate other problems. For example, Raz suggests that morality is not the sort of thing that can be rendered coherent, because it consists of a large number of irreducibly independent principles – that is, principles that neither derive from a common source nor are capable of fitting into a system whose principles are mutually supporting and inter-dependent.⁷² Indeed, this is a view to which anyone who believes that moral principles are sometimes incommensurable would appear to be committed. If two moral principles can each be supported by objective reasons and yet be incommensurable, then it would seem impossible to include all valid moral principles within a single coherent scheme.

However, a perspectival relativist cannot accept that moral beliefs are incommensurable in the sense that Raz and other ecumenical pluralists use that phrase. According to the ecumenical pluralist, two conflicting principles are incommensurable when there are objective *pro tanto* reasons supporting each of those principles, but no objective all-things-considered reasons for preferring one to the other (or for regarding

⁷¹ She does, however, have to explain what is constitutive of truth within the domains of logic and epistemology, and why truth is constituted differently within different domains of thought. Rescher (173) 46-47 offers one suggestion, but I lack space to pursue this issue here.

⁷² Raz (1995) 298, 314. Raz allows for 'pockets' of coherence within the moral domain, but a coherence theory of moral truth needs more than this.

them as equally good). Obviously, this view is not open to a perspectival relativist, since she denies that there are objective moral reasons. This suggests that an objection to a coherence theory of truth based on the existence of incommensurable moral principles cannot create any *new* problems for the perspectival relativist, since she is already committed to denying the existence of incommensurable moral principles.

Nevertheless, the perspectival relativist may be able to make a claim analogous to the ecumenical pluralist's claim about incommensurability. Could she not claim that, relative to a particular perspective, there are *pro tanto* reasons to accept each of two conflicting moral beliefs, but no all-things-considered reason (relative to that perspective) for preferring one of those beliefs to the other (or for regarding them as equally good)? If so, should not the perspectival relativist reject the coherence theory of truth, in order to allow for the possibility of incommensurable principles within a perspective?

However, the incommensurability thesis is likely to be significantly less attractive to a perspectival relativist than to an ecumenical pluralist. Firstly, much of the work done by the incommensurability thesis for ecumenical pluralism is already done for perspectival relativism by the presence of different perspectives. We shall see in Chapter II that an important reason why an ecumenical pluralist might support the incommensurability thesis is that it helps to explain moral diversity. We shall also see that the claim that there is an indefinite number of moral perspectives can play a similar role for the perspectival relativist. Therefore, at least one important motivation for

accepting the incommensurability thesis does not apply if perspectival relativism is correct.⁷³

Secondly, ecumenical pluralists acknowledge that incommensurable principles can be commensurated in non-objective ways (though they claim that there are objective constraints on how this should be done). They also acknowledge that this sort of commensuration may be necessary to determine how one should act when different incommensurably good principles come into conflict.⁷⁴ Yet, if commensurating incommensurable principles (in a non-objective way) may be necessary when determining how to act, why should the perspectival relativist not view this as part of going from a partly indeterminate belief-set to a fully determinate perspective? In other words, why should conflicting, purportedly incommensurable, principles be treated as part of one's perspective, rather than as a part of one's belief-set that must be rendered coherent in order to arrive at a fully coherent and determinate perspective? For the perspectival relativist, unlike the ecumenical pluralist, purportedly incommensurable principles are not supported by objective reasons, so why treat them differently from any other moral principle that needs to be either rendered coherent with the rest of one's belief-set or else rejected?

For these reasons, the perspectival relativist has much less need for the incommensurability thesis than does an ecumenical pluralist, and so has less reason to worry about Raz's objection to coherence theories of morality (namely, that morality is not the sort of thing that can be rendered coherent, because it contains incommensurable

⁷³ This line of argument was suggested by Patrick Emerton.

⁷⁴ eg Raz (1986) 338-340.

principles). Nevertheless, there may be some perspectives relative to which there *are* incommensurable moral options or principles. This possibility is still compatible with the coherence theory of truth, because the claim that the relevant principles are incommensurable would have to cohere with the rest of the perspective in question better than any alternative possibility (such as the possibility that one of those principles is correct and the other incorrect). Unless the incommensurability thesis coheres with the rest of the perspective under consideration, what basis could the holder of that perspective have for accepting that thesis (remembering that – if perspectival relativism is correct – moral truth is not objective, but rather depends ultimately upon one's moral beliefs and desires)?⁷⁵

4) The status of coherence

Two points need to be noted about the status that perspectival relativism accords to the requirement of coherence. Firstly, the coherence theory of truth applies only within a perspective, not across perspectives. Each element of a perspective must cohere with the other elements of that perspective, but a perspective need not cohere with *other* perspectives. (Indeed, a perspective *must not* cohere with any other perspective, or else they would not be distinct perspectives.) We shall see that the perspectival relativist allows that the requirement that one's beliefs cohere with each other may apply to many domains of thought, not just morality. However, coherence is required only within a particular domain of thought, not across domains of thought. For example, it is not clear what sense could be made of a requirement that one's scientific beliefs must

⁷⁵ Note also that the perspectival relativist is not committed to the type of coherence opposed by Raz (1995) 315: 'The coherence to which value pluralism is hostile is the felt need ... to subsume the plurality of values under as few as possible supreme principles.'

cohere with one's moral beliefs. (In what way could a belief in quantum mechanics and a belief that murder is immoral be mutually supporting?⁷⁶) Moreover, the perspectival relativist claims that different perspectives constitute different 'domains of thought' for the purposes of the coherence requirement. The key claim of perspectival relativism is that there is no unitary, objective morality. Instead, there is an indefinite number of conflicting, non-objective moralities, reflected in an indefinite number of moral perspectives, and these conflicting moralities obviously cannot cohere with each other (though each must be *internally* coherent).

Secondly, while the application of the coherence test of truth sometimes requires moral decision-making, the requirement that one's beliefs must cohere with each other is not a moral, but rather a logical and epistemological, requirement.⁷⁷ The law of non-contradiction and the requirement that our beliefs be mutually supporting are not (in themselves) moral requirements, and could potentially apply to many domains of thought, not just to morality. Thus, the perspectival relativist is free to claim that the requirement of coherence is a mandatory requirement that must be respected within each moral perspective. The perspectival relativist is committed to claiming that there is no moral belief that must be part of every perspective, but she need not claim that there is no non-moral principle that applies to every perspective. Indeed, while there

⁷⁶ Patrick Emerton suggested in conversation that a more difficult example might involve the beliefs that animals feel pain and that it is permissible to eat animals. However, any need for coherence in this case stems from the fact that we attach *moral significance* to the fact that animals feel pain, and it is the belief that this fact is morally significant that must cohere with the belief that it is permissible to eat animals. Therefore, this is a case where coherence is required between two moral beliefs, not between a moral belief and a scientific belief.

⁷⁷ Though a moral belief that is rejected as inconsistent with the rest of one's belief-set is *morally* inferior, because deciding which of two inconsistent moral beliefs to accept requires an assessment of the moral importance of those beliefs: 41 above.

may be forms of moral relativism according to which coherence is an optional characteristic of moral beliefs, the perspectival relativist holds that moral beliefs *must* meet this requirement in order to be true, since this is the best way to reconcile her various core commitments.

To claim that the requirement of coherence is a mandatory requirement for every moral perspective is not necessarily to claim that it is an *objective* requirement. Nevertheless, it would appear to be open to the perspectival relativist to make the latter claim as well, since she is only committed to asserting that morality is relative, not that all domains of thought are. However, it might be objected that – if the perspectival relativist *does* claim that the coherence requirement is an objective constraint on which combinations of moral beliefs we can hold – then her position collapses into a form of moral objectivism. While I leave open whether the perspectival relativist should treat the coherence requirement as objective in nature, it is worth considering this objection in order to clarify the ways in which perspectival relativism differs from moral objectivism.⁷⁸

According to the objection under consideration, if the perspectival relativist claims that the coherence requirement is objective, she collapses the distinction between perspectival relativism and the rational convergence thesis. The latter claims that there are non-moral (or mind-independent) principles of rationality that constrain us to adopt a single view with regard to certain moral issues (or at least limit the number of

⁷⁸ A perspectival relativist who claimed that the coherence requirement is objective would also have to show that the considerations that show that morality is relative do not apply to the requirement of coherence. However, pursuing *this* issue would take me too far afield from my primary concerns in this thesis.

acceptable views). If perspectival relativism, too, claims that there are objective, non-moral principles that place constraints upon acceptable moral belief-sets, then how does it differ from rational convergence versions of objectivism?

The difference between a perspectival relativist and an objectivist who accepts the rational convergence thesis is that the latter claims that the application of non-moral (or mind-independent) principles of rationality will produce convergence on certain moral beliefs among all rational beings. The perspectival relativist, on the other hand, denies that the application of the coherence requirement will produce convergence among all rational beings (this is part of her first core commitment). If it turned out that the coherence requirement *did* produce such convergence, then this would not show that perspectival relativism is really a form of objectivism, but rather that perspectival relativism is wrong, since its claim that there cannot be a rational convergence would have been refuted.

Yet how can the perspectival relativist deny that there will be a rational convergence if she concedes that the coherence requirement places objective constraints upon acceptable belief-sets? There are several answers to this question. Firstly, while the perspectival relativist allows that the coherence requirement can rule out certain combinations of beliefs (ie those belief-sets that breach the coherence requirement), she claims that it does not require acceptance of (or exclude) any individual moral belief. The rational convergence theorist, on the other hand, does claim that the application of principles of rationality will produce convergence on particular moral beliefs (or at least rule out some moral beliefs). For example, any modern adherent of the rational

convergence thesis would argue that her favoured principle of rationality excludes, as objectively mistaken, the belief that slavery is morally permissible. The perspectival relativist, on the other hand, must allow that it is possible that the belief that slavery is morally permissible could cohere with the rest of someone's belief-set, and so be true relative to that person's perspective (though it would obviously be false relative to most other people's perspectives).

Secondly, the perspectival relativist claims that, with regard to any moral issue, there is an indefinitely large number of ways of satisfying the coherence requirement. We saw when considering the constraints that the coherence requirement places on our moral belief-set that there are many ways in which different perspectives could satisfy each of these constraints. For example, the law of non-contradiction tells us that we must abandon one of two inconsistent beliefs, but does not tell us *which* belief to abandon. Similarly, there are many different ways in which one might claim that two moral beliefs are related, and many different ways in which one might satisfy the requirement that one provide reasons for one's moral beliefs.

Furthermore, no objectivist would be willing to tolerate many of the ways in which perspectival relativism allows that the coherence requirement can be satisfied. For example, the perspectival relativist would assert that, no matter how repugnant one considers the Nazi moral code to be, one cannot show that it is necessarily incoherent. Thus, according to the perspectival relativist, not only does the coherence requirement not rule out any particular moral belief (eg that slavery is morally permissible), but it does not even rule out a combination of beliefs such as the Nazi's. Any self-respecting

objectivist, on the other hand, would argue that the Nazi's moral code *is* ruled out on objective grounds. Again, if it turns out that application of the coherence requirement *would* produce a convergence (among all rational beings) on the belief that slavery is morally wrong, or that the Nazi's moral code is unacceptable, then this would show that perspectival relativism (in particular, its first core commitment) is wrong, not that perspectival relativism collapses into objectivism.⁷⁹

However, even if perspectival relativism claims that certain moral beliefs, and certain belief-sets, are compatible with objective principles of rationality, whereas any objectivist would deny this, is it not enough that the perspectival relativist is committed to asserting that some belief-sets (such as the minimalist one described above) do not conform to objective principles of rationality and so should be rejected? If perspectival relativism holds that moral belief-sets like the minimalist belief-set can be rejected on objective grounds, then does this not show that perspectival relativism is in fact an (implausible) version of objectivism?

For the reasons already given, a meta-ethical position that held that the only moral views that can be objectively refuted are ones like the minimalist belief-set would not be acceptable to any *actual* objectivist. Moreover, it would not satisfy the rational convergence thesis, since it does not allow that there can be a rational convergence upon any *particular* moral belief (or even upon a limited range of particular moral beliefs). Instead, it allows only that certain *combinations* of moral beliefs can be rationally excluded. Finally, there is a further reason for believing that – even if it excludes the

⁷⁹ For more on the status of Nazism (and slavery) under perspectival relativism, see 102-103 below.

minimalist belief-set on objective grounds – perspectival relativism is properly regarded as a form of anti-objectivism. We shall see in Section 5 that perspectival relativism bears many similarities to versions of moral relativism that *are* generally accepted to be anti-objectivist in nature, such as Gilbert Harman's. Given its similarity to positions that are accepted by anti-objectivists, and its stark differences from positions that are accepted by objectivists, it seems appropriate to regard perspectival relativism as a form of anti-objectivism.

There is one final concern that one might have with the possibility that perspectival relativism may treat coherence as an objective requirement.⁸⁰ If requirements of coherence are objective, then might there not be *other* objective epistemological principles to which moral belief-sets must also conform? If so, it may be possible to reach a rational convergence upon certain moral beliefs after all, and so perspectival relativism may indeed collapse into objectivism.

This is a difficult argument for the perspectival relativist to counter, since it is impossible for her to consider every epistemological principle that her opponent might allege to be both objectively valid and applicable to morality. Perhaps the most that can be said is that the perspectival relativist is committed to claiming that – if there *are* any further objective constraints upon moral thought – then they are insufficient to produce a rational convergence on any non-tautological moral statement. Again, if the perspectival relativist cannot make good on this claim, this means that the objectivist has won the day, rather than showing that perspectival relativism collapses into

⁸⁰ This concern was suggested by John Gardner & Timothy Macklem.

objectivism. This is because the perspectival relativist is committed not just to the coherence theory of truth, but also to the claims outlined in Section 1 – in particular, that moral truth varies depending upon one's moral beliefs and desires, and that a rational convergence on any non-tautological moral belief is unachievable.

5) Distinguishing perspectival relativism from other versions of moral relativism

I shall conclude my discussion of perspectival relativism by comparing it with a more familiar version of moral relativism – that of Gilbert Harman.⁸¹ My purpose in doing so is twofold. Firstly, a comparison of perspectival relativism with another version of relativism may help to highlight the distinctive features of the former position, as well as suggesting why perspectival relativism belongs to the relativist family. Secondly, and more importantly, I want to bring to light the reasons why I have chosen to focus upon perspectival relativism in this thesis, rather than discussing a more familiar version of moral relativism such as Harman's.

In many ways, perspectival relativism and Harman's moral relativism are very similar. The perspectival relativist could agree with Harman that:

[M]oral right and wrong ... are always relative to a choice of moral framework. What is morally right in relation to one moral framework can

⁸¹ I draw exclusively upon Harman (1996). This is the most recent extended presentation of his position, and represents an improvement upon earlier statements of his position: Harman (1996) 48-49, 60-61 (especially 61, n 2). It is worth noting that Kolbel (2003) 69-72 has recently proposed a form of relativism that, while not explicitly addressed to morality, is quite similar to perspectival relativism (even using the terminology of 'perspectives').

be morally wrong in relation to a different moral framework. And no moral framework is objectively privileged as the one true morality.⁸²

Moreover, both theories are cognitivist. Harman, like the perspectival relativist, believes that moral claims can be true or false (relative to a particular framework or perspective, of course).⁸³ And, like perspectival relativism, Harman's relativism is not intended to be a thesis about the meaning of moral statements.⁸⁴ Finally, Harman even argues for his version of relativism in (roughly) the same way as the perspectival relativist.⁸⁵

Harman's relativism does, however, differ from perspectival relativism in two important ways. Both of these differences stem from Harman's adoption of a form of moral conventionalism. He views morality as a set of conventions developed and maintained via bargaining between groups of people, in a situation where there is no right answer prior to a bargain being reached. For example, Mary may refrain from pushing Jack around on the condition that Jack does not push her around, leading each of them to adopt the value of respecting the other.⁸⁶

The first way in which this approach differs from perspectival relativism is that it would seem to replace the coherence theory of truth championed by the latter. On

⁸² Harman (1996) 3. However, we shall see that Harman's account of moral frameworks differs in certain respects from the perspectival relativist's account of moral perspectives, especially with regard to how the content of a framework/perspective is fixed.

⁸³ Harman (1996) 158-159.

⁸⁴ Harman (1996) 4-5.

⁸⁵ See Harman (1996) 8-14, and Chapter II of this thesis, respectively.

⁸⁶ Harman (1996) 22-26. The example is Harman's: 23.

Harman's theory, moral truth (relative to a particular framework) is presumably determined by reference to the outcome of this process of bargaining, rather than being a matter of rendering an individual's moral belief-set fully coherent.

The second, and more important, consequence of Harman's conventionalism is that it means that moral truth is necessarily inter-subjective. On this view, moral principles arise out of a process of bargaining, and so are shared among the parties to the bargain. The perspectival relativist, on the other hand, claims that moral truth is individualistic, in the sense that a moral perspective can be (and almost invariably is) held by a single individual. It is primarily for this reason that I shall focus on perspectival relativism, rather than Harman's moral relativism, in the rest of the thesis. Whether moral truth is inter-subjective or individualistic may have significant implications for adjudication. In particular, a version of moral relativism that holds that moral truth can vary between individuals (including individuals within a particular jurisdiction) is likely to have more interesting implications for adjudication, when compared with forms of objectivism, than a version of moral relativism that accepts moral conventionalism (which suggests that a significant number of people within a jurisdiction are likely to share a significant number of moral truths).

Finally, it is worth distinguishing perspectival relativism from a quite different type of relativism – namely, normative relativism. Both perspectival relativism and Harman's relativism are meta-ethical theories. They are concerned with the status of moral truth (claiming that moral truth is relative to a perspective or framework, rather than being mind-independent or the potential subject of a rational convergence).

Normative relativism, on the other hand, is a substantive moral position. It claims that it is morally wrong for us to impose our moral beliefs upon certain other people. (*Which* people, and what amounts to an imposition of our moral beliefs, depends on which version of normative relativism we have in mind). Clearly, this view has implications for adjudication (to the extent that adjudication involves imposing moral beliefs upon the people whom normative relativism is concerned to protect). Equally clearly, however, this fact cannot establish that the meta-ethical debate has implications for adjudication, since normative relativism is not a meta-ethical position. (Whether there is some sort of link between perspectival and normative relativism, on the other hand, will be a major concern of this thesis.)

D. Conclusion

In this chapter, I have suggested a way of distinguishing objectivist from anti-objectivist theories. I have also outlined two forms of objectivism and a form of anti-objectivism whose implications for adjudication we can consider in later chapters. In the next chapter, however, I shall be primarily concerned with the claim that we do not need to compare the implications of these different meta-ethical theories, since it is evident that some form of ecumenical pluralism is correct and that perspectival relativism is incorrect.

CHAPTER II: ENGAGING IN THE META-ETHICAL DEBATE

In Chapter I, I suggested a way of distinguishing moral objectivism from moral anti-objectivism, and outlined two versions of objectivism (ecumenical pluralism and Moore's moral realism) and one version of anti-objectivism (perspectival relativism). It is these positions whose implications for adjudication I shall explore in later chapters. Before I do so, however, there is a preliminary objection that I must confront in the present chapter. This objection is that it is a waste of time to compare the implications of the meta-ethical theories outlined in the previous chapter. Two semi-independent reasons might be offered to support this objection – that (some version of) ecumenical pluralism is clearly right, or that perspectival relativism is clearly wrong. If ecumenical pluralism is clearly correct, then why should we waste our time comparing its implications for adjudication with the implications of other meta-ethical theories? Those other theories are mistaken, so why discuss them? We might still want to know what implications (if any) *ecumenical pluralism* has for adjudication, but our focus would be confined to this meta-ethical position, and much of the impetus for considering whether different meta-ethical views have different implications for adjudication would dissipate.¹ More straightforwardly, if perspectival relativism is clearly mistaken, then there is little point in considering its implications for adjudication.

¹ I suggest in Chapter IV that one motivation for regarding the no-difference thesis as attractive is the belief that the appropriate resolution of the meta-ethical debate is unclear (or at least hotly contested), and so it would be better if legal philosophy could avoid becoming embroiled in that debate.

Both the view that ecumenical pluralism is clearly correct, and the view that perspectival relativism is clearly flawed, are currently popular in philosophical circles.² In this chapter, I seek to cast doubt upon both of these views. Obviously, I cannot, in the space of a single chapter, address every argument that someone might offer against perspectival relativism, or present a complete refutation of ecumenical pluralism. Nor would such an outcome be consistent with my aim in this thesis, which is to consider the implications for adjudication of the meta-ethical debate, not to resolve that debate. Therefore, my goal is not to show that ecumenical pluralism is wrong and perspectival relativism is right, but rather to suggest that there is sufficient doubt about *which* meta-ethical theory is correct to make it worthwhile to consider the implications for adjudication of a range of such theories.

The most natural way of achieving this goal would be to cast some doubt on both ecumenical pluralism and perspectival relativism. However, few people would regard perspectival relativism as clearly correct, and so there is little need to cast doubt upon this theory. Instead, it may be necessary to show that this view is not as obviously flawed as many people might think. On the other hand, there *is* a need to cast doubt upon ecumenical pluralism, since many contemporary moral philosophers would regard (some version of) that view as clearly correct. This may give the chapter a somewhat lopsided appearance, since I shall be presenting an objection to ecumenical pluralism while defending perspectival relativism from attack. Hopefully, this appearance of bias can be forgiven on the basis that my goal is to demonstrate that there is a genuine debate

² No one else characterises these positions in precisely the same way as I did in Chapter I. However, many contemporary moral philosophers would accept some version of ecumenical pluralism, and many would regard perspectival relativism as clearly mistaken (for the reasons canvassed in this chapter).

between ecumenical pluralism and perspectival relativism, in a philosophical climate that favours one side over the other.

To this end, I begin by offering a criticism of ecumenical pluralism (namely, that it cannot offer as plausible an explanation of the existence of moral diversity as perspectival relativism). While I shall present this objection in as strong a form as possible, my claim is not that this criticism is fatal to ecumenical pluralism, merely that it casts sufficient doubt on the outcome of the meta-ethical debate to justify considering the implications for adjudication of a range of meta-ethical theories. Even if ecumenical pluralism does not offer as plausible an explanation of moral diversity as perspectival relativism, this does not mean that perspectival relativism is preferable to ecumenical pluralism. The existence of moral diversity is only one of the features of moral discourse that meta-ethical theories must explain, and any deficiency of ecumenical pluralism in this area may be compensated for with regard to other issues.³ Nevertheless, if ecumenical pluralism cannot provide as plausible an explanation of moral diversity as perspectival relativism, this gives us some reason not to regard it as *clearly* preferable to perspectival relativism.

The remainder of the chapter is devoted to discussing several common criticisms of moral relativism. For example, I address the claim that moral relativism inevitably collapses into nihilism and/or is self-refuting, and suggest that it is far from clear that either of these objections is valid when applied to perspectival relativism. I then

³ For example, meta-ethical theories must also provide an account of the purpose of moral criticism and debate. Whether perspectival relativism can satisfy this requirement is considered in Part D.

consider whether perspectival relativism leaves room for meaningful moral criticism and debate, and argue that – contrary to first impressions – it does. My conclusion is not that perspectival relativism is correct, but merely that it is harder to establish that it is mistaken than one might suppose.

A. Moral Diversity

In this Part, I begin presenting the argument that perspectival relativism is better able to explain the existence of moral diversity than ecumenical pluralism. I compare perspectival relativism with ecumenical pluralism, rather than with Moore's moral realism, because – at least in the present philosophical climate – it is ecumenical pluralism that is more likely to strike readers as clearly correct.

Before we commence, however, a distinction must be drawn between moral disagreements and moral differences. A moral difference exists where two people accept different moral beliefs or principles, or engage in different moral practices. A moral disagreement exists when there is a moral difference and the different beliefs, principles or practices cannot all be correct.⁴ As we shall see, there may be situations where there are moral differences but no moral disagreement. However, as I shall suggest that perspectival relativism offers a better explanation not just of disagreement, but of diversity more generally, I shall not be overly concerned with distinguishing them, except where this is crucial to the argument.

⁴ This account of moral disagreement may not accord with common usage, since common usage may suggest that there is a disagreement only if there is an *argument*. However, for my purposes, what is relevant is whether at least one party's views must be false, and I shall use the phrase 'moral disagreement' as a convenient label for that situation.

1) The extent of moral diversity

The argument begins by noting the extent to which people differ in their moral practices and beliefs. For any two people, there are at least *some* moral issues on which they differ. Indeed, it has been suggested that the only moral principles that command anything approaching universal assent are either tautological or else vague enough to conceal the differences that arise when they are rendered more specific. For example, the principle ‘murder is wrong’ is either tautological (if murder is defined as wrongful killing) or controversial (if murder is defined as intentional killing – does this include abortion? self-defence? euthanasia?).⁵ The controversy may not always be immediately apparent (as with the statement ‘one must have special reason to kill someone’), but can soon be brought to the surface (when we ask what counts as a ‘special reason’).

Nor is there widespread agreement regarding how to *resolve* these controversies. At the micro level, the parties to a moral dispute may argue not only about the answer to the moral question, but also regarding the kinds of consideration that would settle the question.⁶ For example, not only is the permissibility of abortion debated, but so is the moral relevance of various biological facts about fetuses. At the macro level, there is widespread disagreement regarding the *procedures* that should be used to resolve moral

⁵ Harman (1996) 9.

⁶ Williams (1995a) 557.

disputes. Should we appeal to Kant's categorical imperative? To utilitarianism? To intuitionism?⁷

The amount of moral diversity is not unlimited, however. Although these restraints may take very different forms, any moral system will have *some* sort of restraint on killing, injuring and lying.⁸ Moreover, to be able to communicate about moral matters, we must hold *some* moral beliefs in common, in order to provide sufficient shared premisses on which to base our discussion.⁹ Nevertheless, these limits

⁷ Waldron (1999) 176-179.

⁸ Williams (1985) 153.

⁹ Ayer (1954) 111. It has been suggested that these constraints are so stringent as to exclude any interesting version of moral relativism, just as Davidson (1982) argues that constraints on interpretation rule out any interesting version of *conceptual* relativism. This is an important objection to perspectival relativism, but it is not *obviously* fatal. In his writings on interpretation, Davidson says almost nothing about morality. Virtually his entire discussion is oriented towards the interpretation of sentences dealing with the *physical* world. Therefore, any attempt to apply his arguments to morality must explain why the conclusions that Davidson draws regarding the interpretation of statements about the physical world are also valid with regard to moral statements.

There have been attempts to overcome this hurdle by arguing that we need to share not just beliefs and desires, but also *values*, with those whom we interpret: eg Hurley (1989) ch 6. However, to the extent that this argument is meant to draw upon Davidson's work, it may not succeed against perspectival relativism. Firstly, Davidson needs only a very thin set of values to be shared in order for us to be able to ascribe beliefs and desires to other people (in particular, we must value truth-telling, so that we share a tendency to speak the truth in response to external stimuli). Secondly, Davidson himself is not necessarily hostile to moral anti-objectivism. For example, he refers approvingly to Gilbert Harman's relativist account of moral vocabulary: Davidson (1984) 132. Finally, this sort of argument may establish that there could not be a truly radical version of moral relativism, according to which different people hold completely alien moral values or belief-sets. However, it appears insufficient to exclude perspectival relativism, which draws only upon the sorts of moral disputes that we actually experience (regarding the moral status of Nazism, slavery, abortion, capital punishment, etc). Given that we *do* interpret people as holding differing positions concerning these issues, it would be difficult (to say the least) to show that general constraints on interpretation exclude such differences. Admittedly, there is a further question as to whether these more modest moral differences are sufficient to vindicate perspectival relativism. It may be that, the less radical the moral differences that exist between people, the more plausible it is to claim that they can be explained in objectivist terms. Nevertheless, I suggest in this chapter that perspectival relativism may offer a better explanation of even these more modest differences than does ecumenical pluralism.

The above is a far-from-comprehensive response to the Davidsonian suggestion. I try to show, in some depth, that this suggestion is not fatal to most versions of moral relativism in D Smith (1999) 66-85. See also Williams (1995c) 135-150 for a somewhat similar response to the Davidsonian suggestion.

do not preclude significant disagreement (eg regarding the *form* that the restraint on killing should take). They do not even establish that there must be any moral principle that is accepted by everyone. The overlap in moral beliefs necessary for communication to be possible may be such that everyone shares some beliefs with everyone else, but the beliefs shared by A and B differ from those shared by B and C.

2) How is moral diversity relevant?

How does the fact of moral diversity bear upon the meta-ethical debate? The mere fact that certain issues are controversial does not necessarily mean that there is no objective truth concerning those issues. The existence of disputes regarding moral questions does not entail that those questions lack objective answers, just as the existence of disputes regarding scientific questions does not entail that there is no objectivity in science.¹⁰

However, the fact that moral diversity does not entail that objectivism is false does not mean that it is irrelevant to the meta-ethical debate. P need not *entail* q in order to give us good reason to *believe* q. For example, q may be the best way to *explain* the fact that p.¹¹ Thus, if perspectival relativism explains the existence of moral differences better than ecumenical pluralism, we have reason to prefer the former to the latter.¹² The argument from diversity claims that perspectival relativism does indeed provide a better explanation of moral differences.

¹⁰ Moore (1982) 1090; Finnis (1980) 79 (citing Sellars (1968) 223).

¹¹ Thomson (1996) 73-74.

¹² Though not necessarily a *conclusive* reason, since there are other facts that meta-ethical theories must also explain: 66 above.

The perspectival relativist claims that, if there really *were* objective moral truths that were capable of being known,¹³ we would expect people to in fact know them, and so would expect general agreement on the relevant moral questions. Since there *is* no general moral agreement, diversity is best explained as reflecting people's differing ways of life (or different moral perspectives), without there being an *objectively best* way of life (or perspective).¹⁴ On this view, each side in a moral dispute may be correct relative to their own perspective, and moral perspectives cannot themselves be (objectively) right or wrong.

To assess how plausible this argument is, I shall first outline the ecumenical pluralist's alternative explanation of moral diversity. I shall then compare this explanation with the perspectival relativist's, in order to determine which is more plausible. It is at this stage that I shall develop the perspectival relativist's explanation of moral diversity in more detail.

B. Objectivist Explanations Of Moral Diversity

The ecumenical pluralist's alternative explanation of moral diversity consists of three stages. It is at this point that my account of ecumenical pluralism may diverge from existing objectivist theories, since (as far as I am aware) no objectivist embraces all the explanations of moral diversity canvassed in this Part. Nevertheless, I shall suggest that

¹³ To avoid scepticism, the ecumenical pluralist must not only argue that there *are* objective moral truths, but also that at least some of them can (in principle) be *known*.

¹⁴ Mackie (1977) 36-37.

it is by combining these various explanations that the ecumenical pluralist can provide the most convincing explanation of moral diversity open to an objectivist.¹⁵ Moreover, most objectivists whose theories are meant to fall within the umbrella of ecumenical pluralism could at least accept the broad outline of the explanation (in particular, the three stages in which the explanation occurs).¹⁶

The first stage of the explanation involves claiming that moral differences are not as prevalent as the perspectival relativist asserts. In fact, there is considerable moral *agreement*, something that the perspectival relativist is unable adequately to explain. Secondly, many of the moral differences that do exist are due either to objective variations in circumstances or to moral indeterminacy or incommensurability. Finally, any remaining differences are the result of error (either empirical or moral). In this Part, I expand upon this schema for explaining moral diversity; in the next Part, I suggest that, nevertheless, the perspectival relativist's explanation may be preferable.

1) Over-estimating moral diversity

The first step in the ecumenical pluralist's explanation is to argue that her opponent exaggerates the amount of moral diversity. This is not to deny the existence of moral differences, only to deny that they are as common as the perspectival relativist supposes. Moral beliefs come in various levels of generality, and differences at one

¹⁵ For this reason, I draw upon the views of a number of writers when outlining the ecumenical pluralist's explanation of moral diversity. Some of these writers would reject ecumenical pluralism, but this does not prevent the ecumenical pluralist from learning from their ideas.

¹⁶ Moore's moral realist, on the other hand, cannot (since he rejects moral pluralism). It is primarily for this reason that the ecumenical pluralist can offer a more plausible account of moral diversity than Moore.

level need not reflect differences at other levels.¹⁷ For example, even if there are no *specific* moral principles that are universally accepted, there might be *general* moral principles that are.¹⁸ A variant of this argument is Finnis' claim that there are certain 'basic goods' that are universally recognised.¹⁹ He claims that all societies show a concern for the value of human life, prohibiting the killing of other human beings without justification. Similarly, all societies (he claims) restrict sexual activity, favour co-operation and justice, recognise *some* form of property rights, etc. He concludes that, while there is no specific moral principle that everyone accepts, there are nevertheless certain broad values that *are* universally accepted.²⁰

Conversely, there may be agreement on specific moral principles even though there is disagreement (between utilitarians and deontologists, for example) concerning the ultimate foundations of those principles.²¹ For example, Bambrough asserts that everybody would agree that a child should be given an anaesthetic before undergoing a potentially painful operation.²² Similarly, Moore claims that we can obtain popular agreement in many cases – for example, that a particular brutal murder was wrong, or

¹⁷ Raz (1986) 58, 181; Moore (1982) 1095.

¹⁸ Specific moral principles could then be seen as different ways of rendering general moral principles concrete: Sections 2 & 3.

¹⁹ While Finnis states that the basic goods are not moral in nature, he believes that specific moral principles can be derived from them (with the aid of certain 'principles of practical reasonableness'): Finnis (1983) 69.

²⁰ Finnis (1980) 83-84.

²¹ Raz (1986) 58.

²² Bambrough (1969) 41.

that setting a cat on fire for sadistic reasons is wrong²³ – and Dworkin claims that nearly everyone recognises that genocide is wrong.²⁴

Having argued that there is less moral diversity than perspectival relativists claim, the ecumenical pluralist can turn the tables on her opponents by arguing that she provides a better explanation of moral *agreement*. The more plausible explanation of agreement on both general and specific moral norms is (she could argue) that those norms are objectively true (and that people have come to recognise this fact), not that those norms represent a purely coincidental overlap in people's beliefs and desires.

2) Circumstances objectively alter cases

The ecumenical pluralist does not deny that there are *some* variations between different people's moral beliefs and practices. One way in which this diversity may be compatible with objectivism is if these differences are due to variations in circumstances, so that what is (objectively) right in one case is (objectively) wrong in another.²⁵ On this hypothesis, despite the surface disagreement, there is a higher-order moral principle that is valid for *both* people and that specifies the ways in which different circumstances require different lower-order principles. In other words, there is a unitary morality that requires different things in different circumstances.²⁶ For example, a nomadic tribe may leave its sick or elderly members for dead, whereas *we*

²³ Moore (1985) 381 and Moore (1992) 2511 respectively.

²⁴ Dworkin (1996b) 92.

²⁵ Scanlon (1998) 329; Wiggins (1990–91) 72.

recognise a moral obligation to care for the sick and elderly. However, this difference may be due to variations in our respective circumstances. *We* are obligated to care for the sick and elderly because doing so does not put the survival of our entire society at risk, whereas *they* have no such obligation because it *would* endanger their entire society. Underlying the different specific moral principles is a shared general principle that one is obligated to care for the sick and elderly unless doing so puts the survival of one's entire society at risk.

One could argue that many differences in moral practice are of this type. Instead of providing support for anti-objectivism, they demonstrate how different circumstances render different moral practices objectively appropriate.

3) Incommensurability and indeterminacy

Another way in which moral differences may be compatible with objectivism is if the rival answers to a moral question are indeterminate or incommensurable. The ecumenical pluralist can allow that some moral questions have no determinate answer, and that others have a plurality of incommensurably good answers.²⁷ Many moral differences may concern questions of these two types. In such cases, differences in moral practices are to be expected, as the answer favoured by one side will be no better

²⁶ Wiggins (1990-91) 72.

²⁷ Two answers are incommensurably good if each is better than the other in some respects and worse in others, and neither is better (or equally good) overall: Finnis (1990) 3, 8.

or worse (overall) than the answer favoured by the other.²⁸ For example, Finnis claims that different people have different conceptions of the right to a fair trial because specifying the scope of this right involves making choices from among alternatives that are all (more or less) equally reasonable.²⁹

Susan Wolf offers one of the most developed accounts of how objectivists can appeal to incommensurability to explain moral differences.³⁰ She begins by pointing out that an objectivist can view some moral differences as arising out of situations where there are a plurality of values that cannot be reconciled to produce a uniquely right answer. In such cases – where there are good reasons for one position and good reasons for an incompatible position, and no overarching principle by which these can be reconciled – moral differences are likely, since different people may focus on different values and any attempt by one person to claim priority for her view will beg the question. However, while there is no single right answer about what one morally ought to do in such cases, this does not mean that there are no *wrong* answers. For example, even if an objectivist believes that two positions regarding capital punishment are both reasonable, she is not committed to claiming that *any* position concerning capital punishment would be reasonable.³¹

²⁸ Finnis (1980) 219; Finnis (1983) 77. See also Tasioulas (1998b) 395: ‘The failure to converge on a unitary ethical outlook, rather than compromising the idea of an independent ethical reality, may instead manifest its pluralistic character.’ (footnote omitted)

²⁹ Finnis (1980) 219. Presumably, the qualification in parentheses is meant to acknowledge the fact that, strictly speaking, incommensurable options are not *equally* good (or reasonable).

³⁰ Wolf (1992).

³¹ Wolf (1992) 790.

Moreover, an objectivist can accept pluralism not only at the level of individual moral judgments but also (or instead) at the level of entire moral codes. Hence, she may be able to explain the fact that two people differ regarding a significant range of moral issues by pointing out that there are a number of incommensurably good moral codes, and that we would expect adherents of different codes to diverge on many moral issues. While Wolf describes this as ‘a kind of relativism’,³² it clearly differs from perspectival relativism. The present view holds that there are many moral codes that are objectively wrong, even if there are others that are incommensurably good. For the pluralist, reason should constrain not only the conclusions that we reach within a moral system, but also our choice of moral system (though reason may not determine uniquely best solutions at either level).³³ The present view also claims that it is *objectively* wrong to act contrary to one's moral code. Thus, as Wolf points out, this type of pluralism may accommodate ‘a kind of relativism’, but it does so within an objectivist framework.³⁴

4) An objectivist account of error

However, unless she claims that *all* moral differences are the result of adopting different indeterminately or incommensurably good options (or are the result of objective differences in circumstances), the ecumenical pluralist must explain how there can be disagreements in which at least one side is *mistaken* (either because there is a single

³² Wolf (1992) 791-792.

³³ Wolf (1992) 795-796.

³⁴ Wolf (1992) 797.

right answer or because one side has adopted an answer that is *not* incommensurably good). I turn now to this issue.

One way in which ecumenical pluralists can explain moral disagreements, where at least one side is mistaken, is by claiming that these are often the result of *empirical* errors made by one or both sides. If everyone were aware of the (non-moral) facts, the moral difference would evaporate. For example, MBE Smith claims that, if racists abandoned their false empirical beliefs about black people's low intelligence, lack of self-restraint, etc, then they would no longer be racists.³⁵

However, the main explanation of moral disagreement offered by objectivists is that it is the result of *moral* errors made by one or both sides to the dispute. As George points out, even disagreement between *reasonable* people does not show that there is no objective truth about the matter in question, because even reasonable people are fallible.³⁶

To explain moral disagreement, however, the ecumenical pluralist must not only claim that it is caused by error, but must also explain how these mistakes occur. The reminder that we are fallible goes only part of the way. Our natural fallibility explains how we make *occasional* mistakes. However, if any significant amount of moral diversity is to be explained in this manner, moral errors are more than simply *occasional*.

³⁵ MBE Smith (1980) 418. See also Wolf (1992) 787.

³⁶ George (1999) 316.

Explanations of how moral errors occur on a large scale *are* available to the ecumenical pluralist, however. One explanation is that many moral questions are intrinsically difficult, and so widespread error is likely.³⁷ For example, on Finnis' theory, moral principles are derived from basic practical principles (directing one to pursue the basic goods), with the aid of numerous intermediate principles specifying the requirements of practical reasonableness. Given this complex way of deriving moral principles, Finnis claims that individual and cultural variations in views about those principles are to be expected.³⁸

The ecumenical pluralist's *primary* explanation of moral error, however, is that it is largely due to the way in which self-interest and prejudice can obscure one's view of objective moral truths.³⁹ For example, Finnis attributes to Aquinas the claim that even the most obvious moral implications of the basic goods can be obscured by prejudice or a desire for gratification.⁴⁰ Finnis himself states that failure to realise the wrongness of a particular choice or action is caused either directly by some inclination or emotion or by a disposition that was originally shaped under the distorting influence of emotion.⁴¹ This distortion occurs because one's emotions master one's reason, so that reason becomes the tool of the emotions, inventing rationalisations for doing what the

³⁷ George (1999) 316; Scanlon (1998) 358-359.

³⁸ Finnis (1983) 76-77; Finnis (1998) 129.

³⁹ Scanlon (1998) 358-359; Sturgeon (1988) 229-230.

⁴⁰ Finnis (1980) 30.

⁴¹ Finnis (1998) 97. Compare this unqualified statement with Finnis (1998) 73, where he states that succumbing to emotion or self-interest is the paradigmatic, not the only, cause of wrongdoing.

emotions want rather than bringing one's feelings in line with reason.⁴² This can cause us not only to act wrongly, but also to lose sight of what is morally required, and so can be a source of moral disagreement. For example, our emotional urge to strike someone in hatred or anger may be rationalised as acting to correct an injustice, so that an action that we should have realised was immoral comes to be seen as morally required.⁴³

Some objectivists offer a further explanation of moral error. They argue that possession of a well-developed moral vocabulary and tradition is needed to grasp certain moral truths, and the fact that some people or societies lack such a vocabulary and tradition explains why they fall into error.⁴⁴ However, these objectivists still have to explain *why* some people or societies lack the necessary vocabulary and tradition. The most obvious way to do so is to fall back on the two explanations outlined above (though it may not be A's, as opposed to her parents' or forebears', self-interest or prejudice that caused A to fall into error). (Alternatively, one could argue that a particular community lacks the necessary vocabulary and tradition because of grave disasters – natural or man-made – to which the community has been exposed, as a result of which people were too concerned with survival to develop correct moral views.⁴⁵ However, such an explanation could account for only a very limited range of moral mistakes, since most of the moral disputes canvassed in this chapter do not involve one

⁴² Finnis (1998) 74; Finnis (1980) 125.

⁴³ Grisez, Boyle & Finnis (1987) 123.

⁴⁴ This explanation was suggested by John Tasioulas. McDowell (1998) 101-102 says something similar about upbringing.

⁴⁵ Again, this argument was suggested by John Tasioulas.

party whose survival has been imperiled to the point at which they could not engage in moral reasoning.)

A similar problem confronts Thomson's suggestion that some moral errors are the result of 'walling off'.⁴⁶ She claims that people sometimes ignore what they know to be the case, or fail to connect one belief with another, and this leads them into moral error. For example, American slave-owners in the 19th century often engaged in walling off, so that they would not have to acknowledge that their conduct was morally wrong.⁴⁷ However, Thomson has not really explained the moral errors in question until she explains *why* people engage in walling off. It is insufficient to state that they do so to avoid having to recognise that they hold (and have acted upon) morally erroneous beliefs, since this fails to explain why they adopted those mistaken beliefs in the first place (and why they are so keen to avoid acknowledging their mistake). The most promising explanation of this phenomenon is again to refer to the difficulty of moral questions, and to self-interest and prejudice.

C. Who Provides The Best Explanation Of Moral Diversity?

1) Do relativists exaggerate the extent of moral differences?

Part of the ecumenical pluralist's explanation of moral diversity involves denying that it is as prevalent as the perspectival relativist claims. Who is correct on this issue is

⁴⁶ Thomson (1996) 205.

⁴⁷ Thomson (1996) 205, n 9.

largely an empirical question, which I lack both space and expertise to pursue in depth. However, there are several reasons for doubting the correctness of the ecumenical pluralist's response. In particular, there is reason to doubt whether there is universal agreement on any general or specific moral principle. (I focus on *universal* agreement not because its absence is sufficient to refute objectivism, but because it shows that there is no moral principle regarding which the ecumenical pluralist does not have to explain away moral differences.)

As suggested earlier, general moral principles that are claimed to be universally accepted invariably turn out to be either tautological or else vague enough to conceal the differences that arise when they are rendered more specific. For example, Finnis' claim that all societies prohibit the unjustified killing of other human beings is empty, because any purported counter-example will instead be taken as a claim about what sort of killings are justified.⁴⁸ Moreover, even if there *are* certain broad values that are universally accepted, there is no consensus regarding how they should be applied. For example, there is no agreement regarding *how* sexual activity should be restricted, *what* cooperation and justice between groups requires or what *form* property rights should take. On Finnis' own account, it is *these* that are the morally relevant questions, not whether there are any basic, non-moral values.⁴⁹ Whether the ecumenical pluralist can explain the disagreement over these matters is considered below; my present concern is simply to rebut the suggestion that no such diversity exists.

⁴⁸ Finnis (1998) 163-167 argues that this principle *can* be expressed non-tautologically. However, he does so by providing a controversial account of which killings are justified (based on his distinction between intention and side-effect).

⁴⁹ Finnis (1980) 31, 62; Finnis (1983) 69.

As for the examples given by Bambrough and Moore,⁵⁰ it is unlikely that *no one* would dispute the specific moral judgments in question. The person who committed the brutal murder envisaged by Moore, or set the cat on fire, *may* believe that her actions were wrong, but equally she may believe that what she did was *right* (perhaps simply because it gave her pleasure). The claim that, even if people once believed that slavery was morally permissible, no one does so now fares no better. Twenty-seven million people currently live in slavery worldwide,⁵¹ and it is implausible to suppose that no one associated with this ‘industry’ believes that their actions are morally permissible. Again, the implausibility of the perspectival relativist’s claim that this belief need not be mistaken is considered below; for now, the point is simply that there are unlikely to be any universally held moral beliefs.

The moral differences to which I have just referred (as well as the disputes concerning moral methodology discussed at 68-69 above) are not simply differences *between* societies, but also differences *within* societies. For example, members of any particular society will disagree about when the killing of another human being is justified, and – given the prevalence of slavery even in Western societies – there is unlikely to be any society in the world today in which *no one* believes that slavery is permissible. Moreover, disputes (between utilitarians and Kantians, for example) about

⁵⁰ 73-74 above.

⁵¹ *The Independent* (Sat. 2/12/00). cf Dworkin (1996b) 120: ‘Anyone who is convinced that slavery is wrong, and knows that his view is now shared by almost everyone else, will think that general moral sensibility has improved, at least in that respect, since slavery was widely practised and defended.’ This is more than a little parochial, even within the US and UK (where, according to *The Independent*, sex- and domestic-slavery are on the increase).

what *makes* slavery wrongful occur within particular societies, as well as across societies.

However, even if there is no universal moral agreement, there is clearly considerable less-than-universal agreement. Is the ecumenical pluralist better able to explain this fact than the perspectival relativist? It is not obvious that he is. The perspectival relativist need not claim that overlap between perspectives is purely coincidental. She allows that one influence on people's moral beliefs is their social environment, and (as all members of a society share a similar social environment) some overlap between perspectives is likely.⁵² For example, in a society in which slavery is generally frowned upon, people are less likely to grow up believing that slavery is morally permissible than in a society in which slavery is widely condoned and practised. This, according to the perspectival relativist, is true simply because of society's attitude towards slavery, not because there is an objective moral principle proscribing slavery. Thus, the perspectival relativist *can* explain moral agreement, and it is not obvious that this explanation is less plausible than the ecumenical pluralist's. Moreover, the ecumenical pluralist must explain why this agreement is only general, not universal.⁵³ *Why* are some people seemingly incapable of recognising the moral truth? The plausibility of the ecumenical pluralist's answer to this question is considered below.

2) Differences in circumstances, empirical disagreement and incommensurability

⁵² 36 above.

⁵³ Perspectival relativism does this by pointing out that one's social environment is only *one* influence on one's perspective.

Turning to the ecumenical pluralist's explanations of moral diversity, several could also be used by a perspectival relativist, or are relevantly similar to the perspectival relativist's explanations of moral diversity. In either case, they cannot be used to determine which theory best explains moral differences. For instance, the perspectival relativist, too, can allow that some moral differences are due to differences in circumstances or empirical disagreement. Two people could hold the same perspective and yet disagree regarding what is morally appropriate if there was a relevant difference in their (non-moral) circumstances, or if they disagreed about the (non-moral) facts. While objectivists tend to place more emphasis on these explanations of moral diversity than do anti-objectivists, this is not because those explanations fit better with objectivism. Rather, it is because anti-objectivists tend to focus on the *distinctive* explanations of moral diversity available to them.

As for the incommensurability thesis, there is little difference in the plausibility of explaining moral differences by reference to that thesis and explaining them by reference to perspectival relativism. (The same is true of indeterminacy, but I shall focus on incommensurability, which is more commonly invoked to explain moral differences.) The incommensurability thesis (as opposed to ecumenical pluralism as a whole) explains moral diversity only in cases where two or more people embrace different incommensurably good options, and it does so by suggesting that they have focused on different values or principles, none of which is objectively superior to the others.⁵⁴ Since none of the incommensurably good options are objectively better (all

⁵⁴ 75-77 above.

things considered) than the others, it is to be expected that people will endorse different incommensurably good options, depending upon their tastes, other commitments and so on.⁵⁵ Analogously, the perspectival relativist can explain moral differences by suggesting that different people make different moral commitments, none of which is objectively superior to the others.

The incommensurability theorist will claim, and the perspectival relativist will deny, that there are objective *pro tanto* reasons in favour of both options. However, they will each claim that there is no objective all-things-considered reason to prefer one option to the other, and it is this latter claim that they invoke to explain the fact that people choose different options. In both cases, what explains the existence of moral diversity is the fact that there is no objective, all-things-considered reason for ranking one option higher than the other. Therefore, while the two explanations of moral diversity differ insofar as the ecumenical pluralist claims that there are objective *pro tanto* reasons in favour of both incommensurably good options and the perspectival relativist denies this, that dissimilarity does not affect the plausibility of their respective explanations.⁵⁶

⁵⁵ Strictly speaking, the incommensurability thesis is only part of the explanation of moral diversity. Also important is the fact that people differ in their tastes and commitments, leading them to adopt different incommensurably good options.

⁵⁶ The ecumenical pluralist could argue that this disanalogy explains why people generally hold one or other of the incommensurably good options, rather than embracing objectively mistaken options. However, I suggested above that the perspectival relativist may be able to explain why there is convergence on a limited range of options in some cases (by reference to the influence of one's social environment). Furthermore, ecumenical pluralists concede that, in a significant range of cases, people embrace objectively mistaken options: 89-90 below.

The same is true of another disanalogy between the two explanations of moral diversity. The ecumenical pluralist claims that, while there are some options that are incommensurably good, there are further options that are objectively wrong. However, the incommensurability thesis, by itself, cannot explain how anyone might come to accept such an option. Its ability to explain moral differences is limited to the situation where each person holds a different incommensurably good option, since it is only in this case that there are no objective all-things-considered reasons for preferring one option to another. To explain how someone might accept an objectively wrong option, we must have recourse to other aspects of ecumenical pluralism, of which the incommensurability thesis forms only part.⁵⁷ Thus, if we confine our attention to cases where each person holds a different incommensurably good option, the ecumenical pluralist's explanation of moral diversity appears no more or less plausible than the perspectival relativist's.

There is a third disanalogy between the two explanations of moral diversity that must be considered, however. Pluralism is generally claimed to be a moral theory, whereas perspectival relativism is a meta-ethical view.⁵⁸ Therefore, according to the ecumenical pluralist, if two options are incommensurably good, this represents an objective moral truth. *Prima facie*, this makes no difference to the ecumenical pluralist's and perspectival relativist's ability to explain moral differences. What makes both explanations plausible is that there is no objective all-things-considered reason for

⁵⁷ This issue is considered in Section 3. For now, I am concerned only with differences between people who each hold incommensurably good options.

⁵⁸ Tasioulas (1998a) 190-191; Wolf (1992) 789. See 109 below regarding the morality/meta-ethics distinction.

preferring one moral practice to the other; it does not matter whether it is an *objective moral truth* that there is no objective all-things-considered reason for preferring one moral practice to the other.

In fact, however, this disanalogy between the two explanations of moral diversity may make it *harder* for the ecumenical pluralist to explain moral differences. Pluralism entails that there is a type of moral error (namely, ignorance of the moral doctrine of pluralism) that does not exist according to perspectival relativism. Whenever someone asserts that an incommensurably good option is just plain right, rather than incommensurable, they are (according to the ecumenical pluralist) morally mistaken. Some explanation of why people make mistakes concerning this matter is required. If it is objectively true that the options in question are incommensurably good, why have people not come to realise this? This question is especially pressing given that we can speculate that this sort of moral mistake is quite widespread if ecumenical pluralism is correct. Relatively few people are aware of the incommensurability thesis. While there are equivalent ideas in popular culture (such as references to comparing apples and oranges), the ecumenical pluralist will appear to be fighting an uphill battle if she seeks to argue that people are generally able to identify instances of incommensurability.⁵⁹

⁵⁹ On the other hand, an ecumenical pluralist might argue that she can better explain the fact that some people adopt a pluralistic moral outlook, acknowledging that there is a plethora of valuable ways of living one's life. This, she can argue, is the consequence of their recognition of the objective truth of the incommensurability thesis. However, it could also be explained by the perspectival relativist as a consequence of their recognition that there are no objectively correct ways of living one's life, together with a reluctance to denigrate a particular way of life if it cannot be shown to be objectively mistaken.

Thus, the only disanalogy between the two explanations of moral diversity that affects their plausibility seems to indicate that ecumenical pluralists will have a harder time explaining moral diversity than perspectival relativists. However, I shall not push this point, for two reasons. Firstly, I leave open whether ecumenical pluralists can convincingly explain why people have failed to identify instances of incommensurability. It may be that this is one type of widespread error that *can* be explained by reference to the difficulty of the issues in question. Secondly, even if ecumenical pluralists cannot satisfy this requirement, perspectival relativists must undertake a parallel task of explaining why many people are ignorant of the (meta-ethical) truth of relativism. Therefore, it is unclear whether perspectival relativism possesses any genuine advantage in this area.

* * *

None of the explanations considered in this Section can be used to determine whether perspectival relativism or ecumenical pluralism offers the most plausible account of our moral differences. However, the ecumenical pluralist cannot rely solely on these explanations of diversity. Differences in circumstances and empirical disagreement cannot explain *all* moral differences. There are cases where the circumstances are relevantly similar, and both sides agree regarding the (non-moral) facts, yet disagree regarding what is morally appropriate.⁶⁰ Furthermore, the more the ecumenical pluralist relies on incommensurability to explain moral differences, the more her theory resembles the perspectival relativist's, because there will be fewer

⁶⁰ Ely (1980) 53.

answers to moral questions that are mind-independently true or upon which there could be a rational convergence. This is not to claim that an objectivist cannot be a pluralist, but only that – the more pluralistic she is – the closer to perspectival relativism she is. In fact, most ecumenical pluralists stop well short of approaching relativism. However, this means that they must have recourse to further explanations of moral diversity, and *these* may enable us to determine whether the ecumenical pluralist's explanation is more plausible than the perspectival relativist's.

3) The competing accounts of moral error

We come now to the heart of the matter. The perspectival relativist allows that some moral differences are due to empirical errors or differences in circumstances, but claims that – once these are allowed for – there are still moral differences, which are best explained by saying that each side is correct relative to a different perspective. The ecumenical pluralist, on the other hand, argues that (after allowing for incommensurability as well) remaining differences are best explained on the basis that one or both sides to the dispute are mistaken. Which of these claims is more plausible?

a) ecumenical pluralism and charity

Many highly contentious moral questions have been debated for an extremely long time.⁶¹ Assuming that not *all* of these debates are explicable in terms of differences in circumstances, empirical errors or incommensurability, this means that – according to

⁶¹ For example, the merits of capital punishment were discussed by Aquinas, and are still debated today: Finnis (1998) 279-284; Finnis (1983) 128-131.

ecumenical pluralism – there are some moral questions regarding which many people have been *mistaken* over an extremely long period of time. While people do, of course, make mistakes, they are not usually this widespread and persistent. Is the difficulty of moral questions, and the risk of distortion due to self-interest and prejudice, a sufficient explanation of this phenomenon?

Such an explanation paints an unduly pessimistic picture of our ability to identify moral truths. We are sometimes blinded to the truth due to self-interest or prejudice, and struggle to arrive at the correct answer to complex problems, but rarely on such a large scale. For example, while scientific errors are certainly not uncommon, there are several important disanalogies between morality and science in this regard. Firstly, there is a division of labour with regard to science (that is, there are scientific experts), and this helps to explain why many (lay-)people are ignorant regarding many scientific issues. The claim that there is a similar division of labour with regard to morality (and hence that we might expect large numbers of people to be similarly ignorant regarding moral issues) is far more contentious. Scientific experts may not be universally acknowledged, but they are recognised far more widely than any purported moral expert. Secondly, there seems to be (gradual, sometimes halting) progress in science towards eliminating error in a way that there does not seem to be with regard to morality. I suggested in Section 1 that even the wrongness of slavery is still not universally acknowledged in modern Western societies. Indeed, there has been an increase in certain types of slavery within such societies, suggesting that there may even be a *regress* on this issue. While there are few completely uncontroversial issues in science either, there does seem to be an accumulation of knowledge among scientific

experts. This is far less evident with regard to morality. Even trying to identify which groups are the ones who are accumulating this knowledge in the moral context would prove highly controversial. Thirdly, when people agree about paradigm cases in science, they tend to agree for the same reasons. For example, scientific experts generally agree on the reasons for accepting paradigmatic laws of physics, and lay-people are generally willing to defer to the experts on this matter. The same is not true of morality, where people disagree dramatically about the reasons for accepting even the least controversial proposition (eg the dispute between Kantians and utilitarians concerning *why* slavery is impermissible). Finally, there is general (though obviously not universal) agreement on a *methodology* for resolving scientific disagreement, whereas I have suggested that there is no such methodological agreement with regard to morality.⁶² Of course, there is room for disagreement about how great the differences are between science and morality in any of these four respects. Nevertheless, taken together, these four factors suggest that a significant difference exists.

However, even if we accept that there are significant differences between the extent of moral and scientific disagreement, why should we reject the ecumenical pluralist's suggestion that self-interest, prejudice and the difficulty of moral issues can produce large-scale moral error? One possible answer is that people are not (by and large) self-interested and prejudiced, and so widespread instances of moral error cannot be explained on the basis of self-interest and prejudice. If this answer is correct, ecumenical pluralism offers an implausibly dim view of human nature, portraying human beings as generally self-centered and bigoted. However, there is a potential problem with this suggestion. Even if perspectival relativism produces the result that

⁶² 68-69 above. See further 183 below.

people are largely correct relative to their own perspective, it does not necessarily mean that they are largely correct relative to *my* perspective. Indeed, given the amount of moral diversity claimed to exist earlier in this chapter, other people's moral beliefs will *often* be incorrect relative to my perspective. Therefore, does not perspectival relativism have to explain away just as much moral error as ecumenical pluralism? And will not the perspectival relativist have to refer to self-interest and prejudice to explain that error? We are not yet in a position to assess this objection, however, so I shall instead turn to a second possible explanation of why large-scale moral error (of the sort claimed to exist by ecumenical pluralism) is unlikely, before returning to the present suggestion at the end of this sub-section.

This second explanation is that the ecumenical pluralist's account of error paints an implausibly pessimistic picture of our *intellectual* faculties. People do, of course, make mistakes when trying to answer difficult questions, but it is rare for large numbers of people to be mistaken regarding a wide range of issues over a very long period of time (keeping in mind the disanalogies between moral and scientific disagreement). Given the amount of time that the human race has had to identify objective moral truths, we should expect to see some degree of (more or less) undisputed progress on important moral issues. The fact that we still disagree regarding such issues (including whether, and why, slavery is wrong) suggests that the answer to moral questions ultimately depends not on mind-independent facts, but rather on beliefs and desires that vary between individuals. We can then explain these moral differences on the basis that each side is correct relative to a different perspective, rather than having to assert that one

side is objectively correct and the other objectively mistaken (even though this mistake can be demonstrated to the satisfaction of only one side).

How implausible the ecumenical pluralist's account is depends on how *much* moral disagreement she claims is the result of moral error. She can, of course, claim that moral disputes that last for centuries are prime candidates for indeterminacy or incommensurability. The greater the role given to such factors, the more plausible the ecumenical pluralist's picture becomes, but the closer to perspectival relativism it becomes.⁶³ However, if the ecumenical pluralist wishes to explain any significant amount of persistent and widespread moral diversity in terms of moral error, then she must ascribe persistent and widespread intellectual failings to us, calling into question the plausibility of her view.

This argument cannot be met with the rejoinder that there is just as much moral error if perspectival relativism is correct. When we assess people's *intellectual* abilities, the relevant type of error is error relative to their own perspective, because the truth that people seek to identify is (whether they know it or not) truth relative to their own perspective, not relative to our perspective. There is less error of *this* type on the perspectival relativist's account, because some moral differences will be explained by the ecumenical pluralist in terms of moral error and by the perspectival relativist in terms of differences in perspective. In other words, in some cases where the ecumenical pluralist will claim that one side is objectively mistaken, the perspectival relativist will claim that each side adheres to a different perspective (and so will not ascribe an

⁶³ 89-90 above.

intellectual error to either side).⁶⁴ Thus, perspectival relativism allows for a more optimistic – and, in my view, realistic – assessment of people's intellectual faculties.

However, the claim that there is less of the relevant type of error if perspectival relativism is true could be contested along the following lines.⁶⁵ Many objectivists argue that moral statements contain an implicit ‘claim to objectivity’. For example, when we state that genocide is morally wrong, we are (on this view) implicitly stating that it is *objectively* wrong. If so, perspectival relativism is committed to claiming that all our moral beliefs are wrong, because the claim to objectivity implicit in every moral belief is mistaken.⁶⁶ This would suggest that perspectival relativism is committed to an even more pessimistic view of people's intellectual faculties than ecumenical pluralism, since it produces the result that all of one's moral beliefs are mistaken even relative to one's own perspective.

This objection depends crucially upon the premise that ordinary moral statements contain an implicit claim to objectivity. To examine in detail whether this premise is correct would dramatically extend an already long chapter. However, it is worth briefly indicating the sorts of grounds on which a perspectival relativist might seek to contest this premise (remembering that the aim of this chapter is merely to raise doubts about how the meta-ethical debate should be resolved, not to resolve that debate).

⁶⁴ See further 100-101 below.

⁶⁵ This objection was suggested by John Tasioulas.

⁶⁶ cf Mackie's ‘error theory’: Mackie (1977) 48-49.

Firstly, some anti-objectivists deny that the claim to objectivity reflects common usage. For example, Waldron argues that ordinary moral discourse is as redolent with anti-objectivist phrases and sentiment as it is with objectivist phrases and sentiment:

For every stern preacher who talks about the reality of obligation, there is a gum-chewing sophomore who says that all moral views are just matters of opinion and there's no ultimate standard. The ordinary talk one hears is infected as much with relativist idioms as with [objective] truth-claims.⁶⁷

If Waldron is right, this undermines one common argument in favour of the claim to objectivity – namely, the argument from common usage. That argument involves claiming that the way that ordinary people use moral statements shows that they are implicitly claiming that those statements are objectively true, whereas Waldron suggests that people are deeply divided in the way that they use moral statements.

Secondly, the perspectival relativist can recognise that, when we utter a moral statement, we assert that the statement is *true*. Perspectival relativism allows that moral statements can be true or false; it denies only that they can be objectively true or false. Moreover, I argue in Part D that the perspectival relativist's claim that moral statements can be true or false is consistent with her rejection of objectivism. If so, much of the motivation for positing the claim to objectivity seems to evaporate. It would be strange to deny that, in uttering a moral statement, we assert that it is true. However, why is it strange to deny that we assert that the moral statement is *objectively* true, if there is a non-objective form of truth that could be asserted instead? Indeed, why should we

⁶⁷ Waldron (1992) 166.

assume that, in uttering moral statements, ordinary people are implicitly taking sides in what is (after all) a fairly abstract dispute in moral philosophy? Is it not more plausible to suppose that they are simply asserting that the moral statement in question is true, without (even implicitly) taking sides in the meta-ethical debate?⁶⁸

Of course, neither of these objections is conclusive. However, they do provide some reason for doubting whether a claim to objectivity is implicit in our moral language, and hence for doubting whether the defence of ecumenical pluralism sketched above can succeed.

Returning to the argument that ecumenical pluralism paints an implausibly pessimistic picture of our intellectual faculties, this argument assumes that people make a good faith attempt to identify moral truths, rather than being too apathetic, self-interested or prejudiced even to try. Objectivists sometimes reject this assumption. For example, Scanlon claims that moral disagreement is explicable partly on the basis that most people have not thought hard about moral issues, but rather arrive at most of their moral opinions via socialisation.⁶⁹ This is an empirical claim, but it does not gel with my experience of other people (including, through his writings, of Scanlon himself). It underestimates people's willingness to reflect on difficult moral issues, instead portraying them as passive receptacles of received wisdom. Even when people disagree with me, I rarely find them to be morally unconcerned, unreflective or bigoted. While it

⁶⁸ One possible response is that, in uttering a moral statement, we imply that the statement is rationally assessable. However, moral statements can be rationally assessable even if perspectival relativism is correct: 124-128 below.

⁶⁹ Scanlon (1998) 355-356.

is easy to ascribe these traits to people we do not know (and of whose circumstances we are largely ignorant) in order to explain why they hold views that we consider misguided, when I engage with such people I usually discover more charitable explanations of how they came to hold their moral beliefs.

However, is my denial that people are generally self-interested and prejudiced inconsistent with my recognition earlier in this sub-section that the perspectival relativist must explain how other people can be mistaken relative to *her* perspective, even if they are correct relative to *their* perspective? Must not the perspectival relativist explain errors that other people make relative to her perspective by reference to self-interest or prejudice, and so ascribe as much self-interest and prejudice to other people as the ecumenical pluralist does? Not necessarily. She can instead explain such errors as resulting from a choice of different basic commitments.⁷⁰ She may view some people's choice of basic commitments as (partly or wholly) the product of self-interest or prejudice, but she need not do so, any more than ecumenical pluralists need do so when explaining why people adopt different incommensurably good options. We need not think that someone whose non-rational choices differ from our own is self-interested, prejudiced or intellectually limited, even when we think that they are missing something because they do not share our views. For example, I may believe that you have made a moral error (relative to my perspective) in adopting a basic commitment to sustain the lives of the terminally ill at all costs, but I need not believe that you are self-interested or prejudiced in adopting this view of euthanasia. Nor need I think that you

⁷⁰ By 'basic commitment', I mean any important element of one's belief-set that has implications for a significant number of other elements of one's belief-set. Since one's basic commitments must cohere with the rest of one's belief-set (including, but not limited to, one's other basic commitments), the use of this concept does not introduce a foundationalist element into perspectival relativism.

are intellectually limited, because I acknowledge that you are pursuing a different set of basic commitments from myself.

The ecumenical pluralist, too, can say that people disagree because of their different basic commitments. However, she needs an explanation of *why* people adopt different basic commitments, an alternative to the perspectival relativist's claim that our choice of basic commitments is a non-rational decision ungoverned by any objective moral requirement. Leaving to one side the incommensurability thesis (which was considered in Section 2), at this point the ecumenical pluralist is likely to retreat to mentioning once more the difficulty of moral questions and the risk of self-interest and prejudice.

Therefore, the perspectival relativist can argue that, not only does ecumenical pluralism paint an implausibly pessimistic picture of our intellectual abilities, but it also offers an implausibly dim view of human nature, exaggerating the extent to which human beings are self-interested and prejudiced. Where ecumenical pluralists explain moral differences by reference to self-interest and prejudice, perspectival relativists may explain those differences by reference to different people's choice of different basic commitments.

b) perspectival relativism and moral error

The pessimistic picture of our moral and intellectual faculties painted by the ecumenical pluralist's account of moral error may be implausible, but is it more implausible than

the perspectival relativist's rival account? There are two concerns that the perspectival relativist must address. Firstly, she allows that there are some cases in which one is mistaken relative to one's *own* perspective. Secondly, her denial that moral error exists in certain other cases seems preposterous. I shall consider each of these in turn.

The perspectival relativist concedes that some of our moral beliefs are epistemologically flawed, and that this constitutes moral error *relative to our own perspective*.⁷¹ Thus, is her explanation of moral diversity any more plausible than the ecumenical pluralist's? Must not she, too, claim that there is a significant range of issues upon which we are mistaken (relative to our own perspectives), and so paint an equally pessimistic picture of our capacity to identify moral truths?

However, there are likely to be significantly fewer epistemological defects in our moral beliefs than there are errors according to ecumenical pluralism. This is certainly true of an ecumenical pluralist who accepts that our moral beliefs should be coherent, since a lack of coherence is only *one* of the ways in which such an objectivist is likely to claim that we can go wrong.⁷² For example, she is likely to claim that prejudice and self-interest may lead one to hold wrong, but not inconsistent, beliefs. In such a case, one will be judged to be mistaken by the ecumenical pluralist but not (relative to one's own perspective) by the perspectival relativist. In other words,

⁷¹ 40-44 above.

⁷² An exception is Michael Smith's version of objectivism. Smith suggests that we would converge upon the right desires if we rendered our existing desires fully informed and coherent: 17 above. However, the number of epistemological defects that would have to be present for everyone to share a single underlying perspective despite all our moral differences would have to be enormous (assuming that the amount of incommensurability is not so great as to leave little difference between Smith's objectivism and perspectival relativism). Again, such an account presents an implausibly dim view of people's intellectual abilities.

perspectival relativists will ascribe error (relative to one's perspective) only if one's beliefs do not cohere, whereas this sort of ecumenical pluralist will ascribe moral error in all of those cases *plus* in some cases where one's belief-set is coherent. This means that the problem confronting the perspectival relativist is not as great as that confronting the ecumenical pluralist, because there is less error for the former to explain.

What about an ecumenical pluralist who does *not* accept the coherence requirement? While things are less clear-cut in this case, there are still reasons to believe that, if perspectival relativism is correct, one will be mistaken relative to one's own perspective less often than one would be objectively mistaken if ecumenical pluralism were correct. If perspectival relativism is correct, any one of our beliefs can be mistaken relative to our own perspective, but the *bulk* of our beliefs cannot (since the truth relative to our perspective is determined by applying the coherence requirement to our existing beliefs and desires). If ecumenical pluralism is correct, on the other hand, some people could have radically mistaken belief-sets (eg if they are Nazis or believe that slavery is morally permissible). Admittedly, many ecumenical pluralists claim that many people's moral beliefs are generally correct, but they would have to rule out at least some beliefs (and belief-sets) that could satisfy the coherence requirement (such as the Nazi's moral code). Given that the perspectival relativist also claims that many people's (indeed, everyone's) beliefs are generally correct (relative to their own perspective), this means that there is likely to be more moral error for this ecumenical pluralist to explain than for the perspectival relativist.

What about the second concern mentioned earlier – that the perspectival relativist's denial of moral error in certain cases appears preposterous? The perspectival relativist explains instances of moral diversity where there is no lack of coherence by claiming that *both* sides are correct, relative to different perspectives. However, surely it is wildly implausible to say that the Nazis' moral views were correct, even if this means 'correct relative to their moral perspective'? Surely, Nazis were *mistaken*, just as someone is mistaken if they claim that slavery or genocide is morally permissible. Is it not more plausible to say that these disputes are due to moral error than to say that they are due to different things being true for different people?

However, perspectival relativism claims only that there is *a* perspective according to which Nazism is correct; it allows us to say, from *our* perspective, that Nazism is evil. Perspectival relativism denies that Nazism is *objectively* wrong, but it does not deny that Nazism is wrong relative to many people's perspectives. Nor need it deny that *some* moral views are the result of self-interest and/or prejudice. Thus, the perspectival relativist does not have to choose between the claim that Nazis are evil and the claim that the truth of these matters varies with one's moral beliefs and desires. She can affirm *both*. Perspectival relativism is compatible with our intuition that Nazis are mistaken – it is just that our intuition is valid only within our own perspective. (Though there is obviously a great deal of overlap between perspectives on this point.) Is this so implausible? We may be certain that Nazism is wrong, but are we certain that it is *objectively* wrong (that is, that its wrongness is mind-independent, or would be the outcome of a rational convergence)?⁷³ Indeed, do we have *any* clear intuitions about the

⁷³ This question presupposes that the belief that Nazism is wrong can be separated from the belief that it is *objectively* wrong. This presupposition was discussed briefly at 95-97 above.

metaphysical status of the wrongness of Nazism, or is this a question that most people consider only after embarking on a philosophical investigation that has already influenced their views?

4) Objectivism's promissory note

This does not conclude the debate about which meta-ethical theory can best explain the existence of moral diversity. There are many ways in which ecumenical pluralists could seek to respond to the arguments in the previous Section. While I do not seek to resolve the meta-ethical debate in this thesis, it is worth considering two of these responses, to reinforce my contention that there is a genuine controversy as to whether ecumenical pluralism or perspectival relativism is correct.

The first response suggests that I have asked too much of the ecumenical pluralist in expecting her to explain *all* moral differences. Perhaps it is enough that she can explain how moral diversity arose with regard to *some* issues (such as slavery). This may then give us confidence that eventually we will be able to explain other differences in this way, too.⁷⁴

However, for this confidence to be warranted, certain conditions must be satisfied. Firstly, there must be some moral disputes that we can already convincingly explain using the resources available to the ecumenical pluralist. Secondly, there must be some evidence that this number is increasing, or at least that steps are being taken

⁷⁴ cf Wiggins' 'counsel of perseverance': Wiggins (1990-91) 75-78.

that will lead to such an increase. Even if the first of these conditions can be met, the second cannot. Let us assume that it is plausible to claim that anyone who believes that slavery is permissible is self-interested or prejudiced. Let us also assume that this claim would not have appeared convincing to us 200 years ago, so that there is an explanation of at least one moral disagreement available now that was not available in the past. This is still not enough for the ecumenical pluralist. She must also refute the suggestion that, for every dispute that we can now explain but once could not, there is another dispute that used to be explicable using the ecumenical pluralist's schema but now is not. For example, we may be convinced now that anyone who believes that slavery is morally permissible is either prejudiced or self-interested, but if we had lived 200 years ago we might well have been convinced that anyone who believed that blasphemy was permissible, or capital punishment wrong, was equally prejudiced, self-interested or just plain stupid. Such an explanation would obviously be far more contentious today, as would any alternative objectivist explanation (eg that the answers to these questions are incommensurable, or that the dispute is the result of empirical disagreement). This should at least cause us to hesitate before assuming that we will make progress in explaining more and more disagreements in terms of the ecumenical pluralist's schema.

Alternatively, the ecumenical pluralist could respond to the arguments of the previous Section by offering further explanations of moral error to supplement those already canvassed. For example, she could argue that another reason why people hold incorrect moral beliefs is because the costs of changing those beliefs often outweigh any benefits that would ensue.⁷⁵ Changing our moral beliefs can be costly in terms of time, effort and anxiety. It takes time and effort to consider whether a change in one's moral

beliefs is desirable, and – given the importance of the subject-matter being considered – this process may generate significant anxiety. Moreover, holding the correct moral belief with regard to some topics may not be particularly important. For example, if one will never have an abortion oneself, and will never need to counsel someone else who is considering whether to have an abortion, does it really matter whether one's beliefs about abortion are correct? Given the time and effort it might take to reach the correct belief regarding abortion, would one not be better off spending one's time in other ways? And, if so, is it not unsurprising that some people hold incorrect beliefs regarding the permissibility of abortion?

Certainly, it is true that, as individuals, we do not have time to explore in depth every moral issue that we encounter. Speaking personally, while I have views about the permissibility of abortion, I have not thought through this issue as thoroughly as I might have, and so it may not be surprising if my views about abortion are mistaken. However, there are a significant number of other people for whom the permissibility of abortion is a far more pressing question than it is for me. These include people who are considering whether to have an abortion but who are concerned about doing the morally right thing, people who are worried that abortion is contrary to fundamental moral or religious tenets and who have the time and inclination to pursue this issue in depth, and so on. None of *these* people's views can be dismissed on the basis that they view the costs of arriving at the right answer as outweighing the benefits of arriving at that answer. Yet these people continue to disagree about the merits of abortion, some concluding that it is permissible, others concluding that it is not. Thus, even if the

⁷⁵ This response was suggested by John Gardner & Timothy Macklem.

present suggestion can explain why *some* people are morally mistaken, there is a very significant range of moral disagreement that it cannot explain.

Again, the ecumenical pluralist can claim that whether abortion is permissible is one of those questions that lack a single objectively right answer. However, what I have just said about abortion applies to every other contested moral issue. For example, there are moral philosophers who think that a lot turns on, not just *whether* slavery is impermissible, but *why* it is impermissible. These philosophers clearly consider the costs of arriving at the right answer to this question to be outweighed by the benefits of reaching that answer. However, even if they all agree that slavery is impermissible, they disagree markedly about why it is impermissible. We have already seen how this distinguishes relatively clear cases in morality from relatively clear cases in science.⁷⁶

There is a further reason for playing down this attempt to explain moral disagreement. Cases in which the costs of changing one's moral beliefs outweigh the benefits may be less frequent than one might realise. For example, many moral philosophers concede that – even if we should not strive to render all our moral beliefs coherent – we should at least seek to arrive at ‘pockets’ of coherence.⁷⁷ On this view, there are at least *parts* of morality that need to be internally coherent. However, holding

⁷⁶ John Tasioulas has suggested that the reason that people disagree about why slavery is impermissible may be that the wrongness of slavery is over-determined. On this view, there are several distinct reasons why slavery is wrong, and different opponents of slavery choose different reasons to support their view. However, this does not reflect the views of participants in the debate over slavery. Kantians and utilitarians do not each accept that the other has good grounds for opposing slavery. Rather, they argue that their own proposal is correct and other suggestions are mistaken. For the reasons already given, this would be somewhat surprising if it was an objective truth that the wrongness of slavery is over-determined.

⁷⁷ eg Raz (1995) 298.

the correct belief with regard to any issue falling within one of these ‘pockets of coherence’ is more important than it might appear. Imagine, for the purposes of illustration, that our beliefs about the sanctity of life constitute one such ‘pocket of coherence’. If so, I cannot justify my failure to think through the issue of abortion solely on the basis that I never plan to have an abortion and am unlikely to need to provide advice to anyone who is considering whether to have an abortion. Any mistake that I make regarding abortion may infect my other beliefs about the sanctity of life, because my beliefs about abortion are meant to cohere with those other beliefs. In other words, if we want even a ‘pocket’ of coherence here, and if we continue to hold a false belief regarding abortion, then we will have to start rejecting true beliefs (regarding other aspects of the sanctity of life) that do not cohere with that false belief. Yet holding correct beliefs regarding other aspects of the sanctity of life may well be important enough to justify the costs involved in reaching the correct belief regarding abortion.

D. Is Perspectival Relativism Incoherent?

Moral diversity is such a prominent feature of our moral practices that any concerns about the ecumenical pluralist's explanation of it should raise doubts about whether ecumenical pluralism is in fact the best account of those practices. Admittedly, even if ecumenical pluralism offers an inferior explanation of moral differences compared with perspectival relativism, this does not show that ecumenical pluralism is wrong, since there may be other aspects of our moral practices that it can explain better than perspectival relativism. Nevertheless, the difficulties facing an ecumenical pluralist

when explaining moral diversity give us reason to hesitate before regarding ecumenical pluralism as clearly superior to perspectival relativism.

However, many readers might be tempted to respond that – whatever the problems with ecumenical pluralism – it is still clearly preferable to perspectival relativism, because perspectival relativism is obviously flawed. To justify my decision to focus on perspectival relativism when considering the implications of meta-ethics for adjudication in later chapters, I need to show that it is harder to refute than might be thought. To this end, in this Part I consider three arguments that one might offer to show that perspectival relativism is clearly flawed – that it is self-refuting, that it collapses into nihilism, and that it leaves no room for meaningful moral discourse – and contend that none of these arguments is successful.

It is worth repeating that my aim is not to vindicate perspectival relativism. While I suggest that the three arguments considered in this Part do not succeed in showing perspectival relativism to be mistaken, there are many other criticisms of this meta-ethical position that I shall not address. It is enough to achieve my goal of showing that there is some doubt as to whether ecumenical pluralism is correct and perspectival relativism incorrect if I can show that some of the objections to perspectival relativism that have been thought to be most devastating may not be as potent as they first appear. (This also explains why – when discussing ecumenical pluralism – I sought to show that there is some doubt about whether that view is *true*, whereas – when discussing perspectival relativism – I seek to show that there is some doubt about whether that view is *false*. This difference in treatment is explicable on the

basis that this chapter is concerned to refute the suggestion that ecumenical pluralism is clearly correct and perspectival relativism is clearly incorrect.)

1) The self-refutation argument

Perhaps the most common criticism of relativism is that it is self-refuting. The argument begins by asking whether the claim that truth is relative (henceforth, ‘the relativist’s thesis’) is *itself* only relatively true. If not, there is at least one truth that is *not* relative (namely, the relativist’s thesis). If, on the other hand, the claim *is* relative, then there must be a point of view relative to which it is false. Either way, the relativist’s thesis entails its own falsity.⁷⁸

At least when applied to perspectival relativism, however, both limbs of the self-refutation argument are flawed. Let us start with the first option – that the relativist’s thesis is *objectively* true. The existence of at least one truth that is objective (namely, the relativist’s thesis itself) is inconsistent with perspectival relativism only if the relativist’s thesis is a *moral* claim. The perspectival relativist states that *moral* truth is not objective; she says nothing about other domains of inquiry. Moreover, the relativist’s thesis is *not* a moral claim. Moral claims concern how we should act to respect other people’s interests, whereas the relativist’s thesis is a meta-ethical claim, dealing with the type of truth that moral statements can attain.⁷⁹ It is perfectly

⁷⁸ Harre & Krausz (1996) 28.

⁷⁹ This distinction is discussed further in Chapter III.

compatible with the claim that moral statements can be only relatively true to state that meta-ethical statements can be objectively true.⁸⁰

The second limb of the argument fares no better. If the relativist's thesis is only relatively true, then there must be a point of view from which it is false. However, this does not render that thesis self-refuting. It simply means that the relativist's thesis is true from some points of view and false from others (in the same way as perspectival relativism claims that *moral* statements can be true relative to some perspectives but not others).

Thomas Nagel argues that, even if treating the relativist's thesis as only relatively true saves it from self-refutation, this renders it irrelevant to anyone who is not already a relativist.⁸¹ The thesis may be valid for the perspectival relativist, but it is not valid for us, and so we can simply ignore it. However, just because we do not *believe* that perspectival relativism is true does not mean that it is *not* true (for us). We must examine our other beliefs to see whether they entail that perspectival relativism *is* true. We must also check that we have adequate responses to the arguments in favour of perspectival relativism (such as the argument from diversity), responses that are consistent with our other beliefs. Thus, perspectival relativism may be true for many more people than first appears.

⁸⁰ One might argue that the considerations that show that moral truth is relative also show that meta-ethical truth is relative. If so, the perspectival relativist must confront the second limb of the self-refutation argument, which I discuss next.

⁸¹ Nagel (1997) 15.

I leave open the question of which response to the self-refutation argument should be adopted by the perspectival relativist. However, the answer to this question is relevant to this thesis in one respect. If perspectival relativism is only *relatively* true, then any implications that it has for adjudication exist only for those people for whom it *is* true. To avoid deciding whether perspectival relativism is itself objectively or relatively true (and – if relatively true – for *whom* it is true), I shall simply reiterate that any implications that it has for adjudication exist for anyone for whom it is true, without deciding whether this is everyone, only some people, or no one.

2) Perspectival relativism and nihilism

Another reason that one might offer for regarding perspectival relativism as clearly flawed is that it collapses into moral nihilism. Moral nihilism agrees with perspectival relativism that both the mind-independence and rational convergence theses are mistaken. However, nihilism concludes from this, not that moral truth exists relative to a perspective, but rather that there is no such thing as moral truth or falsity. (The moral nihilist also rejects any notion of validity or appropriateness with which a non-cognitivist might seek to replace the notion of truth.)

Why would it be thought that perspectival relativism collapses into moral nihilism? One argument is that there is a causal link between rejecting objectivism and accepting nihilism. The conclusion that there are no objective moral truths is claimed (as a psychological matter) to lead one to regard none of one's former moral beliefs as

true.⁸² On this view, one could never actually *be* a perspectival relativist. Upon concluding that objectivism is false, one would inevitably become a moral nihilist instead.

However, while the realisation that there are no objective moral truths *might* cause one to conclude that there are no moral truths at all, it *need* not do so (any more than the conclusion that no judgment of taste is objectively better than another precludes one from making judgments of taste).⁸³ Nor need it lead us to regard our moral beliefs as on a par with our tastes in ice-cream.⁸⁴ We need not regard all our ‘tastes’ as equally important, and we are likely to regard our moral ‘tastes’ as particularly important.⁸⁵

Indeed, not only do we not *need* to conclude from the falsity of objectivism that there are no moral truths, it is extremely unlikely that we *would* draw such a conclusion. Psychologically, it is extremely unlikely that anyone would conclude that there are no moral truths at all (or, at least, that they would consistently act in accordance with this conclusion). It may be easy to *say* that we can do without moral beliefs or desires, but it is very hard (if not impossible) actually to do so. If one is inclined to doubt this, imagine oneself interacting with other people without holding *any* moral beliefs. How

⁸² Finnis (1983) 136 (cf 30, where the claim is more guarded).

⁸³ Foot (1982) 161; Goldsworthy (1996) 45. See also Blackburn's discussion of humour: Blackburn (1993) 155-156.

⁸⁴ Contrast Moore (1982) 1063-1064.

⁸⁵ This remains true even if the only sense that perspectival relativists can give to the claim that our moral beliefs are important is that our desire to behave morally is (typically) particularly *strong*, and that the strength with which we hold this desire coheres with the rest of our beliefs and attitudes.

would those interactions be governed? How would one make claims on other people?⁸⁶ Yet, while we continue to hold moral beliefs, we are committed to regarding those beliefs as *true*.

There is, however, another important argument suggesting that perspectival relativism collapses into moral nihilism. Nicholas Sturgeon claims that moral relativism requires us to treat our moral standards as correct, and that this requirement is contrary to the argument that is supposed to provide support for moral relativism. He argues that one cannot conclude from the absence of objective moral truths that one should therefore treat as correct those beliefs that are true according to one's own standards. If objectivism is false, those standards are no more correct than any other element of one's moral system.⁸⁷ The proper conclusion to draw from the discovery that there are no objective moral truths is that *no* element of our moral system is correct, not that we should assume that certain aspects of that system are correct and can be used to assess the correctness of the *rest* of the system. In other words, the discovery that one's standards are the only thing regulating one's moral judgments should undermine one's confidence in those judgments, rather than convincing one that one's standards make those judgments true.⁸⁸

Sturgeon's argument requires modification if it is to apply to perspectival relativism. Perspectival relativism does not treat any 'moral standard' as automatically

⁸⁶ One could seek to make purely self-interested claims on others, but it would be hard to avoid *moral* outrage if (certain of) those claims were rejected. See further n 89 below.

⁸⁷ Sturgeon (1994) 106.

⁸⁸ Sturgeon (1994) 110, n 80.

correct, since it recognises that any element of one's belief-set may be mistaken. Nor does it take for granted the truth of some aspect of our belief-set and use that aspect to assess the truth of the rest of our belief-set. Instead, it applies the coherence requirement to our existing beliefs and desires in order to determine what is true relative to our perspective. Nevertheless, perspectival relativism does treat as correct those beliefs and desires that satisfy the coherence requirement. Sturgeon could argue that these beliefs and desires are no more correct than any other beliefs or desires. Once we discover that there are no objective moral truths, it does not make sense to regard a coherent moral belief-set as true; instead, we should conclude that *no* moral belief-set (no matter how coherent) can be correct.

This argument assumes that the fact that our moral beliefs cannot be *objectively* correct means that they cannot be correct in *any* sense (or at least not in any sense worth caring about). However, this begs the question against the perspectival relativist, who claims that there is an alternative type of correctness based on the application of the coherence requirement to our existing moral beliefs and desires (and that this type of correctness *is* worth caring about). The conclusion that moral beliefs cannot be *objectively* correct does not entail that they cannot be correct in the perspectival relativist's alternative sense, or that this sense of correctness is trivial or uninteresting.

However, what reason do we have for thinking that the perspectival relativist *can* offer an alternative, worthwhile, sense of correctness? I suggested earlier that, psychologically, we cannot avoid holding moral beliefs of one form or another.⁸⁹

⁸⁹ For a further reason for accepting this conclusion, see Waldron's discussion of the importance and durability of the emotions underlying our moral judgments: Waldron (1998) 95-96.

Moreover, to hold a moral belief is to accept that it is correct. Therefore, we cannot avoid claiming that some moral beliefs are correct, contrary to nihilism. This does not *prove* that nihilism is mistaken – the fact that we cannot avoid holding beliefs that conflict with a certain claim does not necessarily mean that the claim is false. However, it does cast doubt on the claim. It is difficult to think of another assertion that one should accept, but that conflicts with other beliefs that one has no choice but to hold.⁹⁰ If there is any way to avoid this conflict – such as accepting a sense of ‘correctness’ that is compatible with the falsity of objectivism, and so avoids nihilism – then the anti-objectivist has reason to adopt it.

To see that there *is* such a way, remember that perspectival relativism claims that moral beliefs should be rendered coherent. This is an epistemological requirement, not a moral one, and so is not undermined by the falsity of moral objectivism. Since we cannot abandon our moral beliefs, we should at least make them coherent. This provides us with a standard of correctness (namely, that a coherent belief-set is preferable to a non-coherent one) that is compatible with the falsity of moral objectivism. In other words, it is either true or false that two (or more) moral beliefs cohere, and so the coherence requirement provides us with a robust sense of truth that is compatible with a rejection of moral objectivism.⁹¹ However, the requirement of coherence cannot tell us *which* of two inconsistent moral beliefs to reject. To answer this question, we must have recourse to our other moral beliefs and desires, to decide which of the inconsistent beliefs coheres best with the rest of our belief-set. Therefore,

⁹⁰ One exception might be the ‘preface paradox’: Makinson (1965).

⁹¹ 40-60 above.

we should appeal to our other moral beliefs and desires to regulate individual moral beliefs even if objectivism is false, as this is necessary to remove inconsistencies from our belief-set. This requires the perspectival relativist to reject the sort of nihilistic view to which we are psychologically incapable of adhering.

3) Does perspectival relativism allow for moral criticism and debate?

It is often argued that meta-ethical positions like perspectival relativism are unacceptable because they do not allow for meaningful moral criticism. Criticism of moral beliefs held by an adherent of a different perspective is question-begging, because it uses the standards of our perspective, rather than standards that are valid for the person being criticised.⁹² Given this, why should the person being criticised pay any attention to our criticism? Why should she care whether her beliefs breach a set of standards that are not her own, and that cannot be shown to be right without begging the question against her? Indeed, Scanlon claims that moral relativism entails that her conflicting judgment is as valid as ours.⁹³ If so, her response to our criticism is as correct as the criticism itself. Does this not show that, if perspectival relativism is correct, offering criticism is misguided?

⁹² Tasioulas (1998a) 180. A variant of this objection is that any form of critical assessment must invoke a background of rational standards, and so moral criticism is dependent upon the truth of objectivism: Tasioulas (2002) 229-230. However, I argue in Section 4 that perspectival relativism can allow for the existence of rational standards.

⁹³ Scanlon (1995) 229, 236.

Furthermore, if participants in the debate do not share moral truths, then what are moral debates *about*?⁹⁴ One possibility is that each side is simply expressing its own beliefs and desires, rather than trying to *discover* anything. However, this is contrary to our usual understanding of the purpose of debate, which is to *discover* or *establish* the truth, not merely to express something that is already known.

Alternatively, moral debate *can* be seen as having a purpose if perspectival relativism is correct, but one that is far from praiseworthy. The perspectival relativist can argue that we engage in moral debate to persuade our opponents to adopt our beliefs and desires. However, since (according to perspectival relativism) beliefs and desires cannot be objectively assessed, the only reason that someone has for adopting our beliefs and desires is that we want her to. This makes moral argument the imposition of our beliefs and desires on other people. One persuades others to accept one's moral beliefs by coercion, manipulation and force of will, rather than by offering reasons that are valid according to neutral criteria.⁹⁵

However, the claim that perspectival relativism does not allow for meaningful criticism overlooks the availability of *internal* criticism.⁹⁶ Internal criticism involves alleging that someone has failed to abide by the standards of their own perspective – for example, that they hold inconsistent beliefs, or acted on a belief that they themselves judge to be less important than a belief that required a different action. Claims that

⁹⁴ M Smith (1991) 402.

⁹⁵ M Smith (1991) 403-404; Tasioulas (1998a) 182-183.

⁹⁶ cf Walzer's notion of 'social criticism': Walzer (1987) 39.

someone made an *empirical* error bearing on their moral beliefs may also be classified as a form of internal criticism. Such criticism is obviously highly relevant for the person being criticised.

Nevertheless, internal criticism is limited to situations where someone has made a mistake relative to her own perspective. We might believe that someone has a truly pernicious moral belief-set, yet be unable to offer internal criticisms of it because it is internally coherent. Moreover, we cannot criticise anyone's *perspective*, because (ex hypothesi) a perspective is fully coherent. Thus, the availability of internal criticism is insufficient to show that widespread, meaningful criticism is possible if perspectival relativism is correct.

Fortunately, there is another form of criticism that is available to the perspectival relativist – namely, *external* criticism. This involves criticising someone else's perspective using the standards of one's own perspective. (Unlike some forms of moral relativism, perspectival relativism does not entail that we cannot criticise people who hold different moral standards, just that we do so from within our own perspective.) It is this form of criticism that is claimed to be question-begging, pointless or distasteful.

Dealing first with Scanlon's objection, there is a sense in which – if perspectival relativism is correct – the beliefs of the person I am criticising are as good as mine, and a sense in which they are not. The other person's beliefs are as good as mine in the sense that neither is objectively correct. However, relative to my perspective, the other person's beliefs are unlikely to be as good as mine. My beliefs will be true (provided I

did not make a mistake relative to my own perspective), whereas the other person's beliefs will be false. Moreover, if perspectival relativism is correct, when I offer external criticisms, I do so relative to my perspective (even if I am unaware of this fact). Thus, when criticising another person's perspective, the fact that my own perspective is no more *objectively* correct (or incorrect) than theirs does not mean that I must acknowledge their perspective to be *morally* equal to my own.⁹⁷

Moreover, the fact that one is not rationally required to accept external criticism, in the way that one is required to heed internal criticism, does not mean that external criticism is pointless. It may serve a purpose for the person *offering* the criticism. The criticism may be correct relative to *her* perspective, and it may be important for her to express her opposition to the beliefs or conduct being criticised. For example, if we offer an external criticism of Nazism, that criticism is valid relative to our own perspective(s), and voicing that criticism may be important as an expression of values that we hold dear.⁹⁸ Indeed, it may be important, not just in expressing disapproval of Nazism, but also in forging a coalition of people opposed to Nazism.

External criticism may also be important for the person being criticised. It may bring to her attention issues and arguments that she had not previously considered. While this is unlikely to cause her to change perspectives, it may prompt her to improve her existing belief-set. For example, reading Robert Nozick's *Anarchy, State and*

⁹⁷ cf Hurd (1999) 42, who argues that a relativist cannot externally criticise a Nazi because he cannot offer any reason why his view should prevail over the Nazi's. She is right that the relativist cannot offer any *objective* reasons, but he can offer all the reasons that are valid relative to his perspective.

⁹⁸ Rachels (1991) 437.

*Utopia*⁹⁹ did not convert me from a liberal to a libertarian, but it *did* prompt me to think more carefully about (inter alia) why taxation is justified, something that I might not have done had I not read Nozick's book. In the process, I increased the coherence of my moral belief-set by formulating reasons for my belief that taxation is justified, and connecting that belief to other moral views that I hold. Thus, Nozick's external criticism of my perspective was beneficial to me, even though I was not rationally required to accept that criticism.

It might be objected that, while one's response to external criticism might sometimes improve the coherence of one's belief-set, on other occasions it will not. The point here is not the trite one that we do not always respond to criticism in a constructive manner. Instead, the objection is that sometimes it is *legitimate* to respond to external criticism in ways that reduce the coherence of one's moral belief-set. This objection can best be elucidated by the use of another example. Imagine a Marxist who also reads *Anarchy, State, and Utopia*. Before doing so, our imaginary Marxist had a belief-set that was as coherent as it is possible for a human being with finite time and intellect to develop. However, after reading Nozick's book, the Marxist concludes that a significant proportion of his belief-set is mistaken, and he duly rejects all of the impugned beliefs. Surely, this is a permissible response to Nozick's external criticism. Yet how can the perspectival relativist regard it as permissible, given that the Marxist's response to those criticisms has diminished, rather than increased, the coherence of his belief-set?¹⁰⁰

⁹⁹ Nozick (1974).

¹⁰⁰ This example, and the general line of thought underlying it, was suggested by John Gardner & Timothy Macklem.

The perspectival relativist can view this example in either of two ways. Firstly, she could claim that – given how much of his initial belief-set he has rejected – our imaginary Marxist has changed perspectives, abandoning his original Marxist perspective for a new one. The perspectival relativist can allow for the phenomenon of ‘conversion’, where one dramatically changes one’s moral outlook and hence one’s perspective. Given his change of perspective, the Marxist is committed to regarding himself as having benefited from Nozick’s external criticism, since he is (now) committed to regarding his new perspective as preferable to his old one. Moreover, because he has changed perspectives, it need not matter that the Marxist’s new belief-set is less coherent than his old one. Rather than providing a reason to return to his old belief-set, this instead gives him a reason to improve the coherence of his new belief-set.

Alternatively, the perspectival relativist can view the Marxist as persisting with his original perspective, but as significantly modifying his belief-set to bring it more in line with that perspective (in the same way that I sought to do after reading Nozick). The obvious objection to this suggestion is that, if perspectives are meant to be fully coherent belief-sets, one cannot bring one’s belief-set more in line with one’s perspective by reducing the coherence of one’s belief-set. However, the perspectival relativist need not agree that the Marxist has reduced the coherence of his belief-set. If the Marxist’s reaction to Nozick’s arguments is not an example of a conversion between perspectives, then – despite the high degree of coherence among his initial beliefs – there must have been some pre-existing belief or disposition that inclined the Marxist

towards accepting Nozick's arguments. Clearly, the parts of the Marxist's belief-set that he has now rejected were inconsistent with that pre-existing belief or disposition. It was to rectify this lack of coherence that the Marxist had to abandon a significant proportion of his belief-set.

A critic of perspectival relativism may not be satisfied with this explanation, however. If there was an inconsistency between a significant proportion of the Marxist's beliefs, on the one hand, and a single belief or disposition that the Marxist may not even have been fully aware of until reading Nozick's book, on the other hand, then surely coherence requires the Marxist to abandon the latter, not the former? However, the coherence theory of truth requires us to consider not only the number of beliefs or dispositions that cohere with a particular proposition, but also how important those beliefs or dispositions are. It may be that the single belief or disposition with which Nozick's arguments resonated was more important (relative to the Marxist's perspective) than the significant number of beliefs that the Marxist has now rejected.¹⁰¹ This may be so even if the Marxist was *unaware* of the disposition in question until reading *Anarchy, State, and Utopia*. Subconscious attitudes or dispositions are not necessarily less important simply because they are subconscious.

The preceding discussion shows that, if perspectival relativism is correct, we should consider arguments offered by people who hold perspectives different from our own because doing so may help us to improve our belief-set (relative to our own perspective). However, even if this happens occasionally, will such occasions not be

¹⁰¹ Remember that the coherence requirement means that we must abandon one of two inconsistent beliefs, but does not tell us *which* to abandon. Often, this will require us to make a *choice*: 41 above.

relatively infrequent? If so, it might be suggested, we will *generally* lack reason to consider arguments put forward by advocates of different perspectives, even if there may be occasional exceptions.

However, a similar objection could be offered against objectivism. Even if there are objective moral truths, many of the moral debates that we engage in may fail to bring us closer to those truths. Nevertheless, we persist with moral discourse and debate because *occasionally* it enables us to improve our views. This same explanation could be offered by the perspectival relativist. No one has a fully coherent moral belief-set, and one major impetus towards improving the coherence of our belief-set is our participation in moral discourse and debate. The fact that not every moral discussion that we engage in has this beneficial effect does not mean that we should disengage from moral debate, especially as we cannot be sure *which* discussions will be of benefit until we actually engage in those discussions.

* * *

The preceding discussion shows that moral debate is not rendered pointless by perspectival relativism. If perspectival relativism is correct, we engage in debate partly to check whether our moral beliefs meet the standards that we set for them, partly because of the benefit that we gain by expressing external criticisms of others, and partly for the benefit that we gain from other people's external criticisms of us.

There is another reason to engage in moral debate, however. Different moral beliefs represent different claims about how people should act towards others. One way of getting people to act in the way that we want is by trying to persuade them to accept our moral beliefs. However, whether we go about this task via coercion and manipulation depends on a moral decision that we must make. We could equally set about persuading other people to accept our moral beliefs by forthrightly offering internal and external criticisms of their beliefs, in the hope that they can be persuaded to adopt our views without the need for deception or force. Perspectival relativism does not require that we adopt one of these approaches rather than the other, or that we resort to the former if (as it often will) the latter fails.

4) Perspectival relativism and rationality

There is a loose end left over from the discussion in the previous Section that needs to be tied up. It is sometimes claimed that it is possible to resolve moral disagreements in a rational way only if objectivism is correct.¹⁰² However, there can be rational constraints on moral argument even if objectivism is false. If perspectival relativism is correct, moral judgments are still subject to standards of rationality, since our moral belief-set must conform to the coherence requirement. Thus, one can offer rational arguments to support one's moral claims even if perspectival relativism is correct, by invoking the coherence requirement. It may even be possible to resolve some moral disputes using this requirement (and hence 'rationally'). For example, there may be some moral disputes regarding which we can identify the solution that coheres best with

¹⁰² eg Tasioulas (2002) 223. In this context, 'rational argument' is being contrasted with 'non-rational persuasion'.

the rest of a particular perspective, and so can identify the position that an adherent of that perspective is rationally required to hold.

Nevertheless, there is an important difference here between objectivism and perspectival relativism. If perspectival relativism is correct, invoking the coherence requirement can settle moral disputes only relative to particular perspectives. Therefore, even though – if perspectival relativism is correct – one can appeal to considerations of rationality when engaged in moral debate, it is not possible to resolve moral disputes in a way that everybody, no matter what perspective they hold, is rationally compelled to accept. If the rational convergence thesis is correct, on the other hand, it may be possible to do so.

Thus, while considerations of rationality apply to moral discourse whether objectivism or perspectival relativism is correct, it seems that those considerations cannot produce conclusions that everybody is rationally compelled to accept if perspectival relativism is correct, whereas they may be able to do so if certain forms of objectivism are correct. However, one should not overstate this difference, because the perspectival relativist can offer a ‘thicker’ account of rationality, according to which one *can* resolve moral disputes in a way that everybody is rationally compelled to accept.

To see how this is possible, let us take a step back. It might be thought that the notion of rationality available to a perspectival relativist is ‘thinner’ than that available to an objectivist. On this view, the perspectival relativist's notion of rationality is

limited to conformity to certain epistemological constraints (namely, those embodied in the requirement of coherence), whereas an objectivist can (though need not) define rationality in terms of conformity to certain moral constraints as well.¹⁰³ It might also be thought that this means that many more moral disagreements are rationally resolvable if objectivism is correct than if perspectival relativism is. However, perspectival relativists can define rationality in terms of conformity to certain moral constraints, too; it is just that this definition will be valid only relative to a perspective. For example, relative to a particular perspective, it might be irrational to believe that abortion is not murder. It is only if she wants standards of rationality that are applicable to *all* perspectives that the perspectival relativist is limited to the thin, epistemological conception.

However, can a standard that is valid only relative to a particular perspective be a standard *of rationality*? Nagel suggests that standards of rationality must be universally valid.¹⁰⁴ This requirement can be met by the thick conception of rationality even if perspectival relativism is correct. If it is irrational relative to my perspective to believe that abortion is not murder, then *anyone* who believes that abortion is not murder breaches this standard of rationality. However, Nagel also claims that standards of rationality must be independent of both community conventions and personal idiosyncrasies.¹⁰⁵ This requirement is *not* satisfied by standards of rationality that exist only relative to one's perspective, because those standards are mind-dependent (that is,

¹⁰³ In Chapter I, I stated that the rational convergence theorist should regard principles of rationality either as non-moral or as *mind-independently valid*.

¹⁰⁴ Nagel (1997) 5.

¹⁰⁵ Nagel (1997) 3-4.

they are valid only if they cohere with the rest of one's moral beliefs and desires). Yet is it not strange to say that what counts as a standard of rationality depends on one's personal beliefs and desires? Does this not show that the thick conception of rationality is unavailable to perspectival relativists?

If standards of rationality must be mind-independent, then perspectival relativism leaves room for only the thin sense of rationality. Moral discourse is governed by epistemological standards of rationality (the requirements of coherence), but there are no moral standards of rationality (and it is moral standards of rationality with which I shall be concerned in the rest of this Section). However, the fact that there cannot be rational, *in the sense of mind-independent*, resolutions of moral disputes cannot pose any new problem for perspectival relativism, since this is simply another way of saying that there cannot be objectively valid resolutions of moral disputes if perspectival relativism is correct.

In other words, critics of perspectival relativism cannot have it both ways. They cannot argue both that objectivity and rationality are this closely related *and* that the fact that perspectival relativism does not allow for rational resolutions of moral disputes poses a distinct problem for perspectival relativism.¹⁰⁶ If the first claim is correct, then the fact that perspectival relativism precludes any rational resolution of moral disputes cannot pose any problems for perspectival relativism that could not be brought to light

¹⁰⁶ This might not be the purpose behind the suggestion that perspectival relativism cannot allow for the rational resolution of moral disputes. Instead, the suggestion might be that this shows that whether one accepts perspectival relativism has implications for adjudication. However, a similar problem arises here, as well. If principles of rationality are necessarily mind-independent, then the fact that perspectival relativism does not allow for such principles cannot have any implications for adjudication that are not inherent in the perspectival relativist's rejection of objectivism in the first place.

simply by asking whether *the rejection of objectivism* poses any problems for perspectival relativism.

Therefore, if it is worth giving separate consideration to whether one can provide rational justifications for one's moral views if perspectival relativism is correct, we need an account of rationality that is independent of moral objectivism. It seems plausible to claim that standards of rationality must *in some sense* be independent of personal idiosyncrasies. However, this requirement can be satisfied if standards of rationality are universally valid *within a perspective*. Relative to one's perspective, a moral standard of rationality is binding upon everyone regardless of any idiosyncrasies that they may have (though acceptance of the perspective itself depends on one's own idiosyncrasies).

This means that, in the thick sense of 'rationally', perspectival relativists *can* allow that moral disputes can be resolved in a way that everybody is rationally compelled to accept. Nevertheless, there remains a difference between objectivism and perspectival relativism in this regard. The perspectival relativist can allow that moral disagreements can be resolved in a way that everybody is rationally compelled to accept only in the *thick* sense of 'rationally' (and so only relative to a perspective). An objectivist who accepts the rational convergence thesis might claim that many moral disagreements can be rationally resolved in the *thin* (non-moral) sense of 'rationally' and/or that the rational resolution of disagreements in the *thick* sense is not confined to particular perspectives. Whether this difference has any implications for adjudication will be considered later in the thesis.

E. Conclusion

The purpose of this chapter has been neither to persuade the reader to reject ecumenical pluralism, nor to persuade her to accept perspectival relativism. Rather, my goal was to establish that there is a genuine debate as to whether ecumenical pluralism or perspectival relativism is correct. I have criticised ecumenical pluralism and defended perspectival relativism because the philosophical climate is currently conducive to the former and hostile to the latter. This raises the possibility that someone might consider it unnecessary to compare the implications of these two views for adjudication, either on the basis that ecumenical pluralism is clearly correct or on the basis that perspectival relativism is clearly incorrect. I hope to have shown that the merits of the meta-ethical debate are less clear-cut than this critic would suggest, and so it is worthwhile considering the implications for adjudication of both ecumenical pluralism *and* perspectival relativism. It is to this task that I turn in the next chapter.

CHAPTER III: RONALD DWORKIN AND EXTERNAL SCEPTICISM

In the previous chapter, I argued that it is not obvious how we should resolve the debate between the meta-ethical positions introduced in Chapter I. It is now time to consider whether those positions have any implications for adjudication. In this chapter and the next, I consider the views of two writers who have denied that the truth or falsity of moral objectivism has any implications for adjudication. The first of these is Ronald Dworkin.

Dworkin's claims about the (lack of) implications of meta-ethics for adjudication take two somewhat different forms. In *Law's Empire*,¹ he argued that – while meta-ethical claims may be intelligible – they have no implications for adjudication, and so can be safely ignored when discussing judicial decision-making. A decade later, in an article in *Philosophy and Public Affairs*,² his claim was more radical. He argued that no claim can intelligibly be given a meta-ethical reading (in which case, there cannot be a meta-ethical position that has implications for adjudication, since there cannot be a coherent meta-ethical position in the first place). I shall refer to the first line of argument as the ‘irrelevance thesis’ and the second line of argument as the ‘no-sense thesis’, and shall discuss each in turn.³

¹ Dworkin (1986).

² Dworkin (1996b). In the text, I shall refer to this article as ‘Objectivity and Truth’.

³ The relationship between Dworkin's two discussions of this issue is more complicated than the text suggests. In particular, Dworkin (1996b) contains elements of the irrelevance thesis, in addition to the no-sense thesis: 149-150 below.

A. Internal and External Scepticism

Before considering either Dworkin's irrelevance thesis or his no-sense thesis, we must first examine the distinction that he draws between internal and external scepticism. That distinction is drawn in slightly different terms in *Law's Empire* and in 'Objectivity and Truth'. In particular, references to 'Archimedeanism', 'neutrality' and 'austerity' appear only in the later article. However, the two accounts of the difference between internal and external scepticism are (I think) compatible, and so I shall present the distinction in a way that I believe is appropriate for a discussion of both the irrelevance and no-sense theses.

External scepticism is the claim that there is no such thing as objective moral truth.⁴ As such, it purports to be a metaphysical, not a moral, theory. It does not deny that moral statements can be true (or valid or appropriate in some sense, in the case of non-cognitivism), only that they can be *objectively* true (or valid or appropriate).⁵ Moreover, it claims not to challenge any particular moral statement, but rather to leave those statements untouched. In other words, it sees itself as a claim about the status, rather than the content, of moral judgments.⁶ Dworkin labels such a theory 'Archimedean'. Archimedean theories purport to stand outside a whole body of beliefs

⁴ Dworkin (1996b) 88, n 1. This is external scepticism *about morality*. One could also be externally sceptical about other domains of thought, but it is morality that is of concern to participants in the meta-ethical debate.

⁵ Actually, Dworkin wavers as to whether external scepticism denies that moral statements can be *true* or *objectively true*. However, the position outlined in the text seems to be his official position, and is definitely the better position. See further 135 below.

⁶ Dworkin (1986) 79-80.

and to judge it from premises or attitudes that owe nothing to it. Thus, external scepticism claims to be both ‘neutral’ (that is, it does not take sides in the moral debates whose status it assesses, and so has no direct implications for action) and ‘austere’ (that is, it does not rely upon any moral premises or convictions).⁷

So what does external scepticism say about the status of moral judgments? It states that moral claims cannot be proven or tested like claims in physics, and that moral values or properties are not part of ‘the fabric of the universe’.⁸ External scepticism can allow that (say) genocide and slavery are wrong, but it denies that their wrongness is ‘out there’ in reality. Instead, their wrongness is something that we project onto reality (and/or is a product of our emotions).⁹ Dworkin claims that most of us disagree with the positive claims of external scepticism (that moral judgments are something that we project onto reality, or are products of our emotions). Instead, we think that genocide is wrong, that this opinion is true, and that this is not just a subjective reaction on our part. However, he acknowledges that external sceptics offer arguments for their views (such as that there is no objective morality out there for our moral beliefs to match), and that these arguments do not *seem* to be moral in nature. He even concedes that external scepticism is attractive, allowing people to abandon all claims about the objective truth of their moral beliefs while still embracing those beliefs as enthusiastically as before.¹⁰

⁷ Dworkin (1996b) 92.

⁸ Dworkin (1986) 79-80.

⁹ Dworkin (1996b) 92.

¹⁰ Dworkin (1996b) 92-94.

Internal scepticism, on the other hand, claims that one would be morally mistaken if one made certain kinds of moral judgment. More precisely, it denies some group of moral claims, and justifies that denial by endorsing a different moral claim. Dworkin gives the example of an internal sceptic about sexual morality, who denies that sexual acts (in themselves) have *any* moral status because she believes that suffering is the only thing that is inherently bad and denies that sexual acts (in themselves) cause suffering.¹¹ Since it is itself a moral judgment, internal scepticism cannot be universal in scope (or else it would be self-refuting). However, it can be extremely broad, claiming that all moral judgments except for the one(s) upon which it rests are mistaken. As an example, Dworkin cites the claim that morality is ‘empty’ because there is no God, which presupposes that God provides the only acceptable basis for morality.¹²

How does Dworkin's discussion of internal and external scepticism relate to the distinction drawn in Chapter I between objectivism and anti-objectivism? Since external sceptics and their opponents argue about whether moral truth can be objective, it might be thought that the debate between objectivism and anti-objectivism is equivalent to the debate between external sceptics and their opponents. However, in Chapter I, I did not distinguish objectivism from anti-objectivism by asking whether moral claims can be proven like claims in physics, whether they are part of ‘the fabric of the universe’, or whether their truth is ‘out there in reality’. Rather, I distinguished objectivism from anti-objectivism partly in terms of whether true moral statements are

¹¹ Dworkin (1996b) 90-91. It is unclear how one could conclude that sexual acts have *no* moral status, as opposed to having the ‘status’ of being morally permissible. However, I leave this puzzle to one side, since my concern is primarily with *external* scepticism.

¹² Dworkin (1996b) 91. Dworkin claims that this presupposition is itself moral in nature.

true independently of our moral beliefs and partly in terms of whether there could be a rational convergence upon certain moral statements.¹³ This seems like a very different distinction from the one that Dworkin draws between external sceptics and their opponents.

This should cause us to hesitate before concluding that perspectival relativism is a form of external scepticism, and that ecumenical pluralism and Moore's moral realism are opponents of external scepticism. This hesitation should be reinforced by the fact that – unlike external scepticism – perspectival relativism does not claim to be neutral, and need not purport to be austere. I shall argue in Part B that, while perspectival relativism has no *direct* moral implications, it can combine with certain moral beliefs to produce further moral conclusions. Hence, it takes sides in actual moral disputes and so is not neutral. I can think of no reason why a perspectival relativist need deny this fact. Nor need perspectival relativism be austere. The argument in Chapter II that perspectival relativism explains moral diversity better than ecumenical pluralism depends on certain claims that are arguably (partly) moral in nature. The argument from diversity is plausible only if the amount of moral disagreement is significant when compared with the amount of moral agreement. Whether this condition is satisfied may depend partly upon the moral significance of areas of moral agreement vis-a-vis areas of moral disagreement. In other words, whether there is a significant amount of moral disagreement for meta-ethical theories to explain may depend in part on whether disputed moral issues are important or trivial. Determining whether this condition is

¹³ Dworkin takes a stance on the former issue, claiming that true moral judgments are true regardless of what anyone thinks about them. However, he argues that this claim is *moral* in nature: 142-144 below.

satisfied may require a moral judgment that then affects the plausibility of perspectival relativism.

Even if perspectival relativism relies (in part) upon certain moral claims for its plausibility, this need not render it self-refuting. It will do so only if the moral claims upon which perspectival relativism relies are meant to be objectively true. If they are only relatively true, then perspectival relativism itself is only relatively true (because it depends for its truth on claims that are only relatively true), but it is not self-refuting. This does, however, mean that perspectival relativism need not purport to be austere, since it may self-consciously rely upon certain moral claims.

Finally, Dworkin sometimes portrays external scepticism as claiming that moral propositions are neither true nor false.¹⁴ However, we saw in Chapter I that perspectival relativism accepts that moral statements can be true or false, denying only that their truth or falsity is mind-independent or can be the subject of a rational convergence. Thus, if Dworkin's discussion of external scepticism is to be applicable to perspectival relativism, it must not hinge upon this particular characterisation of its target.

For these reasons, it is doubtful whether perspectival relativism can be regarded as a form of external scepticism. Yet nor, taken at face value, is it a version of internal scepticism. Perspectival relativism at least *purports* to be a meta-ethical, rather than a moral, thesis. Moreover, internal scepticism about (say) the wrongness of genocide

¹⁴ eg Dworkin (1996b) 89.

precludes us from asserting that genocide is wrong,¹⁵ yet perspectival relativists insist that their view does *not* preclude us from making such assertions (not even if genocide is permissible relative to other people's perspectives). Unlike internal scepticism, perspectival relativism does not purport to have *direct* implications for action.

The lack of fit between Dworkin's discussion of internal and external scepticism and my distinction between objectivism and anti-objectivism will become important when we examine both the irrelevance and no-sense theses later in the chapter. First, however, we must ask a threshold question. We have seen that Dworkin's distinction between external scepticism and its opponents does not track my distinction between objectivism and anti-objectivism. In particular, the form of anti-objectivism on which I have chosen to focus (perspectival relativism) does not satisfy Dworkin's definition of external scepticism. Does this mean that Dworkin's attempt to show that external scepticism is irrelevant (the irrelevance thesis) or nonsensical (the no-sense thesis) is of no concern when considering whether the debate between objectivism and anti-objectivism has implications for adjudication?

To answer this question in the affirmative would be to miss the genuine challenge posed by Dworkin's discussion. We shall see that Dworkin's no-sense thesis is potentially fatal to perspectival relativism, even though perspectival relativism does not satisfy his definition of external scepticism. (It poses the same challenge to ecumenical pluralism and Moore's moral realism, since these views also purport to be meta-ethical in nature.) Thus, rather than treating Dworkin's discussion of external

¹⁵ Dworkin (1986) 85.

scepticism as irrelevant to perspectival relativism, we should instead modify his tests of neutrality and austerity to establish a revised definition of external scepticism that perspectival relativism does satisfy.¹⁶

There is a further reason for re-defining external scepticism so that it applies to perspectival relativism. It is reasonably clear that Dworkin *intends* his discussion of external scepticism to apply to views like perspectival relativism. For example, he states that external sceptics claim to reject, not morality, but only certain philosophical opinions about it.¹⁷ This is precisely what perspectival relativism claims to do, and so we should try to find a way of fitting that view within Dworkin's discussion.

For these reasons, let us review the neutrality and austerity requirements. Dworkin's neutrality requirement is really *two* requirements – that external scepticism not take sides in moral debates and that it have no direct implications for action. We shall see in Part B that, while perspectival relativism does not satisfy the former requirement, it does purport to satisfy the latter. It claims not to entail, by itself, any moral view (though it may combine with certain moral beliefs to produce further moral conclusions). This suggests that all that should be required for a view to be neutral is that it has no direct moral consequences – that is, that it not take a stand on moral issues by itself, as opposed to when it is combined with certain moral beliefs.

¹⁶ As we have seen, Dworkin also mischaracterises the meta-ethical debate more generally. This problem is addressed at 157-160 below.

¹⁷ Dworkin (1996b) 88, n 1.

Perspectival relativism also purports to be neutral in another sense. It claims to leave untouched the fact that moral beliefs can be true or false, whilst leaving open the possibility that it may indirectly affect *which* beliefs are true. While perspectival relativism may have indirect moral consequences,¹⁸ it purports to leave us free to make moral claims, engage in moral debate, etc. This can be compared with internal scepticism, which condemns the making of moral judgments within whichever domain it is sceptical about. For example, an internal sceptic about sexual morality denies that we should make any moral claims about sexual acts, because sexual acts are not (in themselves) appropriate subjects of moral evaluation.

Therefore, we should replace Dworkin's neutrality requirement with a new, two-part requirement. A purportedly meta-ethical theory is neutral if it has no direct moral consequences, and if it leaves us free to make moral claims and engage in moral debate.¹⁹

As for austerity, this requirement was introduced partly due to Dworkin's assumption that the beliefs on which external scepticism is based must be *objectively* valid, or else the external sceptic would have to present her view as a 'subjective' report regarding which we need take only a biographical interest.²⁰ If this assumption were correct, external scepticism could not rely upon moral beliefs, because those beliefs would have to be objectively valid (contrary to the external sceptic's thesis). However, I

¹⁸ 147-148 below.

¹⁹ Not all versions of anti-objectivism purport to be neutral even in this revised sense: n 22 below.

²⁰ Dworkin (1996b) 88.

argued in Chapter II that perspectival relativism could claim to be only relatively true, whilst remaining of more than merely biographical interest. This means that it can rely for its validity, in part, on moral beliefs that are only relatively true.

Dworkin's other reason for introducing the austerity requirement is that, even if a sceptical position is not neutral, it might still be genuinely external if it undermines our moral beliefs via a completely non-moral argument. According to Dworkin, this requires that the case for external scepticism rely on no moral premises whatsoever.²¹ However, why cannot external scepticism rely on arguments that make use of moral premises in certain ways? To be a form of external scepticism, a view cannot rely on moral arguments, but the use of a moral premise does not necessarily make an argument a *moral* argument. Just as a moral argument can make use of a scientific premise (eg regarding certain beings' ability to feel pain) and yet remain a moral argument, so can a non-moral argument make use of a moral premise and yet remain a non-moral argument. In particular, I argue in Part C that the claims made by perspectival relativism can be given a non-moral reading even if (as suggested above) their defence relies partly upon certain moral premises concerning the significance of areas of moral diversity.

This means that we must revise the austerity requirement, so that it states that the case for external scepticism must not take the form of a moral argument, though it may consist of a non-moral argument that makes use of moral premises. However, this revised austerity requirement adds nothing to the neutrality requirement. Any genuinely

²¹ Dworkin (1996b) 123.

moral argument will have direct moral consequences, and so will not be neutral. Therefore, any breach of the revised austerity requirement will also be a breach of the neutrality requirement.²² Since the revised austerity requirement adds nothing to the neutrality requirement, it can safely be ignored.

B. The Irrelevance Thesis

Having seen what Dworkin means by internal and external scepticism, and having modified his account of external scepticism so that it applies to perspectival relativism, let us now consider his irrelevance thesis. This is his claim that external scepticism is irrelevant to adjudication (and to legal practice and theory more generally). Dworkin offers two arguments to support this claim. The first is that the truth or falsity of external scepticism cannot affect the truth or falsity of moral statements. The second is that the external sceptic denies claims that nobody makes. I shall consider each of these arguments in turn.

1) Moral truth and falsity

In *Law's Empire*, Dworkin introduces external scepticism in the context of his discussion of interpretation. He wishes to argue that some interpretations can be better

²² The converse is not true. The neutrality requirement can be breached without also breaching the austerity requirement. Indeed, Dworkin portrays Mackie as an external sceptic who rejects the neutrality requirement but accepts the austerity requirement, and devotes considerable effort to arguing against this form of external scepticism: Dworkin (1996b) 112-129. This shows that not all external sceptics accept both the neutrality and austerity requirements; some accept only the latter. However, in this chapter I shall consider only forms of external scepticism (such as perspectival relativism) that purport to comply with *both* requirements, since they are harder to defend against Dworkin's critique (given that they claim to be both austere *and* neutral).

than – not merely different from – other interpretations. However, he is worried that someone might object that there can be no right answer to the question of which interpretation is correct, and he seeks to show that external scepticism cannot be used to support this objection.²³

While Dworkin's focus is on interpretation, it is clear that his discussion is meant to apply to morality (presumably, both as a possible object of interpretation in its own right and as an element in legal interpretation).²⁴ Dworkin wishes to show that some moral views are preferable to others (indeed, that there are right answers to moral questions) or at least that external scepticism cannot be used to support the contrary position. Moreover, he concludes from this that external scepticism poses no threat to legal (or moral) practice.²⁵ While this does not necessarily commit him to claiming that external scepticism is *irrelevant* to legal practice, it certainly pushes him in that direction, and I shall consider whether his arguments give us any reason to accept this stronger claim. (That Dworkin accepts the stronger claim could be inferred from the fact that he goes on to provide an account of how legal practice should operate without considering external scepticism any further.)

In *Law's Empire*, Dworkin concedes that there is an 'ancient and flourishing philosophical debate' over whether external scepticism is correct.²⁶ However, he is concerned only with whether, if external scepticism *were* sound, it would condemn the

²³ Dworkin (1986) 76-77.

²⁴ Dworkin (1986) 77.

²⁵ Dworkin (1986) 266-267.

²⁶ Dworkin (1986) 80.

view that one moral statement can be better than another and that there can be right answers to moral questions. It would seem that, by definition, external scepticism could not have any such consequence. External scepticism claims to leave the practice of making moral claims untouched, in the sense that it enables the external sceptic to continue to hold opinions about morality and to give reasons in support of those opinions. Thus, it appears that external scepticism does not have the implications that Dworkin is concerned about. It cannot show that there is no moral truth, or that one moral claim cannot be better than another. Moreover, to focus on *my* area of concern, if external scepticism leaves our moral practices untouched, then it becomes difficult to see how it can have any implications for adjudication.

However, Dworkin believes that our ordinary practice of making moral claims is not confined to asserting that some moral statements are true and others false, or that some moral claims are preferable to others. He believes that our ordinary practice extends to making the following sorts of assertions as well:

- 1) Not only is slavery wrong, but it is ‘really’ and ‘objectively’ wrong.
- 2) That slavery is wrong is not just a matter of opinion. It would still be true that slavery is wrong even if everyone thought otherwise.²⁷

If external scepticism has implications for whether these further statements are correct, then – Dworkin claims – it *does* have implications for ordinary moral practice (and so may also have implications for adjudication).

²⁷ Dworkin (1986) 80. Dworkin refers to statements like these as ‘the further statements’.

Prima facie, external scepticism *does* have implications for whether the further statements are correct. External scepticism denies that moral claims are objectively true, instead claiming that their truth ultimately depends on our moral beliefs. Therefore, it would appear to be committed to denying the correctness of the further statements. However, external scepticism views itself as making *metaphysical* claims. Its claims that moral statements cannot be objectively true and that their truth is ultimately 'a matter of opinion' are meant to be metaphysical claims. Yet Dworkin asserts that, when we utter the further statements as part of our ordinary moral practice, we are not making metaphysical claims, and so are not asserting anything that external scepticism denies.²⁸ In fact, we are uttering further *moral* statements, of the sort that external scepticism purports to leave untouched. If so, external scepticism is not relevant even to the further claims that Dworkin believes are part of our ordinary moral practice.

Why does Dworkin assert that the further statements are not metaphysical claims? He argues that, when we make the further statements as part of our ordinary moral practice, we are not trying to give our initial moral claims (such as that slavery is wrong) a metaphysical base, but rather are seeking to render those initial claims more precise and/or to emphasise or qualify their content. For example, we might use the further claims to distinguish the original moral judgment from a mere report of taste (eg a claim about which flavour of ice cream is preferable). Or we might use the further claims to distinguish between statements that are meant to hold only for people with

²⁸ Dworkin (1986) 80-81.

particular beliefs, needs or interests (eg 'I should dedicate my life to reducing the risk of nuclear war') and statements that are meant to hold impersonally for everyone (eg 'slavery is wrong').²⁹ In both cases, the further claims are moral, not metaphysical, in nature, since they simply qualify the original moral statement.³⁰

Whether Dworkin's interpretation of the further statements is acceptable will prove crucial when I discuss the no-sense thesis. However, for now, I shall proceed on the assumption that Dworkin is correct on this point, and ask whether this means that external scepticism is irrelevant to adjudication. To this end, I shall focus on Dworkin's claim that the truth of external scepticism would leave our *initial* moral statements (eg that slavery is wrong) untouched.

We saw in Part A that we need to be careful when considering in what sense external scepticism purports to be neutral. If external scepticism were true, it would leave our moral beliefs untouched in the sense that we could sensibly continue to claim that our moral beliefs are correct and that competing beliefs are incorrect. (This was the burden of my argument in Chapter II that perspectival relativism need not collapse into nihilism.) Moreover, the truth of external scepticism would not directly entail the truth or falsity of any particular moral belief that we might hold.

This last claim is controversial. Some people have argued that acceptance of moral relativism requires one also to accept what (in Chapter I) I called *normative*

²⁹ Dworkin (1986) 81.

³⁰ Dworkin (1986) 82.

relativism, which forbids the imposition of one's moral beliefs on other people.³¹ Other commentators have concluded that moral relativism must be false from the alleged fact that, if it were true, there would be no moral constraints on our actions.³² If perspectival relativism has either of these implications, then there is at least one form of external scepticism that *does* directly entail the truth or falsity of particular moral beliefs.

Neither view *is* entailed by perspectival relativism, however. Normative relativism is a *moral* principle, governing the way that we should interact with other people. If this principle is meant to be true relative to every possible perspective, then it is inconsistent with the very doctrine that allegedly entails it. One cannot derive a non-relative moral principle from perspectival relativism. If, on the other hand, normative relativism is meant to be true relative to only some perspectives, then it cannot be a *necessary* consequence of the truth of perspectival relativism. The same is true of the opposing claim that perspectival relativism entails that 'anything goes', which is also a moral claim (namely, that we are subject to no moral constraints).³³ Indeed, *no* moral principle can be entailed by perspectival relativism, because that principle would be either objectively true (and hence inconsistent with perspectival relativism) or only relatively true (in which case, it cannot be a necessary consequence of perspectival relativism).³⁴

³¹ Williams (1982) 171 (accusing other writers of arguing this).

³² eg Hurd (1988) 1467.

³³ Hurd may have intended instead to claim that moral relativism collapses into nihilism. However, she offers no argument to support this claim, and I argued against it in Chapter II.

³⁴ I suggested earlier that any argument for perspectival relativism may need to draw upon moral beliefs (eg about the significance of areas of moral disagreement: 134-135 above). It might be thought that such beliefs must be true whenever perspectival relativism is true (though they would not, strictly speaking, be

It might be thought that perspectival relativism is inconsistent with at least one moral belief – namely, the belief that one should act in conformity with objectively true moral principles. Since perspectival relativism denies that objectively true moral principles exist, this direction seems impossible to follow. However, it may be possible to separate the direction to act in conformity with objectively true moral principles into two parts – ‘act in conformity with true moral principles’ and ‘true moral principles are *objectively* true’.³⁵ Perspectival relativism is consistent with the first part of the re-interpreted direction, because it recognises that there are moral truths (albeit only relative to a perspective). Moreover, only the first part of the direction is moral (as opposed to meta-ethical) in nature.³⁶

Thus, if it turns out that external scepticism is true, this will leave morality untouched both in the sense that we could sensibly continue to hold moral beliefs and in the sense that the truth of external scepticism would not directly entail the truth or falsity of any particular moral belief. This might be enough to achieve Dworkin's goal of showing that interpretation could continue uninterrupted even if external scepticism were correct (though the truth of external scepticism might affect the *content* of our

implications or entailments of perspectival relativism, since they are part of the case for perspectival relativism rather than vice versa). However, it is doubtful whether any *particular* moral belief must appear in any convincing case for perspectival relativism. Simplifying for the purposes of illustration, one person might arrive at perspectival relativism by viewing disagreements about abortion as morally significant (and not explicable by ecumenical pluralism), whereas another person might arrive at the same conclusion by viewing disagreements about the reasons why slavery is wrong as morally significant.

³⁵ This assumes that moral statements do not contain a claim to objectivity (or else the claim that one should conform to true moral principles *is* the claim that one should conform to objectively true moral principles). This assumption was discussed at 95-97 above.

³⁶ This last point would be contested by Dworkin, and is discussed further in Part C.

interpretive practices, for the reasons that follow). However, it is not enough to show that the truth of external scepticism would have no consequences for adjudication.

The fact that perspectival relativism does not directly entail any moral principle does not mean that it is irrelevant to whether one should accept certain moral principles. While perspectival relativism has no direct moral consequences, it can combine with certain moral beliefs to produce indirect moral consequences. Those consequences might then have a bearing upon adjudication. Consider, for example, the moral belief that it is permissible to require other people to act in a particular way only if those people can be rationally³⁷ persuaded that acting in that way is morally appropriate. If perspectival relativism is correct, this requirement can be satisfied to only a limited extent, since one can be *rationally* persuaded to act in a particular way only if acting in that way is permitted by one's perspective, and different people's perspectives will permit different ways of acting. If a rational convergence version of objectivism is correct, however, it may be possible to satisfy this requirement, at least to a greater extent than if perspectival relativism is correct, since there are some moral propositions that everybody is rationally required to accept.³⁸ As it is part of the adjudicative process that people are required to act in certain ways (for example, the parties are required to comply with court orders), this would mean that the justifiability of adjudication would vary, to some extent, depending upon the outcome of the meta-ethical debate. Or, at least, nothing that Dworkin has said so far precludes this possibility.

³⁷ The reference to rationality here is to rationality in the 'thin' sense: 125-126 above.

³⁸ This contrast between objectivism and perspectival relativism is explored in greater depth at 210-212 below.

This point is worth emphasising. Dworkin is correct when he states that the truth of external scepticism would not prevent us from continuing to make moral claims. However, this rules out only one possible implication of external scepticism. While the truth of external scepticism would allow one to continue to make moral claims, it might affect the *content* of those claims (depending on what other moral beliefs one holds). Since perspectival relativism is not itself a moral claim, it cannot have any direct moral consequences. (Nor can ecumenical pluralism or Moore's moral realism, for that matter.) However, when combined with certain moral beliefs (such as the belief discussed in the previous paragraph), it *does* produce moral consequences (eg that – for any moral belief – there are some people whom one should not require to act in accordance with that belief, because they cannot be rationally persuaded to do so). Moreover, the moral conclusion that one reaches in this way can be of universal scope – one may conclude that *no one* should impose their moral beliefs on everyone else (because there will always be *some* people who cannot be rationally persuaded to act in accordance with those beliefs). That conclusion is valid only relative to a perspective, but perspectival relativism has no (direct) implications for whether, within that perspective, the conclusion is of limited or universal scope.

This conclusion should be of concern to Dworkin, since it means that he cannot develop his legal theory (law as integrity) without considering whether external scepticism is correct and/or whether (if it is correct) it would interact with his moral beliefs in ways that have implications for his legal theory. Similarly, his argument cannot be used to show that the meta-ethical debate has no implications for adjudication. His argument does rule out certain conceivable implications (for example,

that there are no true moral beliefs that could be drawn upon in the adjudicative process).³⁹ However, it leaves open the possibility that other implications might exist (in particular, that one's meta-ethical position may interact with certain moral principles to influence which moral beliefs are correct, in a way that has consequences for the justifiability of adjudication).

2) Attacking straw people

The argument that external scepticism does not affect the truth or falsity of our moral beliefs constitutes only part of Dworkin's case for the irrelevance thesis. He also argues that external sceptics seek to refute absurd claims that no one actually makes. Remember that Dworkin portrays external scepticism as claiming that moral assertions cannot be proven or tested like claims in physics, and that moral values or properties are not part of the 'fabric of the universe'. He then points out that no sensible person claims that moral assertions *can* be proven in this way, or that moral values *are* part of the 'fabric of the universe'.⁴⁰ Yet, if no sensible person asserts what external scepticism denies, why should we pay any attention to external scepticism?⁴¹

This argument also appears in 'Objectivity and Truth'. Dworkin states that the claim that the wrongness of abortion is a moral fact 'out there' in some independent realm is not a claim that people actually make. We can make sense of this claim as

³⁹ Though even this is true only of those forms of external scepticism that adhere to the neutrality requirement: n 22 above.

⁴⁰ Dworkin (1986) 83.

⁴¹ Indeed, Dworkin (1986) 83 suggests that it might be more charitable to interpret an alleged external sceptic as really an internal sceptic instead.

something that people might actually say only by understanding it as a metaphorical way of repeating claims such as ‘the wrongness of abortion does not depend on anyone thinking that it is wrong’.⁴² Similar comments can be made about any attempt to interpret the claim ‘genocide is objectively wrong’ as asserting that there are moral particles in the universe that somehow determine that genocide is immoral. This is not even a remotely plausible thesis to attribute to anyone who claims that genocide is objectively wrong.⁴³ If the external sceptic is concerned to *deny* that there are such moral particles, then her position is singularly uninteresting, because nobody uses the language of objectivity to claim that such particles exist.

Dworkin concedes that some ‘so-called moral realists’ accept the external sceptic’s challenge as sensible and try to meet it.⁴⁴ They declare that there really are objective moral properties or facts in the universe, and intend this to be a *metaphysical* claim. However, rather than concluding that the external sceptic is not attacking a straw person after all, Dworkin seems instead to conclude that this ‘moral realist’ is as uninteresting as the external sceptic, because both are subject to the fundamental confusion identified by the no-sense thesis (which I discuss in Part C).

Dworkin’s second argument for the irrelevance thesis has not passed without challenge. For example, Brian Leiter has argued that the external sceptic does offer a genuine threat that her opponents must seek to overcome. In doing so, he focuses not

⁴² Dworkin (1996b) 99.

⁴³ Dworkin (1996b) 104-105.

⁴⁴ Dworkin (1996b) 127.

on the claim that moral values are part of the 'fabric of the universe' or that there are moral particles in the universe, but rather on the claim that morality must satisfy the requirements of the 'scientific epistemology' (especially the principle that only something that makes a causal difference to experience can be real and can be known). Leiter interprets Dworkin as conceding that such a demand is philosophical, not moral, in nature, but as arguing that either it is a disguised version of the 'moral particles' thesis (requiring proof of the existence of moral particles that are analogous to physical particles) or else it is question-begging. With regard to the latter alternative, Dworkin argues that different domains of belief differ in their content and nature, and so we cannot assume that the same epistemological standards should apply in every domain. In particular, while the scientific epistemology may be appropriate for science, we cannot simply assume that it is appropriate when applied to morality. Leiter responds that the demand to find a place for moral facts within the scientific epistemology is neither arbitrary nor *a priori*, but rather is the natural demand to make given the *a posteriori* success of science. Since science gives us beliefs of such immense practical value, and the scientific epistemology has been so successful in weeding out beliefs (eg regarding witchcraft) that lack practical value, we need to fit our account of morality within a scientific world view in order to show that moral reasoning is worthwhile.⁴⁵

However, I am sympathetic to Dworkin's suspicions about this 'one size fits all' approach. While this issue is controversial, it is at least arguable that science and witchcraft are competing *causal* explanations of what goes on in the world, whereas morality is not. If so, the scientific epistemology (which, on Leiter's view, is concerned

⁴⁵ Leiter (2001) 77-78.

with determining whether something makes a causal difference to experience) may be appropriate for choosing between science and witchcraft, but not for assessing the worth of our moral practices. More generally, the requirement that a domain of thought be of practical or instrumental value may be appropriate when applied to science or witchcraft, but is not necessarily an appropriate demand to place on our moral practices.

Given these doubts about Leiter's position, it may be worthwhile considering an alternative response to Dworkin's argument. Dworkin accuses the external sceptic of attacking straw people, since nobody really believes that moral properties are part of the 'fabric of the universe' or that there are moral particles that determine what is right or wrong. However, in doing so, Dworkin parodies external sceptics' depictions of their opponents. While it is unfortunately true that some external sceptics have attributed to objectivists the belief that moral properties are part of the 'fabric of the universe',⁴⁶ this is certainly not an essential part of the external sceptic's position. On my view, objectivists need not subscribe to such a fanciful view, but rather must accept either the mind-independence or rational convergence theses. (Remember that the mind-independence thesis claims that moral truth does not ultimately depend upon anyone's moral beliefs or desires, but allows that moral truth may ultimately depend upon human needs, capabilities, etc.) Similarly, the central claims of perspectival relativism are that moral truth is not mind-independent and that there cannot be a rational convergence upon any non-tautological moral belief. It is *not* a central tenet of perspectival relativism that moral properties are not part of the 'fabric of the universe'.

⁴⁶ eg Mackie (1977) 15. Not that the blame is all on one side. Moore's moral realism sometimes seems to flirt with the idea that moral properties are part of the 'fabric of the universe'. Ecumenical pluralism, on the other hand, does not.

Therefore, the second limb of Dworkin's irrelevance thesis misses the mark. The statements that Dworkin claims external scepticism is keen to deny are neither made by (sensible) objectivists nor attributed to them by (sensible) anti-objectivists (or, in Dworkin's terminology, sensible external skeptics). Moreover, the statements that sensible external sceptics *do* oppose (namely, the mind-independence and rational convergence theses) *are* things that people actually assert. Indeed, Dworkin himself seems to do so, when he distinguishes moral statements from mere matters of taste. (As we have seen, he claims that the assertion that moral statements are not mere matters of taste is itself a moral claim. This issue is explored in Part C.)

C. The No-Sense Thesis

1) Dworkin's argument

We have seen that, in *Law's Empire*, Dworkin characterises our 'ordinary' claims about objective moral truth as *moral* claims. In that book, he is content to conclude from this that external scepticism does not affect the validity of our 'ordinary' claims. In 'Objectivity and Truth', however, his argument is more radical. He asserts that the fact that our 'ordinary' claims about objective truth are really moral claims shows that there is no metaphysical realm in which external scepticism and its opponents can fight for supremacy. In other words, Dworkin argues that supposedly external claims (eg that genocide is objectively wrong) make no sense except when treated as internal (ie moral)

claims.⁴⁷ Since external scepticism consists of the *denial* of such claims, it is either nonsensical or else is a disguised form of internal scepticism (and hence is a moral view). If this is right, purportedly meta-ethical positions such as ecumenical pluralism and perspectival relativism are either nonsensical or are heavily disguised moral positions. Either way, they cannot live up to their claim to provide a meta-ethical assessment of our moral beliefs.

Before examining Dworkin's reasons for adopting this position, I should say something about the relationship between the no-sense and irrelevance theses. We have seen that, in 'Objectivity and Truth', Dworkin continues to offer the second argument for the irrelevance thesis (that the claims that the external sceptic seeks to deny are never actually asserted by anyone). It is not entirely clear whether Dworkin offers this as an alternative to the no-sense thesis, or simply wavers between them. However, the most charitable interpretation is that Dworkin regards most of the claims made by external sceptics (eg claims about morality being a matter of taste) as being subject to the no-sense thesis, and the rest of the external sceptic's claims (eg claims about moral particles) as being subject to the irrelevance thesis. I shall proceed on this basis.⁴⁸

The core of Dworkin's argument for the no-sense thesis is that the claims that external sceptics attribute to objectivists, and whose validity they deny, make no sense except when treated as internal (moral) claims, because they are neither neutral nor

⁴⁷ Dworkin (1996b) 96-97.

⁴⁸ Tasioulas (1998a) 184 adopts a somewhat similar approach, interpreting Dworkin as claiming that the external sceptic's assertions are either subject to the irrelevance thesis or else should be interpreted as moral claims.

austere. External scepticism depends for its intelligibility upon the distinction between meta-ethics and morality, yet (Dworkin argues) this distinction collapses once we recognise that supposedly meta-ethical claims both rely upon moral arguments and have direct moral consequences. We have seen that (for our purposes) the austerity requirement adds nothing to the neutrality requirement, so let us focus on Dworkin's claims about neutrality.

As we saw when discussing the irrelevance thesis, Dworkin claims that the most natural reading of purportedly meta-ethical statements is that they simply clarify or emphasise certain moral opinions. For example, the statements 'abortion is objectively wrong' and 'abortion would still be wrong even if no one thought it was' simply render more precise the claim that abortion is wrong, by distinguishing our opinion about abortion from opinions that we regard as someone's subjective reactions or as mere matters of taste.⁴⁹ Why is this the most natural reading of such claims? Because, Dworkin argues, to deny that abortion would still be wrong even if we did not think that it was wrong is to endorse the *moral* judgment that there is no moral objection to abortion in societies that approve of it.⁵⁰ Similarly, the claim 'whether genocide is morally wrong depends on whether it outrages people' takes sides in moral disputes by entailing that – if people ceased to be outraged by genocide – then genocide would no longer be morally wrong. Such a conclusion is plainly both substantive (ie moral) and controversial.⁵¹

⁴⁹ Dworkin (1996b) 97-98.

⁵⁰ Dworkin (1996b) 99.

⁵¹ Dworkin (1996b) 101-102.

However, even if we grant that this is the most natural reading of purportedly meta-ethical claims, this does not show that those claims *must* be given this reading. Dworkin recognises this, and so seeks to show that the moral reading is the *only* intelligible reading of those claims (or at least the only intelligible reading that captures what anyone who utters those claims might plausibly be thought to believe).⁵² To this end, he considers a number of other possible interpretations of purportedly meta-ethical statements, and concludes that – to the extent that we can make sense of these interpretations – they either collapse into the moral interpretation or are wildly implausible (and hence not the sort of thing that people actually say). I shall not discuss these further interpretations, since Dworkin has already mentioned the reading that I wish to give to the external sceptic's claims – namely, that moral rightness or wrongness depends (ultimately) upon our moral beliefs and attitudes.⁵³

Since external scepticism is either nonsensical or a disguised form of internal scepticism, Dworkin concludes that it must be the latter. Presumably, this is a consequence of his belief that we should strive to show objects of interpretation 'in their best light'.⁵⁴ However, the important point for present purposes is that, if Dworkin is right, the positions introduced in Chapter I (ecumenical pluralism, Moore's moral

⁵² Dworkin (1996b) 96f. The qualification in parentheses provides a hint as to how the irrelevance thesis might complement the no-sense thesis.

⁵³ Dworkin never discusses the second thesis attributed to objectivists in Chapter I (namely, that moral beliefs can be the subject of a rational convergence). However, my criticisms of his position can be expressed in terms of the mind-independence thesis, which he does discuss.

⁵⁴ Dworkin (1996b) 110 implies that we should be reluctant to dismiss claims that almost everyone accepts (eg that slavery would still be wrong even if no one thought it was) as metaphysical nonsense. In other words, we should interpret purportedly meta-ethical statements as internal (moral) ones, because this is the only way to make sense of them.

realism and perspectival relativism) cannot live up to their claim to be a (meaningful) meta-ethical assessment of the status of our moral beliefs. Therefore, they cannot have any implications for adjudication unless interpreted as internal, moral claims.

2) Mis-characterising the meta-ethical debate

There is reason to be suspicious of the no-sense thesis from the outset, since it appears to be self-refuting. Dworkin claims that statements about the status of moral judgments are either nonsense or else are really moral statements in disguise. However, this is itself a claim about the status of moral judgments (namely, that any claim about their status is a moral one) that – at least *prima facie* – is neither nonsense nor a moral claim. It does not seem to be a moral claim, since it does not constitute a constraint on an agent's conduct the central aim of which is to protect the interests of people other than the agent.⁵⁵ Indeed, it does not constitute a constraint on anyone's conduct at all. While the no-sense thesis might have indirect implications for how one should act, such consequences are far from immediate. (In this respect, the no-sense thesis resembles the statement that human beings are capable of feeling pain – this may have indirect implications for morality, but these consequences are not immediate enough to render the claim a *moral* claim.) Yet nor is it unintelligible. So what is it? The most plausible answer is that it is a meta-ethical claim. Yet one cannot show that all allegedly meta-ethical claims are either nonsense or really moral claims, as Dworkin seeks to do, by making a meta-ethical claim oneself.

⁵⁵ Chapter I, n 1. For those readers who regard the definition of morality adopted in Chapter I as unduly narrow, Dworkin's claim does not appear to be an ethical claim, either – it does not seem to instruct people how to live or determine what makes for a successful and worthwhile life.

However, I shall not rely on this argument to refute the no-sense thesis. Dworkin would object that the no-sense thesis is not a meta-ethical, but rather an interpretive (and hence moral), claim.⁵⁶ On this view, morality is an interpretive practice, and the no-sense thesis is part of the more abstract end of that practice (just as Dworkin claims that legal philosophy represents the more abstract end of *legal* practice). If so, the no-sense thesis is not self-refuting; rather, it is an abstract moral denial of the possibility of meta-ethical claims. While I am unconvinced by this response (even the most abstract moral claim needs to have *some* connection to how we should act, of a type not possessed by the claim that human beings can feel pain), there is a second reason for not pursuing the self-refutation argument further. Even if the no-sense thesis *is* a meta-ethical claim, Dworkin could argue that the only valid meta-ethical claim is the one that he asserts – namely, that all *other* statements about the status of moral judgments are either nonsense or are really moral statements in disguise. He would need to explain how his own thesis escapes the trap into which all other purportedly meta-ethical statements fall. Nevertheless, this is a challenge that he may be able to meet. Therefore, let us put the status of Dworkin's own claim to one side, and ask whether he is right to assert that all *other* statements about the status of moral judgments must be given an internal, moral reading.

We saw in Part B that much of the allure of Dworkin's second argument for the irrelevance thesis stemmed from his mis-characterisation of the meta-ethical debate. A similar point can be made about the no-sense thesis. Take, for example, Dworkin's

⁵⁶ See Dworkin (1996b) 90 for a passage suggesting this response.

claim that any intelligible argument that evaluative propositions are neither true nor false must be internal to the evaluative domain.⁵⁷ This claim could be challenged on a number of grounds (for example, a non-cognitivist – who claims that evaluative utterances are not propositional and hence not truth-apt – would be keen to contest this claim), but it does possess a certain aura of plausibility. If one wishes to show that an evaluative proposition is neither true nor false, does one not have to engage in an evaluative inquiry? Similarly, whether it is true that abortion is wrong (or, in Dworkin's terminology, whether there is a right answer to the question of abortion, namely that it is wrong) certainly appears to be a moral question. As Dworkin points out, to state that it is true that abortion is wrong is simply to restate the moral position that abortion is wrong.⁵⁸ However, one cannot conclude from this (as Dworkin does) that external scepticism is mis-conceived, because external scepticism need not claim that moral utterances can be neither true nor false (at least not if perspectival relativism is meant to be a version of external scepticism). We saw in Chapter I that the meta-ethical debate is not about whether moral statements can be true or false, but rather about whether their truth (or validity or appropriateness, to acknowledge the non-cognitivist possibility) is mind-independent or whether there can be a rational convergence upon certain moral statements. It is far less clear that the statement that the truth of moral propositions is mind-independent, or that there can be a rational convergence upon certain moral propositions, is a statement internal to the moral domain. (This question is considered in Section 4.)

⁵⁷ Dworkin (1996b) 89.

⁵⁸ Dworkin (1996b) 97-98. Though, again, this overlooks the non-cognitivist possibility.

The no-sense thesis also gains an illegitimate aura of plausibility due to Dworkin's tendency to conflate issues of scope (or universality) with the issues purportedly at stake in the debate between objectivists and anti-objectivists.⁵⁹ External sceptics need not deny that the claim 'abortion is *universally* wrong' is a moral assertion. They may agree with Dworkin that this claim simply makes it clear that abortion is wrong for everyone, regardless of their circumstances, and that whether this is so is a moral question.⁶⁰ As we saw in Chapter I, the question of whether a moral statement is universally true differs from the question of whether it is objectively true. Thus, Dworkin cannot further his argument by showing that whether a moral statement is universally true is a moral question, because this is not the sort of question that I claim is meta-ethical.

Nevertheless, this is not enough to disarm the no-sense thesis. Indeed, Dworkin could reply that to insist on a distinction between the issue of universality and the issues at stake between objectivists and anti-objectivists is to miss the point of his argument, which is that the *only* meaningful interpretation of purportedly meta-ethical statements is that they are statements about the universality of some moral claim (or are in some other way disguised moral statements). While the plausibility of his argument may be reduced once we more carefully identify what the external sceptic is claiming (in particular, when we note that she is not necessarily claiming that moral statements cannot be true or false), that argument has not yet been refuted.

⁵⁹ A similar point is made by Tasioulas (1998a) 185.

⁶⁰ Dworkin (1996b) 98.

3) Narrowing our focus

Dworkin's no-sense thesis has attracted a number of critics. However, I shall suggest in this Section that – despite the fact that there are now several reasonably well-known objections to the no-sense thesis – there is still room (indeed, a need) for a fresh consideration of this issue. The purportedly meta-ethical statements that Dworkin treats as moral in nature comprise a somewhat heterogeneous group. Which of those statements his opponents choose to focus upon depends upon their view as to which issues are central to the meta-ethical debate. For example, Leiter focuses primarily upon statements about naturalism. He argues that, where purportedly external statements take the form of reductive definitions of morality, or claims that moral properties are identical to certain natural properties, they stand or fall on their ability to reflect our linguistic intuitions and the desiderata of theory-construction, not on the basis of moral argument.⁶¹ If so, this strongly suggests that – while these external claims are statements *about* morality – they are not themselves moral statements.

However, I doubt whether the debate about moral objectivity is best expressed in terms of the debate about naturalism (especially as Leiter explicitly links naturalism to the mind-independence thesis⁶²). On the taxonomy offered in Chapter I, the dispute about naturalism is only one of the issues raised by the meta-ethical debate. To focus only on disagreements about naturalism would be to overlook the dispute about the rational convergence thesis. (It may also involve taking too narrow a view of the issues

⁶¹ Leiter (2001) 74-75.

⁶² Leiter (2001) 67.

raised by the mind-independence thesis.) Leiter does offer an argument as to why we should view the meta-ethical debate in terms of the dispute about naturalism.⁶³ Nevertheless, it may be worthwhile searching for a response to Dworkin's arguments that does not depend upon Leiter's characterisation of the meta-ethical debate, a characterisation that suggests that a number of well-known objectivist theories (those that adopt the rational convergence thesis) miss the whole point of the meta-ethical debate.

Simon Blackburn has suggested a different response to the no-sense thesis. He seeks to defend his expressivist position against that thesis by arguing that Dworkin deprives himself of the resources necessary to criticise expressivism.⁶⁴ Dworkin claims that the further statements (eg that genocide would continue to be wrong even if people came to believe that it was permissible) simply make additional moral claims. However, Blackburn's expressivist can – and would – agree with those additional moral claims. Therefore, in asserting the further statements (and treating them as moral claims), Dworkin is not saying anything that an expressivist need disagree with. According to Blackburn, this means that Dworkin has not offered any criticism of expressivism, since nothing that he has said is inconsistent with expressivism.

However, this response seems to miss the point of Dworkin's argument. Certainly, the expressivist can agree with the further statements when they are treated as moral claims. However, unless expressivism is a purely moral position, devoid of any

⁶³ Leiter (2001) 85-91.

⁶⁴ Blackburn (1998) 296-297.

philosophical content, it must say something in addition to these moral claims (for example, that asserting a moral claim primarily involves expressing one's feelings or emotions, where this is not itself to be taken as a moral claim). Yet Dworkin's point is that there is nothing more that can be said here. All we can do is make further moral statements; we cannot stop making moral statements and start making meta-ethical statements. Blackburn fails to respond to this argument. Worse, if he concedes that all the further statements are moral in nature, then it becomes unclear how he can state his own expressivism. It is this problem that leads Dworkin to describe Blackburn's theory as the Cheshire cat of moral philosophy.⁶⁵

Blackburn may be able to overcome this problem.⁶⁶ However, it is sufficiently serious that it may be worthwhile leaving his views to one side and considering whether a different response could be made to the no-sense thesis. It is to this task that I turn in the next Section.

4) Making room for meta-ethics

The crux of Dworkin's argument is that to reject (say) the statement 'abortion would still be wrong even if we did not think it was' is to endorse the *moral* judgment that there would be no moral objection to abortion if we came to believe that it was morally permissible. Let us test this claim by considering perspectival relativism. Perspectival relativism asserts that moral truth depends upon one's moral beliefs and attitudes. This

⁶⁵ Dworkin (1996b) 110-112.

⁶⁶ Elsewhere, he demonstrates an awareness of this problem: Blackburn (1996). However, his response is both tentative and short on detail.

entails that – if one's moral beliefs and attitudes were (sufficiently⁶⁷) different – then the truth or falsity of one's moral beliefs would change. Dworkin is correct when he claims that statements of this form can be given a moral reading.⁶⁸ One could say that if one's moral beliefs and attitudes were different then the truth or falsity of one's moral beliefs would change, and intend by this to *endorse* that state of affairs. More precisely, one might mean that it is *morally appropriate* that the rightness or wrongness of certain actions depends on one's moral beliefs and attitudes. Such an assertion may even be correct in certain circumstances. For example, whether it is morally permissible to invoke a right of conscientious objection may depend on one's moral beliefs and attitudes (because these determine whether one is a genuine conscientious objector). Indeed, the moral reading of 'the permissibility of invoking the right of conscientious objection depends on one's moral beliefs and attitudes' may even be the *most appropriate* reading, if the context suggests that the speaker is making the (moral) point that one should be a genuine conscientious objector if one seeks to exercise this right.

However, this is not the *only* intelligible reading that such statements can be given. Instead of making a moral point, they may instead be asserting that, while we can offer all sorts of reasons in support of our moral beliefs, those reasons ultimately depend upon nothing more than our other beliefs and attitudes, rather than being mind-independent or the potential focus of a rational convergence. *This* is not a moral claim. While it might be thought to entail that, if our beliefs and attitudes changed, then so

⁶⁷ Not every change in one's beliefs amounts to a change in perspective. A change in one's beliefs may rectify (or create) an epistemological flaw in one's belief-set, in which case it need not represent a change in perspective. Indeed, this sort of change is, I think, far more common than a genuine change in perspective.

⁶⁸ See also Blackburn (1998) 296 n 12.

might the reasons that applied to us, it does not do so relative to our moral perspective, and it is only from within a moral perspective that we can utter moral statements.⁶⁹ Relative to our present perspective (which is based on our *current* beliefs and attitudes, once all epistemic errors have been eliminated), genocide would remain wicked even if our beliefs and attitudes were to change. If we came to believe that genocide was permissible (and this belief cohered with our new belief-set), we would not have changed what is true relative to our old perspective. Rather, we would have abandoned that perspective in favour of a new one. In other words, if perspectival relativism is correct, all moral statements are made relative to some perspective or other, and – relative to that perspective – the truth or falsity of moral statements will not vary with changes in one's beliefs and attitudes (unless this is specifically licensed by the perspective in question, as may be the case with the example of conscientious objection discussed in the previous paragraph). Relative to one's old perspective, genocide continues to be wrong, even if one has now adopted a new perspective according to which it is (and always has been) permissible.

So in what sense *is* the claim 'if our moral beliefs and attitudes changed, then so would the truth of our moral beliefs' (henceforth, 'the conditional') valid if perspectival relativism is correct? It is valid from the point of view of a person who is ascribing a moral perspective to us. Which perspective we hold depends upon our moral beliefs and attitudes, and determines what is morally right and wrong for us. If our moral beliefs and attitudes change in certain ways, then so does our perspective (and hence

⁶⁹ Remember that the issue is not whether these claims made by perspectival relativists are correct, but rather whether they can be given an intelligible non-moral reading.

what is morally right and wrong for us).⁷⁰ However, ascribing a perspective to someone is a sociological or psychological, not a moral, task. We do not ask which perspective someone morally ought to hold, but rather which perspective we can ascribe to her on the basis of the beliefs and attitudes that she actually holds. Thus, to ascribe a new perspective to someone, on the basis of a change in her moral beliefs and attitudes, is not to make a *moral* judgment. It is in this – non-moral – sense that perspectival relativists assert the conditional.

Dworkin might resist the conclusion that ascribing a perspective to someone is a sociological or psychological task, instead describing it as an interpretive task.⁷¹ It is not clear that he *would* accept this suggestion, given that – in a different context – he states that: ‘A sociological account of other peoples’ moral convictions is not [a moral judgment], because it does not itself endorse or presuppose any moral assessment.’⁷² Similarly, it might be thought that – in offering an account of someone else’s perspective – one does not endorse or presuppose any moral assessment (relative to one’s own perspective). Nevertheless, Dworkin could claim that – if perspectival relativism were true – it would require us to *interpret* other people’s beliefs and desires in order to determine which perspective they hold. He could then argue that this interpretive activity is moral in nature.

⁷⁰ As noted earlier, a change in one’s beliefs does not always result in a change in one’s perspective. However, I am concerned here with changes that *do* amount to a change in perspective.

⁷¹ This possibility was suggested by John Tasioulas.

⁷² Dworkin (1996b) 90.

Whether or not Dworkin would endorse this line of thought, it does not appear promising. According to Dworkin, interpretation involves presenting something in 'its best light'.⁷³ Therefore, if ascribing a perspective to someone were an interpretive activity, it would involve showing her moral beliefs and attitudes in the best light. There are two ways in which we could understand this requirement in the context of perspectival relativism. On the first, showing someone's moral beliefs and attitudes in the best light involves portraying them in a way that minimises any epistemological defects in those beliefs and attitudes. However, this is an epistemological, not a moral, endeavour, and so viewing the interpretive activity in this way cannot show that ascribing a perspective to someone is really a *moral* enterprise.

Admittedly, if perspectival relativism is correct, removing epistemological defects from one's own perspective may require moral reasoning (eg to determine which of two inconsistent moral beliefs is more important, and so should be retained). However, interpreting someone else's belief-set in a way that minimises epistemological defects in that belief-set may not involve removing those defects, as opposed to choosing whichever interpretation of that belief-set shows it to have the fewest epistemic flaws. Moreover, even if the interpreter *is* required to remove epistemological defects (eg by deciding which of two inconsistent beliefs should be rejected), she is concerned with the way in which the *subject* would remove those defects, not the way in which *she* would do so. This follows from the fact that she is interpreting the subject's perspective, not her own, and from the fact that (on the current

⁷³ Dworkin (1986) 54.

hypothesis) she is concerned with showing the subject's belief-set in the epistemically, not morally, best light.

Alternatively, showing someone's moral beliefs and attitudes in the best light might involve portraying them in a morally desirable way. However, this would mean that which perspective A holds depends upon the interpreter's perspective, because it depends on what is the most morally desirable interpretation of A's belief-set (and this will vary depending on the interpreter's perspective). This is clearly contrary to perspectival relativism, which claims that the content of A's perspective depends upon A's beliefs and desires, not on the interpreter's beliefs and desires. Now, perhaps this reveals a deep inconsistency in perspectival relativism, showing that perspectival relativism claims both that the content of A's perspective depends on A's beliefs and desires and that ascribing a perspective to A requires us to show A's belief-set in its morally best light (something that depends on *our* beliefs and desires). However, it would be uncharitable to leap to this conclusion when there are at least two ways of avoiding it – by treating ascriptions of perspectives to other people as a sociological or psychological task or by treating it as an interpretive task, but one requiring that people's belief-sets be shown in the *epistemically* best light. Both of these options entail that ascribing perspectives to other people is not a moral task.

To reinforce my claim that the conditional can be given a non-moral reading, let us consider the revised tests of neutrality and austerity endorsed in Part A. (While I argued that the revised austerity requirement adds nothing to the neutrality requirement, it may be worth putting this contention to the test by considering whether the

conditional can satisfy *both* requirements.) Dworkin's central claim (when advancing the no-sense thesis) is that purportedly meta-ethical statements should in fact be interpreted as moral statements, because they are neither neutral nor austere. Thus, if it can be shown that the conditional can be read in a way that *is* neutral and austere, this would be strong evidence that it can be given a genuine meta-ethical reading. At the very least, it would rebut Dworkin's central objection to the morality/meta-ethics distinction.

The statement that the wrongness of abortion varies depending on our moral beliefs (when given the second of the two readings suggested above) is neutral in both of the senses endorsed in Part A. Let us start by considering the first of those senses. The fact that which perspective we should ascribe to someone depends on their moral beliefs and desires does not have any direct implications for how we should act relative to our perspective.⁷⁴ More generally, I argued in Part B that perspectival relativism cannot have direct moral implications. It may be that people would drastically change their moral beliefs if they came to accept that perspectival relativism is correct, but this would be because they hold certain moral beliefs (for example, that we should not require people to refrain from doing X unless they can be rationally persuaded that doing X is wrong) that combine with perspectival relativism to produce that result. Such indirect implications cannot be enough to show that perspectival relativism is a moral thesis. Scientific discoveries might have even greater moral implications (for example, if we discovered that certain people cannot feel pain), but this does not mean that those discoveries are moral in nature. To show that a moral assessment of a

⁷⁴ 171 below.

particular claim has moral implications is not to show that the claim itself is a moral one.

As for the second sense of 'neutrality' endorsed in Part A, the claim that moral rightness or wrongness depends on our moral beliefs (when given the second reading suggested above) still leaves us free to continue with our existing moral practices of making moral assertions, engaging in moral debate, etc. It simply claims that the appropriate assessment of those practices varies depending on people's moral beliefs, since which perspective it is appropriate to ascribe to A depends upon A's moral beliefs.

What about austerity? When asserted by a perspectival relativist, the conditional may rely for its validity upon certain moral claims about the significance of areas of moral disagreement. Does this show that it is really a moral statement in disguise? I have argued that this is not enough to breach the version of the austerity requirement accepted in Part A. The mere fact that a purportedly meta-ethical argument contains a moral premise does not make the conclusion a moral one, any more than the fact that a moral argument contains a premise in physics or economics converts the conclusion from a moral one to a scientific or economic one. Similarly, the mere fact that the conditional may rely for its validity (in part) upon certain moral claims is insufficient to establish that the conditional must be given a moral, rather than a sociological or psychological, reading.

There is a final reason to reject Dworkin's claim that the conditional can be given only a moral reading. When given the second of the two readings suggested

above, the conditional lacks many (if not all) of the distinctive features of moral statements.⁷⁵ It does not itself impose any constraint on conduct; instead, it points out that constraints on conduct ultimately flow from one's moral beliefs and desires. This may have indirect moral implications, but does not *by itself* affect how one should act. Nor does it seek to protect the interests of people other than the agent, or present itself to the agent as a check on her 'natural' inclinations or tendencies to act. It is also worth noting that it does not express approval or disapproval of the state of affairs claimed to exist.⁷⁶ Perspectival relativism neither approves nor disapproves of the fact that moral truth varies according to people's moral beliefs and attitudes. This can be compared with the *moral* reading of the statement 'abortion would cease to be wrong if we no longer believed that it was', which claims that it is *morally appropriate* that the wrongness of abortion depends on our attitudes towards it.

5) The morality/meta-ethics distinction

In the previous Section, I argued that there are two distinct interpretations that could be offered of the further statements. On the first reading, those statements are – as Dworkin claims – moral statements. However, on the second reading, the further statements differ from recognisably moral statements in several important ways. When given the second reading, the statement that the wrongness of abortion varies depending

⁷⁵ The rest of this paragraph draws upon the definition of morality offered in Chapter I, n 1. However, similar points could be made using the broader definition of ethics mentioned in that footnote. When given the second reading, the conditional does not have any direct implications for how we should live or for what makes for a successful and worthwhile life.

⁷⁶ While this last consideration is not part of the definition of morality offered in Chapter I, it is a widely accepted characteristic of moral statements and so is relevant when considering whether the conditional is a moral statement.

on our moral beliefs does not entail that (relative to one's perspective) the permissibility of abortion would change if one's beliefs changed. Rather, it entails that one would have switched perspectives if one's beliefs changed in certain ways. Since this entailment does not hold *relative to a perspective*, and moral statements can be made only relative to a perspective (if perspectival relativism is correct), the statement is not moral in nature. Instead, it is a psychological or sociological claim about which perspective can be ascribed to someone given the moral beliefs and desires that they have. The further statements also satisfy the tests of neutrality suggested in Part A, which were meant to represent defining characteristics of meta-ethical statements.⁷⁷ Finally, the further statements do not impose constraints upon conduct, protect the interests of people other than the agent or express approval or disapproval of a particular state of affairs.

These are all good reasons for concluding that there really are intelligible meta-ethical statements. However, to claim that there is a genuine distinction between morality and meta-ethics is not to claim that there are no inter-relations between them. In fact, morality and meta-ethics are related in numerous important ways. I shall argue in later chapters that one's meta-ethical position has (indirect) implications for the stance that one should adopt towards various moral issues relevant to adjudication. We have already seen that, while meta-ethical positions cannot have direct moral implications, they can combine with certain moral beliefs to produce moral consequences. Thus, while I have rejected Dworkin's radical doubts about the

⁷⁷ Those tests are modified versions of the requirements suggested by Dworkin, but I argued in Part A that there are good reasons for making these modifications.

morality/meta-ethics distinction, I agree with the more moderate concerns that have been expressed about any attempt to keep morality and meta-ethics entirely separate.⁷⁸

Just as meta-ethics has implications for morality, morality also has implications for meta-ethics. I suggested in Chapter II that one important consideration when choosing between ecumenical pluralism and perspectival relativism is which can better account for the existence of moral diversity. This means that the proper outcome of the meta-ethical debate turns, in part, on the existence and nature of substantive moral disputes.⁷⁹ If there are many long-standing, seemingly intractable moral disputes, then perspectival relativism gains in plausibility. If, on the other hand, we begin to converge on certain moral propositions, or develop persuasive ways of explaining moral controversies, then ecumenical pluralism starts looking more attractive. Or, as Leiter puts it, ‘... the issue of the objectivity of morality remains a *live* issue precisely because we find within our practices the sorts of intractable moral disagreements that invite skepticism in the first place’.⁸⁰

It should almost go without saying that a recognition of the connections between morality and meta-ethics is consistent with the claim that there is a genuine distinction between them. To say that two things like morality and meta-ethics are distinct is to say that there are important differences between them; it is not to say that neither has any implications for the other.

⁷⁸ eg Darvall (1998) 12, who suggests that all the great thinkers in moral philosophy have attempted to integrate meta-ethics and morality into a coherent, systematic view, exploring the implications for morality of their meta-ethical position.

⁷⁹ Tasioulas (1998a) 186.

⁸⁰ Leiter (2001) 80 (italics in original).

Recognising the important inter-relationships between morality and meta-ethics helps to allay a concern that may underlie Dworkin's stance on this topic. In the past, philosophy has sometimes claimed to be a 'master' discipline, separate from and superior to all others. On this view, philosophy has implications for other disciplines (indeed, it may determine whether those disciplines are viable), but remains untouched itself by advances in those disciplines. It may be this picture that Dworkin seeks to refute with his attack on Archimedeanism. However, we have seen that a defence of meta-ethics need not be a defence of Archimedeanism. On the picture I have painted, meta-ethics does not collapse into morality, but it is dependent upon developments in the moral sphere (just as morality is affected by the meta-ethical conclusions that we reach). In other words, meta-ethics is concerned – at least in part – with the resolution of tensions internal to moral thought, rather than occupying an authoritative standpoint outside moral discourse from which it judges that discourse by standards totally extrinsic to it.⁸¹ We have seen that the outcome of the meta-ethical debate depends (in part) upon which side can best explain the existence and persistence of actual moral controversies, not on '... an *a priori* and global verdict issued by a philosophical tribunal serenely above the fray of substantive ethical controversy.'⁸² Thus, while Dworkin is correct to oppose Archimedeanism, one need not be an Archimedean in order to do meta-ethics.⁸³

⁸¹ Tasioulas (1998a) 186. Contrast Dworkin (1996b) 88.

⁸² Tasioulas (2002) 228.

⁸³ See further Tasioulas (1998a) 186; Leiter (2001) 80.

D. Conclusion

Dworkin's attempt to show that we do not have to consider meta-ethics when theorising about the law (including adjudication) is ultimately unsuccessful. He fails to show that the meta-ethical debate is irrelevant to law. He also fails to show that purportedly meta-ethical claims cannot be given any sensible interpretation unless they are treated as *moral* claims. This means that whether one's meta-ethical position has implications for adjudication remains a live question. In this chapter, I have eliminated two arguments that meta-ethics cannot have implications for adjudication, but I have not yet shown that it does have any implications. This task will be taken up to a limited extent in Chapter IV, but primarily in Chapters V-VI.

CHAPTER IV: JEREMY WALDRON AND THE NO-DIFFERENCE THESIS

In the previous chapter, I assessed Ronald Dworkin's attempts to show that we do not need to become embroiled in the meta-ethical debate when engaging in legal practice or theory. I argued that neither his irrelevance thesis (that the meta-ethical debate may be intelligible, but is irrelevant to both legal practice and theory) nor his no-sense thesis (that the meta-ethical debate makes no sense unless understood as a debate between certain *moral* positions) is valid. In the present chapter, I shall discuss the other main proponent of the view that we need not consider meta-ethics when thinking about adjudication. Jeremy Waldron argues for a conclusion not dissimilar to Dworkin's irrelevance thesis, but which I shall call the 'no-difference' thesis.¹ Waldron accepts that there is a genuine philosophical dispute between meta-ethical positions such as ecumenical pluralism and perspectival relativism, but denies that this debate does (or should)² make a difference to one's views concerning adjudication. While Waldron is not the only person who argues for this conclusion, he is the most prominent advocate of the no-difference thesis, and so it is his views upon which I shall focus.

In Part A, I set out Waldron's position. Part B then seeks to resolve some ambiguities in the no-difference thesis. In Part C, I discuss several attempts by Michael Moore to refute the no-difference thesis, and argue that these attempts are unsuccessful. Finally, in Parts D & E, I offer my own refutation of Waldron's position.

¹ I follow Moore (1992) 2447 in this regard.

² This equivocation is discussed at 187 below.

A. Waldron's Position

As stated above, Waldron acknowledges that there is a genuine philosophical dispute between objectivists and anti-objectivists,³ but denies that this dispute has any implications for adjudication. While he sometimes seems to suggest that the meta-ethical debate is irrelevant not only to adjudication, but to legal practice and theory in general, he generally confines his attention to judicial decision-making. Since my concern, too, is with this area of jurisprudence, I shall follow Waldron in this regard, even though this excludes from consideration a range of other jurisprudential issues to which the meta-ethical debate may make a difference.⁴

There are two further restrictions on Waldron's focus. Firstly, he is interested mainly in societies 'like ours', in which there are disagreements on all or most major moral issues.⁵ The significance of this choice of focus will become apparent in due course. Secondly, he is not concerned with the *moral* version of the no-difference thesis, which asserts that the meta-ethical debate has (or should have) no implications for one's moral practices, beliefs or attitudes.⁶ Waldron does consider whether the meta-ethical debate has implications for our moral practices and beliefs, but only to the

³ Waldron (1992) 165. This article is substantially reproduced in Waldron (1999) ch 8, but I shall refer to the original article.

⁴ These include the nature of law, of legal reasoning and of law's claim to authority: Tasioulas (2002) 229-232.

⁵ Waldron (1992) 159.

⁶ One way of understanding Simon Blackburn's 'quasi-realism' is as defending the moral version of the no-difference thesis: Blackburn (1993). See also Snare (1992) ch 11.

extent necessary to determine whether that debate is relevant to adjudication. Again, I shall follow him in this regard.⁷

1) The arbitrariness of judicial decision-making

Waldron tests the no-difference thesis by asking whether the meta-ethical debate has any implications for the arbitrariness of those judicial decisions that are based on moral judgments. He begins by distinguishing three senses of ‘arbitrary’.⁸ In the first sense, judicial decision-making is arbitrary if it is unpredictable; in the second sense, it is arbitrary if it is unreasoned (that is, if it is based on whim, reflex or prejudice, rather than argument); and, in the third sense, it is arbitrary if it is illegitimate or lacks authority. That these are three distinct senses of ‘arbitrary’ is clear from the fact that a judicial decision can be unreasoned yet predictable (if we know what prejudices a judge holds), reasoned yet unpredictable (if we know that a judge will reason by her own lights, but do not know what those lights are) or predictable *and* reasoned yet illegitimate (if the decision should have been left to another institution).

Does the truth or falsity of moral objectivism affect the arbitrariness of judicial decision-making in any of these three senses? Waldron claims that the standard answer is as follows.⁹ Anti-objectivists view moral judgments as mere expressions of emotion or personal opinion, such that everyone's view is as good as everyone else's. If they are

⁷ Though note the discussion at 147-148 above.

⁸ Waldron (1992) 161-162.

⁹ Waldron (1992) 163-164. This ‘standard answer’ is something of a parody of anyone's actual views, but we can overlook this fact for now.

right, moral decision-making by judges is unpredictable, unreasoned and lacks legitimacy. If, on the other hand, morality is objective, then moral judgments are truth-claims, with all the legitimacy, reasonableness and predictability that this makes possible. Thus, the received view concludes, objectivists should be much more comfortable about allowing judges to make moral decisions than should anti-objectivists.

However, Waldron argues, the problem of the arbitrariness of moral decision-making by judges is every bit as pressing for the objectivist as for her opponent. Whether objectivism is true or not, a judge must acknowledge that many people affected by her decisions hold moral views that are different from her own. Moreover, even if some moral claims are objectively true and others objectively false, the best a judge can do is impose her *opinion* about moral truth and falsity on the litigants, who will have differing opinions and who will want to know why the judge's opinion should prevail over their own. In other words,

the truth of moral [objectivism] (if it is true) does not validate any particular person's or any particular judge's moral beliefs. At best, it alters our understanding of the character of a moral disagreement without moving us any closer to an understanding of who is right and who is wrong.¹⁰

¹⁰ Waldron (1992) 177. Throughout, Waldron refers to 'moral realism', rather than objectivism. His definition of moral realism bears some similarity to the mind-independence thesis, but he makes no mention of anything akin to the rational convergence thesis.

Thus, Waldron concludes, if a judge pays any attention to the fact that other people disagree with her, she should be conscious of the arbitrariness of her opinion prevailing over other people's, *whether she is an objectivist or not*.¹¹

This appears to be true in each of our three senses of 'arbitrary'. The truth of objectivism cannot make judicial decisions more predictable, because judges must rely on their moral opinions or attitudes whether objectivism is true or not. Since (Waldron claims) objectivists offer no privileged way of identifying objective moral truths, judges must fall back on their ordinary moral opinions, which is precisely what they would do if objectivism were false. Moreover, as we cannot predict a judge's decision on the basis of what the objective truth is, we must instead look to her past *opinions* about what the truth is, and something closely analogous is available even if anti-objectivism is correct.¹² Hence, the only guide to a judge's decision today is her decisions in the past, whether or not objectivism is correct.

Secondly, while it might seem that judicial decision-making can be reasoned only if objectivism is true, anti-objectivists are actually quite capable of arguing for their moral views. They, too, can appeal to general considerations to support particular judgments (though those general considerations will themselves be non-objective).¹³ For example, a perspectival relativist can support her claim that a particular action is

¹¹ Waldron (1992) 178.

¹² Waldron (1992) 178. It might be retorted that, if objectivism is correct, we can look to past opinions for evidence of moral insight or blindness. However, perspectival relativism leaves room for the concepts of moral insight and blindness, too. While, on the perspectival relativist's account, these phenomena can exist only relative to a perspective, it remains to be shown that this is more than a purely philosophical difference.

¹³ Waldron (1992) 179-180.

morally wrong by showing that it belongs to a more general category of actions of which she disapproves, and can support her disapproval of that more general category of actions by showing that this attitude coheres with her other moral opinions. Similarly, an anti-objectivist need not try to justify judicial review on the basis that judges' preferences or emotions should prevail over Parliament's. Rather, she can argue that there are good reasons for the judge to feel what he does, or that judges are more likely to identify those reasons than are legislators.¹⁴ Of course, if perspectival relativism is correct, these reasons will be valid only relative to particular perspectives. However, Waldron acknowledges that there are philosophical differences between objectivism and anti-objectivism; he denies only that these differences affect the arbitrariness of judicial decision-making.

Finally, we have seen that the legitimacy of judicial decision-making is a problem for objectivists as well as anti-objectivists. For example, it is often argued that, if moral judgments are not objective, then judicial review is illegitimate because it allows the subjective preferences of a small number of judges to prevail over those of a majority of the electorate.¹⁵ However, an analogous problem exists for objectivists. Why should the opinions of a small number of judges regarding objective moral truth prevail over the opinions of a majority of the electorate? While the truth of objectivism would mean that there were right answers for judges to find when exercising the power of judicial review, this would provide no reason to prefer judges to legislators when deciding who should settle political disputes, because there would be right answers for

¹⁴ Waldron (1998) 93. I seek to show how perspectival relativists might do this in Chapter V.

¹⁵ Dworkin and Bork, who agree on little else, agree on *this*: Dworkin (1977) 138; Bork (1971) 8-11.

legislators to find, too. Waldron concludes that the case for judicial review must be won or lost on the basis of moral arguments about fairness, justice and democracy, and that the meta-ethical debate is irrelevant to this battle.¹⁶

2) Objectivism's epistemological defect

Waldron's arguments hinge on his claim that, even if some moral utterances are objectively true, the best a judge can do is impose her *opinion* about moral truth on the litigants. This may seem like a strange assertion. If objectivism is right, surely there are objective moral truths that judges can invoke? However, Waldron argues that, '... although [objectivists] insist that there [are moral truths], they offer us nothing which would help distinguish a mere arbitrary opinion from a well-grounded belief.'¹⁷ Objectivists fail to establish any connection between the idea of objective truth and the existence of procedures for resolving the moral disagreements that exist even if objectivism is correct. They can tell us to choose the objectively correct view, but which view is correct is precisely what the disagreement is about. Moreover, it is this disagreement, not its meta-ethical status, which raises doubts about the legitimacy of judicial decision-making, because those doubts concern the justification for imposing moral beliefs or attitudes on people who do not accept them. The objectivist's failure to provide a way to resolve moral disputes renders the truth of objectivism irrelevant to this issue.¹⁸

¹⁶ Waldron (1992) 180-182.

¹⁷ Waldron (1992) 176.

¹⁸ Waldron (1998) 79; Waldron (1992) 184.

This is not to claim that objectivists have nothing to say about identifying objective moral truths. Waldron recognises that a natural lawyer, say, has an account of how to identify moral truths, but points out that there is nothing that she can say to support this account that is not part of her dispute with, say, utilitarians or Kantians.¹⁹ In morality, unlike science, there is no generally accepted method (however complicated) for settling disagreements. In science, while people disagree, most of them accept the same methodology for settling those disagreements, and they use that methodology to resolve at least some of their differences. With regard to morality, there is nothing comparable, since each of the major moral theories (Kantianism, utilitarianism, etc) has its own methodology for resolving disputes. In morality, unlike science, there is ‘... nothing that even begins to connect the idea of there being [an objective] fact of the matter with the idea of there being some way to proceed when people disagree.’²⁰

The failure of objectivists to offer an appropriate methodology for resolving moral disputes forms the cornerstone of Waldron's defence of the no-difference thesis: ‘... the epistemic inadequacy of moral [objectivism] is far-reaching: in practical matters, it deprives [objectivists] of almost everything that they might want to say or argue for in the name of objectivity.’²¹ In particular, it means that objectivists should be every bit as concerned as anti-objectivists about allowing judges to make moral decisions.

¹⁹ Waldron (1998) 86.

²⁰ Waldron (1998) 84.

²¹ Waldron (1992) 182.

3) The possibility of expertise

Waldron considers several objections to the no-difference thesis, only one of which I shall discuss here. It is sometimes claimed that objectivists, but not anti-objectivists, can design legal institutions so as to minimise the risk of distortion in moral judgment.²² Objectivists recognise the possibility of moral error, and may be able to agree on some of the factors likely to produce such error (such as self-interest and prejudice) even if they cannot agree on a method for identifying moral truths. Thus, they may be able to determine which legal institution is least likely to be subject to such errors, giving them a significant advantage in the debate about the legitimacy of judicial review.

Similarly, Moore argues that objectivists, unlike anti-objectivists, can allow for the possibility of moral expertise (because, if there are moral *facts*, then there might be moral *knowledge*, and hence moral *expertise*). This raises the possibility that judicial review can be justified on the basis that judges have greater moral expertise (that is, are better at identifying the objective truth) than legislators. This may not in fact be the case, but Moore's point is that it is a *possibility* for the objectivist, but not for the anti-objectivist.²³

In response, Waldron points out that we do not in fact agree about the factors likely to produce moral error, at least not in a way that would help settle the debate

²² See Hurley (2000) 179 for a suggestion along these lines.

²³ Moore (1992) 2447-2448.

about judicial review. For example, we may agree that self-interest distorts people's judgment, but we also believe that important political decisions are best taken by people who have a sufficient stake in the matter to decide the issue responsibly. Thus, there are arguments on *both* sides of the debate about judicial review, and objectivists lack the resources to adjudicate between those arguments.²⁴

Moore might object that, even if objectivists cannot resolve this debate, they can at least *start* it, whereas the anti-objectivist cannot even make sense of the idea that self-interest distorts judgment. However, it is unclear whether there is any (non-philosophical) advantage to being able to start a debate that one cannot resolve or even make significant progress in. Waldron could also argue (as I did in Chapter II) that anti-objectivists, too, can acknowledge the possibility of moral error, and may identify self-interest as a possible cause of error. For example, perspectival relativists recognise that one may be mistaken relative to one's own perspective (eg if one holds inconsistent moral beliefs), and may consider that one way in which one might come to hold inconsistent moral beliefs is if one's self-interest battles against one's concern for others. If so, anti-objectivists are no worse off than objectivists in this regard.

Waldron further argues that objectivists fail to produce an epistemology that would support a claim of expertise.²⁵ The fact of disagreement deprives objectivists of the neutral epistemic apparatus necessary to ground such claims. How can we tell who the moral experts are if one of the things that we disagree about is how to identify true

²⁴ Waldron (1998) 86-87.

²⁵ Waldron (1992) 181; Waldron (1998) 84.

moral beliefs? In the alternative, it could be argued that any anti-objectivist account that leaves room for moral truth (as perspectival relativism does) *also* allows for the possibility of moral knowledge and hence expertise (though, according to perspectival relativism, expertise can exist only relative to a perspective).

B. Some Rules For The Debate

Before proceeding further, some ambiguities in Waldron's position must be resolved. For one thing, *which* meta-ethical views should we be contrasting? There are many different forms of objectivism and anti-objectivism, and it may be that some versions of each view have implications for adjudication even if other versions do not. Should we compare *every* form of objectivism with *every* form of anti-objectivism, or only the more plausible or popular versions of each position? It is implicit in Waldron's argument that the answer to this question does not matter, because the epistemological limitations that he identifies are present in *all* forms of objectivism. Therefore, in this chapter, I shall not limit my attention to the most plausible versions of objectivism and anti-objectivism.²⁶ While some opponents of the no-difference thesis have suggested that Waldron obtains illicit support by offering implausible accounts of the various positions in the meta-ethical debate,²⁷ I shall argue that the more implausible the meta-ethical positions being considered, the more obviously false the no-difference thesis is.

²⁶ In Chapter VI, however, I compare the implications for judicial review of the most plausible versions of objectivism and anti-objectivism.

²⁷ Especially objectivism: Tasioulas (2002) 214-215.

It is when comparing the most plausible versions of objectivism and anti-objectivism that the flaws in the no-difference thesis are least evident.²⁸

There is a second ambiguity in the no-difference thesis. Waldron could be interpreted as claiming that whether objectivism is true or false can make no difference to the arbitrariness of adjudication. On this view, adjudication can be no more predictable, reasoned and legitimate if objectivism is true than if it is false. Alternatively, Waldron could be interpreted as claiming that which side we take in the meta-ethical debate makes no difference to our beliefs about the arbitrariness of adjudication. This can be compared with the first possibility, under which he claims that our meta-ethical beliefs *should* make no difference to our beliefs about the arbitrariness of adjudication, but leaves open what effect they *will* have.

Waldron clearly adopts the first approach. He does not argue that, as an empirical matter, our beliefs about adjudication are independent of our meta-ethical beliefs. Rather, he argues that which side we take in the meta-ethical debate *should* make no difference to our views regarding the arbitrariness of adjudication. This is just as well, since it is clear that people's meta-ethical beliefs do in fact influence their attitude towards adjudication. For example, a belief in anti-objectivism has led numerous people (such as Richard Posner and Robert Bork²⁹) to oppose moral decision-making by judges.

²⁸ There may be one exception to this general rule: n 48 below.

²⁹ Posner (1999) and Bork (1971) respectively (though Posner opposes only a certain *type* of moral decision-making by judges and Bork focuses on the specific context of judicial review).

However, the first interpretation requires further elucidation. There are at least two ways in which an opponent of the no-difference thesis could be mistaken. Firstly, she might misunderstand one of the positions in the meta-ethical debate (for example, by mistakenly believing that anti-objectivism *entails* a particular moral principle³⁰). Clearly, Waldron is entitled to exclude this sort of error from consideration when defending the no-difference thesis. He need only claim that, on a *proper* understanding of the positions in the meta-ethical debate, which side is correct can make no difference to the arbitrariness of adjudication.

Someone might also oppose the no-difference thesis because they hold false *moral* beliefs. (How moral beliefs can be relevant to the correctness of the no-difference thesis is explained below.) Just as an opponent of the no-difference thesis cannot rely on a meta-ethical misunderstanding to refute that thesis, it could be claimed that she cannot rely on a false moral belief, either. However, this claim must be rejected. If it can be shown that a particular moral belief combines with different meta-ethical positions to produce different implications for adjudication, then the no-difference thesis is refuted, regardless of whether that belief is correct.³¹ To see why, consider what would happen if only *correct* moral beliefs were relevant to the truth of the no-difference thesis and if perspectival relativism were correct. We would have to assess whether the no-difference thesis is correct *from within a moral perspective*,

³⁰ cf 144-146 above.

³¹ However, one cannot refute the no-difference thesis simply by asserting (say) that judicial review is illegitimate unless objectivism is correct: n 36 below.

because which moral beliefs are correct (and hence relevant to the truth of the no-difference thesis) would depend on which perspective one holds.

There are two problems with having the truth of the no-difference thesis depend on which perspective one holds. Firstly, there is no evidence to suggest that Waldron (or any other no-difference theorist) would accept this (potential) relativisation of their thesis.³² Secondly, it would mean that who the no-difference thesis is true for would depend upon one's meta-ethical position. That thesis could conceivably be true for everyone if objectivism is correct. However, if perspectival relativism were true, the no-difference thesis would be true only for those people who hold a certain type of perspective. Moreover, if Waldron is correct in claiming that moral differences are ubiquitous in societies like ours, then not everyone will hold that type of perspective. Thus, to determine the status of the no-difference thesis, one would have to determine whether perspectival relativism is correct. Yet the whole purpose of the no-difference thesis is presumably to avoid having to make that determination in order to reach a conclusion about the arbitrariness of adjudication. The no-difference thesis is worth asserting only if it is possible to determine whether – and for whom – that thesis is true without having to engage in the meta-ethical debate, and this is possible only if we do not limit our focus to *true* moral beliefs.³³

³² Indeed, requiring that we consider only *true* moral beliefs would breach Waldron's requirement that we not privilege contested moral beliefs when doing political philosophy. As I reject this requirement (205-207 below), however, I shall not rely on it here.

³³ That said, my primary quarrel with Waldron is not about whether the no-difference thesis can be refuted by drawing upon false moral beliefs.

The preceding discussion highlights a further obstacle to understanding the no-difference thesis. No-difference theorists do not discuss whether the implications that the meta-ethical debate is meant to have, and that they deny, are direct or indirect. They do not consider the possibility that a meta-ethical position may have distinctive implications only when combined with certain moral beliefs, let alone whether those beliefs must be true in order for the implications to count.³⁴ I argued in Chapter III that perspectival relativism can have only indirect moral consequences – it cannot, by itself, entail any particular moral conclusion. However, I also argued that perspectival relativism can combine with certain moral beliefs to produce distinctive moral conclusions. Therefore, the no-difference thesis is correct to the extent that it is concerned only with direct moral consequences, but – if the point of asserting the thesis is to establish that we need not become embroiled in the meta-ethical debate when formulating our views concerning adjudication – then indirect moral consequences are also relevant. If the legitimacy of judicial review, for example, depends even indirectly on our meta-ethical position, then we cannot finalise our views concerning adjudication without taking sides in the meta-ethical debate. Thus, I shall be concerned with both direct and indirect consequences of that debate.

Finally, ‘... it is vital to the [no-difference] thesis that it is not premised on rejecting [moral] objectivism and embracing anti-objectivism.’³⁵ No-difference theorists claim that the truth or falsity of objectivism makes no difference to the

³⁴ Admittedly, this issue is mainly relevant to the third sense of ‘arbitrary’ distinguished by Waldron. Moral considerations are largely irrelevant to whether the truth of objectivism would render judicial decisions more predictable or reasoned, but we shall see that they *are* relevant when considering whether the meta-ethical debate has implications for the legitimacy of judicial decisions.

³⁵ Tasioulas (2002) 212.

arbitrariness of adjudication, and they cannot show this by taking sides in the meta-ethical debate. Rather, they must show that – whatever side one takes in that debate – it makes no difference to how one should view the adjudicative process. Prima facie, this means that the no-difference theorist cannot deny any claim made by objectivists (or anti-objectivists), or else she becomes entangled in the very debate that she claims to be irrelevant. However, this would make it too easy to defeat the no-difference thesis. All that would be needed is to find someone who has claimed, without substantiation, that his meta-ethical views make a difference to adjudication. Instead, we need a requirement that prevents the no-difference theorist from arguing that objectivism (or anti-objectivism) is mistaken rather than irrelevant, but that also prevents her opponent from simply *stipulating* that she is wrong.

It is not entirely clear how we can achieve this end. We cannot simply state that the no-difference theorist must not contest any claim that an objectivist argues for (cf stipulates). The mere fact that an objectivist *argues* against the no-difference thesis should not prevent Waldron from defending that thesis. For one thing, that argument is not sufficiently central to the objectivist's meta-ethical position. This suggests that a more appropriate requirement is that the no-difference theorist cannot deny any *meta-ethical* claim that an objectivist argues for.³⁶ This involves distinguishing claims about, say, how to identify objective moral beliefs from claims about the relevance of meta-ethics to adjudication. The no-difference theorist should be free to challenge the claim

³⁶ The no-difference theorist cannot challenge any *moral* claim relevant to the truth of her thesis, either: 188-189 above. However, this does not mean that one can defeat the no-difference thesis simply by claiming that judicial decision-making is morally justified only if objectivism is correct. That claim must be argued for, and the no-difference theorist is free to challenge any non-moral premises used in that argument, as well as to argue that the conclusion does not follow from the premises offered.

that objectivism makes a difference to the arbitrariness of adjudication, but not the claim that objective moral truths can be discovered in a certain way. This distinction is likely to become blurred at certain points. (Similarly, there will sometimes be only a fine line between correcting a misunderstanding of a particular meta-ethical position, which I have argued is permissible, and arguing that the position is wrong, which is not permissible.) In such cases, one must decide on a case-by-case basis whether the no-difference theorist can challenge the claim under scrutiny without begging the question. A key consideration when making this decision is whether all sides to the meta-ethical debate can accept the claim in question. If they can, this suggests that the claim is not sufficiently central to any meta-ethical position to be immune to challenge from the no-difference theorist.

C. The Allure Of The No-Difference Thesis

As John Tasioulas points out,

the thought that the interminable debates about the metaphysical and epistemological status of [moral] judgments have no significant implications for our understanding of law and the ideals that govern it is an understandably alluring one.³⁷

If the no-difference thesis were correct, we could practice and theorise about law (and, in particular, about adjudication) without needing to become embroiled in a debate that is unlikely to be resolved in the foreseeable future.

³⁷ Tasioulas (2002) 254.

This allure is increased by the fact that there have been several unsuccessful attempts to refute the no-difference thesis. For example, we saw in Chapter I that, according to Moore's moral realism, there is a uniquely right answer to every moral question. Moore contrasts this view with a conventionalist form of anti-objectivism, in which moral conventions (and hence right answers) inevitably run out at certain points.³⁸ This means that, if Moore's moral realism is correct, there is always a right answer to any moral question that might arise in a legal case. If, on the other hand, conventionalism is correct, there are likely to be some moral questions that arise in legal cases that have no right answer.

This argument cuts no ice against Waldron, however (at least, not until supplemented by the arguments in Part D). Waldron argues that, even if there are objectively right answers, we cannot know what they are. Thus, there is no practical difference between Moore's moral realist judge, for whom there are right answers that are inaccessible, and a conventionalist judge, for whom there is no right answer in a particular case because the conventions have run out. Neither judge is able to appeal to a right answer to resolve the case before her. (It might be claimed that this shows that the meta-ethical debate makes the opposite difference to the one Moore claims – there will never be a right answer accessible to the moral realist judge, but there will sometimes be one available to the conventionalist. However, Waldron would probably retort that the question of what our moral conventions are will be as hotly contested as the question of what the objective moral truth is.)

³⁸ Moore (1992) 2484. Put crudely, conventionalists claim that which moral beliefs are true within a society is determined by the moral conventions of that society.

Moore also argues that moral realists, unlike conventionalists, can reach conclusions opposed to the conventions of their community. Conventionalists (unlike most other anti-objectivists) appeal only to social conventions when deciding cases, rather than also appealing to their personal beliefs and attitudes. Moore's moral realist, on the other hand, does both (whether or not her conclusions are correct).³⁹ This is because the conventionalist equates true moral beliefs with the moral conventions of his community, whereas the moral realist does not.

However, this confuses conventionalism as a *meta-ethical* thesis with conventionalism as a *moral* thesis. The moral thesis does indeed claim that judges should rely on only those moral beliefs that reflect conventions within their society (though it may allow that consideration of one's personal beliefs and attitudes may assist in identifying those conventions).⁴⁰ However, the moral thesis is not (directly) related to any *meta-ethical* claim. The meta-ethical conventionalist, on the other hand, does make a meta-ethical claim – namely, that what morality *consists in* are certain social conventions. However, she need not recommend that judges decide cases solely on the basis of the considerations that she labels 'moral', and so she can allow that judges should sometimes reach conclusions opposed to the conventions of their community.⁴¹

³⁹ Moore (1992) 2482, 2485.

⁴⁰ eg Eisenberg (1988).

⁴¹ John Tasioulas has pointed out that Moore could salvage his argument by claiming that, *when combined with a desire to act morally*, meta-ethical conventionalism does have this implication. Moore's mistake is to believe that a meta-ethical position can have implications for adjudication *by itself*.

Finally, Moore argues that, if judges accept (any form of) anti-objectivism, there is a danger that they will

seek to evade their responsibility to engage in the moral reasoning that makes legal reasoning possible, because they will think that they are using the coercive power of the state to foist off their own desires or feelings, or those of some informal consensus, onto hapless litigants.⁴²

The objectivist judge, on the other hand, will not see her task as simply imposing her own will upon society and so will be more willing to engage in moral reasoning when deciding cases. However, this argument can succeed only by riding on the coat-tails of some other refutation of Waldron's position; otherwise, it misses the point of the very argument that Moore is opposing. Waldron argues that the objectivist judge is no better off, because she is using the state's coercive power to uphold her own opinion about objective moral truth in the face of disagreement about what that truth is. Why should judges be any happier about doing this than about imposing their non-objective desires or feelings on people who do not accept those desires or feelings?

Moore cannot retort that, if objectivism is correct, judges can have good reasons for their opinions. Firstly, Waldron's point is that whether those reasons are good is disputed, and objectivism offers no way of resolving that dispute. Secondly, we have seen that anti-objectivists, too, are able to offer reasons for their moral views. Admittedly, the *status* of those reasons will differ depending upon whether objectivism or anti-objectivism is correct, but we have not yet found any basis for thinking that this difference has implications for adjudication.

⁴² Moore (1992) 2480.

D. Begging the Question

So is the no-difference thesis correct, after all? To answer this question, we must examine the key premise in Waldron's argument – namely, that objectivists do not offer any (successful) way of determining *which* moral beliefs are objectively true. Immediately, a problem arises. *Prima facie*, this claim either is clearly false or else begs the question, depending on whether we include the word in parentheses. Objectivists do indeed offer ways of determining which moral beliefs are objectively true – indeed, nearly as many ways as there are objectivists. Thus, we have objectivist accounts of moral error,⁴³ procedures for arriving at true beliefs,⁴⁴ and even accounts of how moral reality can causally influence which moral beliefs we hold.⁴⁵

It may be that none of these accounts are true, or even plausible, and this may be all that Waldron is claiming. However, that claim is question-begging in the present context. I argued earlier that the no-difference theorist cannot deny an important claim made by objectivists, at least not when this claim is a central component of their meta-ethical position. For example, Moore's suggestion that 'moral reality' can causally influence our moral beliefs may be implausible, but to reject objectivism on that basis is to take part in the meta-ethical debate, not to show that it is irrelevant. On this interpretation, Waldron's argument for the no-difference thesis seems indistinguishable

⁴³ 77-81 above.

⁴⁴ Putnam (1995) 19; Tasioulas (2002) 242.

⁴⁵ 25-27 above.

from an attack upon objectivism, because it focuses on a purported *defect* in objectivism – namely, the putative absence of reliable ways of identifying objective moral truths.⁴⁶ Thus, whether Waldron denies that objectivists offer any way of determining which moral beliefs are objectively true, or only that they offer any *successful* way of doing so, his position seems open to a devastating objection.

Clearly, we should hesitate before ascribing such an obviously flawed view to Waldron. Instead, I shall offer four further interpretations of his argument that strive to avoid this objection. However, I shall not seek to determine which is Waldron's actual position, as I shall argue that each succumbs to a different criticism.

1) A definitional dispute

On the first interpretation, Waldron treats objectivism as simply the claim that there are objective moral truths, which is distinguished from claims about how to identify those truths.⁴⁷ If all we know is that there are objective moral truths, but not how to identify them, then we are no closer to resolving our moral disagreements than we were before. Yet if the truth of objectivism does not help us to settle moral disputes, then how can it make moral decision-making by judges any less arbitrary? Moreover, since (on this interpretation) claims about how to identify moral truths are distinct from the claim made by objectivism, to argue that the former claims are false is not to reject

⁴⁶ Tasioulas (2002) 238-239.

⁴⁷ See Waldron (1992) 177 for a passage suggesting this interpretation.

objectivism, and so does not beg the question. The objectivist could assert that there are objective moral truths while conceding that we have no way of identifying them.

However, objectivists do not simply assert that *a* form of objectivism is correct. They also make specific claims about the nature of objective moral truth, claims that usually include at least the outlines of an epistemology for distinguishing moral truth from moral error. In particular, objectivists who accept the rational convergence thesis combine metaphysical *and* epistemological elements in their theory because, if a rational convergence upon moral beliefs is possible, then objective truths must be (in principle) epistemically accessible.⁴⁸ Thus, on the present interpretation, Waldron's argument overlooks the form that the meta-ethical debate actually takes, and so has little claim to our attention. If Waldron's purpose is to argue that we need not, when discussing adjudication, pay attention to what objectivists and anti-objectivists actually say, then he cannot achieve his aim in this way.

Admittedly, there is no one epistemology that all objectivists accept. Thus, we cannot define objectivism (as a general position) even partly in terms of a particular epistemology. However, as I argued in Chapter I, there are many different versions of objectivism, and to overlook this fact is to neglect the true state of the meta-ethical debate. Moreover, we cannot fully explicate a particular form of objectivism without specifying the epistemology that it accepts for identifying moral truths. Thus, we cannot assert that such a meta-ethical position makes no difference to adjudication

⁴⁸ Tasioulas (2002) 238-239. Tasioulas argues that only extremely implausible versions of objectivism separate meta-ethics and epistemology to such an extent that one could be completely out of touch with objective moral truths.

without showing that its epistemology makes no difference. So let us turn to some interpretations of Waldron's position on which he seeks to show exactly that.

2) Epistemological mimicry?

On the second interpretation, the no-difference thesis claims that the epistemologies offered by objectivists are the same as those available to anti-objectivists.⁴⁹ It then claims that our epistemology, not our metaphysics, determines which beliefs we should hold. As the same epistemologies are available regardless of our meta-ethical view, the meta-ethical debate cannot affect which moral beliefs judges should use to decide cases or which moral beliefs we should use to assess their performance.

However, this is not true of all forms of objectivism. For example, according to Moore's moral realism, objective moral truths have a causal impact upon our moral beliefs. It is hard to see how an anti-objectivist could make a parallel claim. As we saw in Chapter I, Moore argues that there are moral properties 'in the world' that causally interact with us in a way that tends to produce in us correct moral beliefs. While acknowledging that the causal relationship between 'moral reality' and one's moral beliefs is fragile, Moore claims that it increases the predictability of judicial decision-making by making it more likely that judges will act on correct moral principles (and that we – the law's subjects – will know what those principles are in advance).⁵⁰ Thus,

⁴⁹ There is little textual evidence to support ascribing this position to Waldron. However, since it is explicitly embraced by another no-difference theorist (Fish (1989) 381-384), it is worth considering briefly.

⁵⁰ Moore (1992) 2473-2474. Moore concedes that the increase in predictability will not be enormous, but any non-trivial increase will have implications for the arbitrariness of adjudication.

there are forms of objectivism that incorporate distinctive epistemologies with consequences for the arbitrariness of judicial decision-making. While one may find it hard to accept the claim that there is a moral reality that causally influences what we believe, the pertinent question is not whether Moore's form of objectivism is correct, but rather whether – if correct – it would affect the arbitrariness of adjudication.

Many other objectivists *do* offer epistemological theories that could be adopted by anti-objectivists. This is certainly true of some ecumenical pluralists, such as Michael Smith. Smith claims that we will all converge on certain desires if we each render our current set of desires maximally informed and coherent, and that moral facts are a sub-set of facts about these desires. This is very similar to the process recommended by perspectival relativism for arriving at the truth relative to one's perspective.⁵¹ However, the important question is not whether *all* objectivists must say something that *no* anti-objectivist can say, but rather whether there are versions of either position under which one must hold views that adherents of different positions need (or must) not hold. We should view the meta-ethical debate, not as a dispute between objectivists as a group and anti-objectivists as a group, but rather as between a myriad of positions divided into two general camps. Only by doing so can we establish whether we can formulate our views regarding adjudication without having to consider which (specific) meta-ethical position we should adopt, and it is only if this is the case that we can ignore the meta-ethical debate. Viewed in this way, that debate does make a difference to adjudication, because which specific objectivist or anti-objectivist

⁵¹ 17 & 40-44 above (respectively). What distinguishes Smith's version of ecumenical pluralism from perspectival relativism is that Smith suggests that, if we all render our desires maximally informed and coherent, we will converge upon a shared set of desires. Perspectival relativism, on the other hand, treats any convergence as purely contingent.

position one adopts may affect one's epistemology in a way relevant to the arbitrariness of judicial decision-making.

3) Disputed epistemologies

Neither of the above interpretations attaches sufficient weight to Waldron's concern with moral disagreement. Perhaps by remedying this, we can formulate an interpretation under which his argument escapes these difficulties. Waldron sometimes acknowledges that objectivists *do* offer (possibly distinctive) epistemologies for identifying objective moral truths. However, he argues that those epistemologies cannot help us to decide which side in any actual moral dispute is right and which is wrong.⁵² For example, while Moore tells us that moral reality causally influences our beliefs, this does not help us to determine who is right when people have *conflicting* beliefs. Nor will Moore's further recommendations (eg that we should seek to bring our beliefs into reflective equilibrium) always be sufficient to identify the correct answer. Similarly, of what help is it to know that we should use the methodology prescribed by utilitarians (or Kantians), if two people can both use that methodology and yet arrive at conflicting answers? In such situations, the use of disputed moral beliefs by judges is as problematic for the objectivist as it is for the anti-objectivist.

However, while most objectivists concede that their favoured epistemology cannot determine the answer to every moral question, they claim that it can determine the answer to many questions. Indeed, many objectivists argue for controversial moral

⁵² 183 above.

conclusions on the basis of their epistemology.⁵³ Where that epistemology *does* produce a determinate answer to a moral question, judges need not rely simply upon their *opinions* regarding objective truth, and so can avoid Waldron's attack on the legitimacy of their decisions. (This assumes that the epistemology being used is the correct one, but the no-difference theorist cannot contest that assumption without begging the question against the objectivist.) While there will be other cases where two people both use that epistemology and yet arrive at conflicting results, the same is true of the scientific methodology (which Waldron implies *is* useful). The scientific methodology can resolve many disagreements, but sometimes two people both apply that methodology and yet arrive at different answers to a scientific problem.

There are two responses open to Waldron.⁵⁴ Firstly, he could deny that objectivists' epistemologies produce a determinate result in *any* case. However, this would straightforwardly beg the question against objectivists, since it would necessarily cast doubt on whether objectivism is correct. Secondly, he could argue that disagreement about how to apply the epistemologies available to moral objectivists is far more common than with regard to the scientific methodology. However, there will be agreement about how to apply a particular epistemology in *some* cases (for example, there is consensus among Kantians regarding the wrongness of slavery), and this is enough to refute this version of the no-difference thesis (provided those moral questions are in some way relevant to adjudication). Moreover, this response, too, begs the question. Many objectivists *deny* that moral disagreement is significantly more

⁵³ eg Finnis (1980) ch V.

⁵⁴ Not including the claim that these epistemologies are themselves contested, and so cannot be used by judges to settle moral disputes. This argument is considered in Section 4.

common than scientific disagreement, and this forms part of their dispute with anti-objectivists. Indeed, it is common for objectivists to argue that, since most anti-objectivists concede that scientific truth is objective, and since moral disagreement is no more prevalent than scientific disagreement, anti-objectivists should accept that moral truth is objective, too. Thus, to assert that moral disagreement is more common than scientific disagreement is to take sides in the meta-ethical debate.

It might be objected that the amount of moral disagreement is an empirical matter, and so Waldron can take a stance on this issue without participating in the meta-ethical debate. However, there are at least two reasons why this is not so. Firstly, how much moral disagreement there is depends partly upon how we should demarcate moral issues. This is itself, in part, a moral question (the answer to which varies between perspectives if perspectival relativism is correct). Secondly, imagine a situation in which Anna asserts that it is morally permissible to assist someone else to commit suicide, whereas Brian denies this. An ecumenical pluralist might view this as a case of moral disagreement, in which one side is correct and the other incorrect. However, she could alternatively explain it as a situation where two people hold different incommensurably good beliefs, in which case there need not be a moral disagreement after all. This suggests that how much moral disagreement one believes there is depends partly on one's meta-ethical position (eg on whether one accepts the incommensurability thesis).

4) The nature of justification

There is a final response open to Waldron. It begins by pointing out that the epistemologies that objectivists clearly *do* offer are controversial, even among fellow objectivists. Why is this a problem? Why cannot an objectivist acknowledge that her epistemology is disputed, yet claim that it nevertheless represents the correct way of identifying moral truths? It cannot be because disagreement renders the epistemology implausible, because this is to suggest that the version of objectivism in question is incorrect, not that it is irrelevant.⁵⁵ A more promising suggestion draws on the fact that Waldron is concerned with attempts to *justify* the use of moral beliefs in judicial decision-making, and that he has particular views about the nature of political justification. Waldron believes that we justify ourselves to other people in the political domain only if we provide them with arguments that they can accept given their current beliefs and commitments.⁵⁶ Whilst this is a controversial interpretation of Waldron's views,⁵⁷ it is worth considering because it escapes many of the objections to preceding interpretations of the no-difference thesis. Firstly, it explains why epistemological disagreement is so significant for Waldron. Even if an objectivist has discovered the single correct epistemology, she has not provided other people with a defence of that epistemology that they can accept, and so has not justified the conclusions that she reaches using that epistemology. Thus, the problem of legitimacy seems as pressing for

⁵⁵ Tasioulas (2002) 244.

⁵⁶ Waldron (1987) 128, 134-135, 140-141; Waldron (1999) 205. Presumably, Waldron would require that the people to whom we must justify ourselves be reasonable, in the sense of being responsive to the evidence that we present.

⁵⁷ Prima facie, it stands in some tension with Waldron (2002) 239, where he cautions against trying too hard to be 'non-sectarian'. However, it may be reconcilable with this passage on the basis that we can require people to change their beliefs in line with their own commitments.

the objectivist as for the anti-objectivist. Secondly, it explains why Waldron claims that, since each moral theory has its own epistemology, there is nothing that a Kantian can say to support her claim that utilitarianism is mistaken.⁵⁸ Obviously, there are many things that she can say, but there is nothing that she can say *that satisfies Waldron's test of justification*. Finally, on this interpretation, Waldron does not beg the question. He is not assuming that the objectivist's epistemology is wrong, but is simply pointing out something that the objectivist would presumably concede – namely, that she cannot demonstrate to other people's satisfaction that her epistemology is correct. Waldron does not need to take sides in the meta-ethical debate to make this point.⁵⁹

However, this response depends upon an account of justification that is self-defeating. Waldron's account of justification falls within the political domain (because it is a moral claim about what counts as a successful political argument), and so – on Waldron's view – must itself be defensible by reference to arguments that everyone can accept given their current beliefs and commitments. Yet Waldron's account of justification cannot be established to everyone's satisfaction. There are many people who reject it, and it is unlikely that they could all be persuaded to change their minds given only arguments that they could accept given their current beliefs and commitments. Therefore, if Waldron's account of justification were correct, it would establish a test that it itself was required to satisfy but could not.⁶⁰

⁵⁸ Waldron (1998) 86.

⁵⁹ Nor need he be embarrassed by the comparison with science. Since scientific decisions are not imposed upon the community at large in the way that political decisions are, the appropriate standards of justification for those decisions may differ. If so, the fact that we cannot justify every element of the scientific methodology to everyone's satisfaction is irrelevant.

⁶⁰ See 271-272 below for a further problem with Waldron's account of justification.

Waldron could respond that I overestimate the depth of disagreement concerning his account of justification. This would be a strange response for him to make, given that a central theme of his writings is the omnipresence of moral disagreement in societies like ours. Nevertheless, Waldron could maintain that, even if people currently disagree about his account of justification, they could be brought – via careful consideration of his arguments – to accept it. However, while this possibility may exist given certain meta-ethical views, it does not exist if perspectival relativism is correct. Perspectival relativism claims that the widespread moral differences in modern democratic societies suggest that different moral beliefs are true for different people, and that a rational convergence upon any (non-tautological) moral belief is impossible. This suggests that there is *no* moral belief – especially not a hotly contested belief such as Waldron's account of justification – that every member of such a society can be provided with reasons to accept given their current beliefs and commitments. Yet if Waldron's account of justification is plausible only if perspectival relativism is incorrect, then the no-difference thesis (which, on this interpretation, relies on that account of justification) is self-defeating. Whether the no-difference thesis is correct would depend on which meta-ethical view is valid, and so we could not determine whether meta-ethics affects the arbitrariness of adjudication without adopting a meta-ethical stance. If so, the whole point of asserting the no-difference thesis in the first place (namely, to avoid having to adopt a meta-ethical stance when discussing adjudication) would be undermined.

A similar problem exists with regard to the other response that Waldron might make – that his account of justification is not meant to apply to itself, but only to all *other* political claims. Let us leave to one side the fact that any such view would appear to be ad hoc. To restrict the account of justification in this way is itself to adopt a moral position that, if perspectival relativism is correct, may be valid relative to some perspectives but cannot be valid relative to all perspectives. This returns us to a position where we must first determine whether perspectival relativism is correct before we can determine for whom (if anyone) the no-difference thesis is correct.

E. A First Look At Judicial Review

Thus, Waldron's attack on objectivists' epistemological claims fails. What does this mean for the arbitrariness of judicial decision-making based on moral judgments? I shall consider two implications.⁶¹ Since objectivists have epistemologies available to them, they can assess the relative abilities of judges and legislators to identify moral truths, and so may be able to argue that judicial review is justified because judges are better placed to determine which outcomes are objectively correct. Perspectival relativists *also* claim that some moral beliefs are true, and *also* have an epistemology available to them that they can use to assess how judges compare with legislators in identifying those beliefs. However, we have seen that some epistemologies are available only to objectivists. To the extent that those epistemologies produce distinctive assessments of judges' ability to identify moral truths, one's meta-ethical

⁶¹ A third was mentioned briefly at 199-200 above.

position should make a difference to one's views regarding the legitimacy of judicial review.

This difference may be subtle, however. For instance, while Moore's moral realism increases the likelihood that judges will possess true moral beliefs, it does the same for legislators, and so may not give judges any direct advantage vis-a-vis legislators. However, if we have some *other* reason for preferring judges to legislators, Moore's epistemology may play a defensive role, by blocking the objection that – while judicial review would otherwise be desirable – judges should not have that power because they are ill-equipped to identify objective moral truths.⁶²

This does not mean that all objectivists should adopt one stance towards judicial review and all anti-objectivists another. Not all objectivists accept the same epistemology (and nor do all anti-objectivists). Also, one's meta-ethical position cannot be the *only* contributor to one's views regarding judicial review. As we saw in Chapter III, a meta-ethical position has implications for moral issues like the legitimacy of judicial review only when combined with certain moral principles. However, it is enough to refute the no-difference thesis if one's meta-ethical position should be *one* factor influencing one's attitude towards judicial review,⁶³ and I have just suggested one way in which this is so.⁶⁴

⁶² This issue is explored in greater depth at 287-293 below.

⁶³ 190 above.

⁶⁴ I shall say much more about the ways in which the meta-ethical debate should affect one's views concerning judicial review in Chapters V-VI.

John Tasioulas has suggested another way in which meta-ethics is relevant to the arbitrariness of adjudication. He argues that one's meta-ethical views should influence one's understanding of the nature of moral disagreement, and hence one's understanding of the various types of arbitrariness to which judicial decision-making is claimed to be subject. On this view, objectivists, unlike anti-objectivists, can – at least in some cases – offer arguments that *everyone* has reason to accept, rendering judicial decisions based on those arguments less arbitrary.⁶⁵

However, a perspectival relativist, too, can claim that everyone has reason to accept certain moral beliefs, although this reason exists only relative to her perspective. In other words, a perspectival relativist need not accept relativism of scope with regard to all (or even any) of her moral beliefs.⁶⁶ Relative to *their* perspectives, other people may have no reason to accept those beliefs, but an analogous point can be made if objectivism is true – the objective reasons that everyone should accept do not necessarily coincide with people's *internal* reasons.⁶⁷

Nevertheless, the perspectival relativist's situation differs from the objectivist's. If perspectival relativism is correct, for someone to accept a belief that is true relative to another person's perspective but not relative to her own requires non-rational persuasion (or something akin to a religious conversion). She has reasons to change to the other person's perspective from within his perspective, but not from within her own, and there

⁶⁵ Tasioulas (2002) 235-237.

⁶⁶ 34-35 above.

⁶⁷ Roughly, an internal reason is a purported reason that one is justified in accepting as valid given one's current beliefs and dispositions.

is no (moral) reason independent of *someone's* moral beliefs and attitudes for preferring one perspective to the other. If objectivism is correct, on the other hand, the shift from one's current belief-set to an objectively correct belief-set can be justified in a 'neutral' way, even if it is not justified relative to one's (current) internal reasons. Thus, more can be said for the new belief-set than simply that it is better on its own terms.

Does this difference have any implications for adjudication? Tasioulas argues that it does. He claims that the fact that, if objectivism is correct, there are reasons on which judges could act that can potentially be grasped by everyone (without the need for non-rational persuasion) increases the rationality, and hence justifiability, of judicial decision-making.⁶⁸ Of course, those reasons are unlikely *actually* to be grasped by everyone. However, the fact that they *could* be grasped by everyone may make the difference that Tasioulas claims, depending upon one's beliefs about the type of justification needed for judicial decision-making.

To see this, imagine that Anna believes that people should not be treated in ways that they cannot be rationally persuaded are correct. If perspectival relativism is correct, Anna should oppose judicial decisions requiring other people to act contrary to their internal reasons (because those decisions will be contrary to their perspective and so cannot be accepted except via non-rational persuasion). This is so even if those decisions would otherwise be correct relative to Anna's perspective. If, on the other hand, a 'rational convergence' version of objectivism is correct, Anna can support judicial decisions that accord with objective truth, since – even if one currently does not

⁶⁸ Tasioulas (2002) 236-237.

accept those decisions – one could come to do so without the need for non-rational persuasion.

There are two objections that the no-difference theorist might offer at this point. Firstly, she might argue that – even if objectivism is correct – we could not (even in principle) rationally persuade everyone that any particular moral proposition is true. However, this objection relies on the epistemological attack upon objectivism that was rejected in Part D. I argued there that, for the purposes of the no-difference thesis, one cannot assume that the epistemological theories offered by objectivists are unacceptable. In particular, one cannot assume that a rational convergence upon particular moral propositions is, in principle, unachievable. Of course, not everyone will in fact be persuaded of the truth of any moral proposition, but Anna requires only that people *could* be (rationally) persuaded, not that they actually *be* persuaded.

This leads into the second objection that the no-difference theorist might offer. Not everyone will agree that Anna's is the appropriate test of legitimacy. One might instead agree with Waldron that justification must be in terms of people's current beliefs and commitments.⁶⁹ On that view, many (or even all) judicial decisions will be illegitimate regardless of whether objectivism is correct, because people's current beliefs and commitments differ enormously in societies like ours. Or one might believe that it is enough if one can provide reasons that are valid relative to one's own currently accepted standards, even if one cannot provide reasons that are valid relative to the currently accepted standards of other people affected by the decision. If so, judicial decisions may be legitimate even if anti-objectivism is correct.

However, we have seen that it is enough if one's meta-ethical position makes a difference given certain moral beliefs; it need not make a difference regardless of which moral beliefs one holds. The fact that objectivists and anti-objectivists may go either way on this issue does not show that one's views regarding that issue are independent of one's meta-ethical position, but rather that the latter cannot *by itself* determine the former. One's meta-ethical position is nevertheless relevant, because it may determine whether one's test of legitimacy for judicial decision-making (for example, that people could come to accept those decisions without the need for non-rational persuasion) is satisfied.

F. Conclusion

Whichever interpretation we accept, Waldron's arguments for the no-difference thesis fail. However, if I am correct in rejecting the no-difference thesis, what motivated its adherents to accept it? I have already mentioned one reason – namely, the attraction of the thought that we can engage in legal practice and theory without having to participate in a long-standing philosophical dispute that does not appear close to resolution. A further reason why the no-difference thesis may appear attractive is that many common claims as to the difference that the meta-ethical debate makes to adjudication are grossly overstated. We saw some examples of this in Part C. I shall consider another example in the next chapter, where I discuss the claim made by a number of commentators that judicial review is justifiable only if some form of objectivism is correct. I will argue that this is not in fact the case. For example, a perspectival relativist could accept that

⁶⁹ Despite my arguments to the contrary: 205-207 above.

judicial review is legitimate, and could do so on the same grounds as an objectivist. This raises the question of whether there is some truth to Waldron's no-difference thesis, after all, and I pursue this question in Chapter VI.

CHAPTER V: CAN PERSPECTIVAL RELATIVISTS SUPPORT JUDICIAL REVIEW?

We saw in the previous chapter that Waldron's defence of the no-difference thesis is unsuccessful. He fails to show that the truth or falsity of objectivism can have no implications for adjudication. However, it is one thing to offer abstract reasons to reject the no-difference thesis and quite another thing to trace out the differences that one's meta-ethical position should make to a concrete legal dispute. In Chapter IV, I briefly discussed two consequences that the meta-ethical debate may have for the legitimacy of judicial review. In this chapter and the next, I pursue this question in much greater depth.

Those theorists who have investigated the relationship between the meta-ethical debate and the legitimacy of judicial review have generally adopted one of two positions. The first involves accepting the no-difference thesis and arguing that one's meta-ethical position should make no difference to one's views concerning the legitimacy of judicial review. The second involves claiming that, far from not making a difference, the truth or falsity of moral objectivism may well be determinative of the legitimacy of judicial review. On this view, it is open to an objectivist to defend judicial review, but it is difficult – if not impossible – for an anti-objectivist to do so.

I shall seek to distinguish my own position from both of these views. In Chapter IV, I suggested some reasons for rejecting the first view. In the present chapter, I argue

against the second view, contending that the truth or falsity of objectivism does not make as radical a difference to the legitimacy of judicial review as has been supposed by most opponents of the no-difference thesis. To this end, I seek to show that a perspectival relativist can endorse judicial review.¹ Since the legitimacy of judicial review is a moral issue, judicial review cannot be legitimate relative to everyone's perspective if perspectival relativism is correct. However, I shall argue that it can be legitimate relative to some (even many) perspectives. Perspectival relativism is not (logically, or in spirit) inconsistent with support for judicial review, though it does not demand such support.

I begin, in Part A, by outlining two arguments that have been offered in support of judicial review. In Part B, I consider three ways in which radical opponents of the no-difference thesis might seek to show that perspectival relativists cannot rely on these arguments. I argue that none of these attempts are successful. Part C then focuses on the notion of rights used in the two arguments in favour of judicial review. It considers whether perspectival relativism favours any particular account of rights, and whether this has any implications for its ability to support judicial review. I conclude the chapter, in Part D, by summarising my central claim – that perspectival relativists, like objectivists, can accept the two arguments in favour of judicial review introduced in Part A – and by suggesting an important qualification to those arguments that should be accepted by both objectivists and perspectival relativists.

¹ To show that perspectival relativism is compatible with support for judicial review is not to show that the same is true of *all* forms of anti-objectivism. However, it is enough to refute radical opponents of the no-difference thesis, who assert that it is difficult (if not impossible) for *any* anti-objectivist to support judicial review: eg Moore (1992) 2469-2480.

By the end of this chapter, the reader may be wondering whether there is some truth to the no-difference thesis, after all. If I succeed in establishing that both objectivists and perspectival relativists can support judicial review, in what way does the truth or falsity of objectivism influence the legitimacy of judicial review? I briefly suggested two ways in Chapter IV, but I shall explore this issue in much greater depth in Chapter VI.

There are several reasons why I have chosen the legitimacy of judicial review as my focus in the last two chapters of this thesis. While my stated concern is with adjudication more generally, an enormous number of issues arise with regard to the adjudicative process, and it would be impossible to consider the implications of the meta-ethical debate for all of those issues. By focusing on just one issue – namely, the legitimacy of judicial review – I am able to consider in some depth whether the meta-ethical debate makes a difference to a concrete dispute concerning adjudication. Moreover, the legitimacy of judicial review is of particular concern to both advocates of the no-difference thesis (especially Waldron) and opponents of that thesis (such as Moore and – in his early writings – Dworkin). By discussing that issue myself, I can more clearly locate myself on a spectrum between no-difference theorists and their more extreme opponents.

A. Two Arguments in Favour of Judicial Review

In this Part, I present two arguments that purport to show that judicial review is not unjustifiably undemocratic.² These are not the only arguments that one could offer in favour of judicial review. However, they are sufficient to provide a basis from which to consider whether perspectival relativists can support judicial review. Nor are these arguments particularly novel. Instead, I draw to a large extent upon existing defences of the practice. This is because my goal in this chapter is not to offer new grounds for supporting judicial review, but rather to show that a perspectival relativist can rely upon certain existing grounds. Moreover, while I consider some objections that opponents of judicial review might make to these two arguments, I do so only to the extent necessary to show that these arguments are worthy of consideration. It is enough for my purposes if I can show that there are strong, albeit contested, arguments in favour of judicial review that are available to perspectival relativists. It is neither necessary nor possible (in the space of a single chapter) to show that these arguments can survive all the objections that opponents of judicial review might level against them.

Since my purpose in the present Part is simply to present the two arguments in favour of judicial review, I shall do so without reference to either objectivism or anti-objectivism. Whether those arguments are compatible with perspectival relativism will form the focus of Parts B & C.

Before introducing the two grounds for supporting judicial review, however, I should explain what I mean by ‘judicial review’. *Prima facie*, this is simple: courts

² This wording is intended to leave open whether judicial review is not undemocratic at all or is undemocratic but justified. I shall say as little as possible about what I take ‘democracy’ to mean, since the debate about judicial review can largely be expressed in terms of whether constraints on majoritarianism are needed, without becoming involved in the vexed issue of defining ‘democracy’.

exercise the power of judicial review when they decide whether to strike down legislation as unconstitutional.³ However, if the meta-ethical debate affects the merits of judicial review, it is most likely to do so in cases where judges use moral reasoning to reach the conclusion that a particular statute is or is not unconstitutional. It is this situation on which I shall concentrate. (I shall assume that some cases of this type exist in any jurisdiction that adopts judicial review.) A second reason for this choice of focus is that it is this situation that the more extreme opponents of the no-difference thesis have in mind when they argue that anti-objectivists are hard-pressed to support judicial review.⁴

1) The protection of rights

The first argument that I wish to consider is that judicial review is necessary to protect people's rights.⁵ Legislators are (typically) dependent upon the support of a majority of the electorate to retain office, and so lack sufficient motivation not to mistreat any minority that the majority wishes to oppress. As rights are designed, in part, to protect individuals and groups from oppression by the majority, their protection cannot safely be left to an institution that is dependent upon the support of that very majority. Since we cannot trust the majority (through the legislature) always to respect rights, and because rights are too important to be left subject to such a risk, judicial review is

³ It could be argued that judges also exercise the power of judicial review when they interpret legislation so that it conforms to fundamental principles of the common law. However, I shall limit my focus to the paradigmatic form of judicial review discussed in the text.

⁴ eg Moore (1992) 2469-2470.

⁵ Except where indicated otherwise, all references to rights in this chapter are to moral rights. I consider two rival accounts of rights in Part C.

needed to ensure that those rights are respected. Judges, unlike legislators, are not normally dependent upon the majority's support to retain office, and so are better placed to oppose the majority when it fails to respect a minority's rights. Therefore, judges are appropriate protectors of rights, not because they are wiser than legislators, but because they are not beholden to the majority and so are more capable of protecting the interests of the unpopular and unrepresented.⁶

Even if we confine our attention to cases in which both legislators and the majority act in good faith, there is still an unacceptable risk of oppression, because the majority's sincerely held beliefs about rights may be mistaken (either objectively or relative to the perspective that we are using to assess the merits of judicial review, depending on whether objectivism or perspectival relativism is correct). For example, if the majority acts on a sincere belief that members of a particular group have no right to the protection of the law (eg because they are not citizens), that group is as much in need of protection as if the majority were acting in bad faith. Thus, even when the majority acts in good faith, the recognition given to the minority's rights by the majority may be radically insufficient. (The majority may also underestimate its *own* rights, but I shall not consider this possibility here.)

Some opponents of judicial review seek to downplay this risk of oppression. They argue that, to win office in a pluralistic democracy, a political party must appeal to a wide range of interests. This gives political parties an incentive not to ignore the

⁶ Choper (1980) 67-70.

interests of any particular group.⁷ Modern societies do not consist of a fixed majority, together with one or more minorities. Instead, they are constituted by a plethora of minority groups, and anyone wishing to hold political office must appeal to a broad range of such groups, not just the one to which she belongs. Therefore, it is not in her interests to oppress a minority by ignoring that minority's rights.

Strictly speaking, this argument suggests that political parties have an incentive to act in the way that people want, not necessarily to act in people's interests. (Even if perspectival relativism is correct, there is a distinction between what is in people's interests and what they believe to be in their interests.) Nevertheless, since I believe that people are not *typically* mistaken about their own interests, I agree that – to obtain majority support – legislators must appeal to a wide range of interests. However, they need not appeal to *everyone's* interests. Indeed, where people's interests conflict, a political party may maximise its support by acting in the interests of some groups at the expense of others. This raises the possibility that those who are left out of the coalition put together by the ruling party may be oppressed by that coalition.

Indeed, experience suggests that no majoritarian system that lacks judicial review will protect all the rights of everyone subject to that system. Of course, the same is true of systems *with* judicial review, and the implications of this will be considered in Part D. However, on the rationale suggested in this Section, judicial review provides a check upon the legislature for the express purpose of protecting rights. Therefore, there is reason to hope that judicial review will at least *reduce* rights violations.

⁷ eg Sandalow (1977) 1190-1191.

This argument in favour of judicial review need not assume that members of the majority are motivated solely by their own self-interest, without any scruples regarding the treatment of the minority.⁸ The majority may *generally* be well-disposed to the minority, but this will not *always* be the case. No matter how well-behaved the majority is generally, there will be occasions on which it fails to respect the minority's rights.⁹ Even when the majority acts correctly by its own lights, it may not in fact be acting correctly, and so may infringe the rights that the minority in fact possesses.¹⁰ It is for the protection of the minority on *these* occasions that judicial review is necessary. Nor does the fact that such occasions may be infrequent mean that judicial review is of little worth. The minority interests that are infringed on such occasions may be so vital that judicial review is very important indeed.

This assumes that there are certain interests – namely, those that provide a foundation for rights – that are too important to be left up for grabs in the ordinary political process. While I lack space to consider fully how this claim might be defended, I shall suggest some reasons for accepting it with regard to certain rights in Section 2. For now, it is sufficient to note that this assumption enables us to distinguish between cases where a minority legitimately loses out in the ordinary political process (namely, where its rights are not breached) and cases where it is treated illegitimately

⁸ If it *did* make this assumption, it might well be incompatible with perspectival relativism, since part of the argument in favour of perspectival relativism presented in Chapter II involved claiming that people are not predominantly self-interested or prejudiced: 97-99 above.

⁹ As most opponents of judicial review concede: eg Waldron (1999) 258.

¹⁰ This statement can be given a perspectival relativist reading – the majority is acting correctly relative to its own perspective, but incorrectly relative to the perspective being used to assess its actions.

and so should be protected by the courts (namely, where its rights *are* breached).¹¹ In other words, there are certain interests that are so important that – where the legislature fails to respect them – the courts must do so. However, provided those interests *are* respected, the courts must let all other political issues be decided according to majoritarian principles.¹²

2) Policing democracy

A second argument in favour of judicial review is that it is necessary for the preservation of democracy. To understand this argument, it is first necessary to consider an argument offered by Jeremy Waldron *against* judicial review. Waldron claims that legislative decision-making respects individuals in a way that judicial decision-making does not.¹³ Having political decisions made by the people's elected representatives gives weight to each person's views (since each person has a vote when electing those representatives), and ensures that the weight given to each person's view is equal (since each person has an *equal* vote). Waldron concludes that this 'pure majoritarianism' '... attempts to give each individual's view the greatest weight possible in this process compatible with an equal weight for the views of each of the others.'¹⁴ As a result, it respects people in a way that adjudication does not, by giving each person

¹¹ cf Choper (1980) 76.

¹² This point is confined to the present context. I am not claiming that, when *not* exercising the power of judicial review, judges must defer to the majority unless someone's rights are at stake.

¹³ Waldron (1999) 108-109.

¹⁴ Waldron (1999) 114 (footnote omitted).

the greatest possible say (compatible with an equal say for everyone else) in political decisions that affect her interests.

Underlying Waldron's argument is the view that people have the right to participate in all aspects of their community's governance, based on the values of autonomy and responsibility.¹⁵ However, the right to participate in a majoritarian decision-making process is not particularly meaningful if the *opportunity* to participate is lacking. Moreover, the opportunity to participate is best protected by recognising further rights.¹⁶ For example, the right to free (political) speech is necessary to protect people's ability to acquire the information that they need to participate meaningfully in the political process. Similarly, the right of assembly is needed to protect people's ability to organise into viable political units. Where a majority seeks to infringe these rights, there is a conflict between the imperative of participation on which majoritarianism is based (since preventing the majority from acting as it wishes involves acting on a decision in which the majority was not allowed to participate), and the importance of these further rights for ensuring that participation is meaningful. In such cases, judicial review may be necessary to uphold these further rights.¹⁷ Where the majority would undermine these rights, the damage done by taking this matter away from the majority may be less than the damage done by letting the majority have its way.¹⁸ Democracy can survive having an occasional decision taken away from the electorate and made by a judicial elite (see below); it cannot survive widespread

¹⁵ Waldron (1999) 213.

¹⁶ Choper (1980) 4; Dworkin (1996a) 363.

¹⁷ Freeman (1990) 355; Dworkin (1996a) 363.

breaches of such rights as the right to free speech or assembly. Such breaches undermine the democratic credentials of *all* political decisions.

Therefore, the claim that the importance of political participation weighs against judicial review represents only part of the story. For participation to be meaningful, certain constraints upon majoritarianism (such as the right to free speech) are necessary. We participate meaningfully in political decision-making only if we are able to make *free and informed* decisions. As a result, judicial review designed to uphold such constraints on majoritarianism may promote, rather than impede, political participation.

Of course, even if the protection of certain rights is a prerequisite of meaningful participation in the political process, so is actual involvement in that process. Judicial review breaches this latter requirement – rights must be respected, not because the electorate has so decided, but because judges require it. Therefore, there is something lost, from a democratic point of view, when an unelected and unaccountable court makes a binding decision about what democracy requires.¹⁹ Even if the *content* of that decision advances democratic values (because the right that it upholds is indeed a prerequisite of meaningful participation in the political process), the *process* of judicial review is still undemocratic because the court is not accountable to the electorate.²⁰ This leads opponents of judicial review such as Waldron to accept that majoritarianism has merit only under certain conditions (such as free speech and freedom of

¹⁸ This assumes that the *court* will decide the matter correctly. This assumption is examined in Part D.

¹⁹ Waldron (1999) 293.

²⁰ Choper (1980) 9-10.

association), but to argue that the majority should be left to determine the exact nature and scope of those conditions.²¹

However, while judicial review interferes with the majority's right of participation to some extent, it leaves much scope for the exercise of that right (in cases not involving other rights), and will (if courts decide cases correctly) respect the majority's other rights. If, on the other hand, the majority is left free to oppress the minority, it can deny the minority's most basic rights, and hence its ability to participate meaningfully in the political process. Thus, even if it reduces the majority's opportunity to participate to some extent, judicial review can be vital to protecting minorities from a far more serious reduction in their ability to participate.

It is worth noting in this context that the argument in this Section seeks to justify a more limited form of judicial review than does the argument in Section 1. On the present view, judicial review is permitted only to uphold that subset of one's rights that is necessary to render one's right of participation meaningful. This involves recognising that decisions reached on a majoritarian basis may infringe important rights that are *not* preconditions of that process.²² Such rights fall outside the proper scope of judicial review because they are not essential components of democracy:

Once the rights and other interests necessary to the democratic process have been effectively secured, then the more the [courts] extend their

²¹ Waldron (1999) 283.

²² Dahl (1989) 176. Dahl gives the example of the right to a fair trial.

authority to substantive questions, the more they reduce the scope of the democratic process.²³

Limited in this way, judicial review promotes participation overall, by ensuring that the opportunity to participate in the political process is not unduly restricted, whilst respecting the outcome of people's participation in all other cases.²⁴

B. Perspectival Relativism and Judicial Review

In the previous Part, I outlined two arguments that are commonly offered in support of judicial review. The purpose of this chapter is not to determine whether those arguments are correct, but rather to examine whether perspectival relativists can support them. In this Part, I consider three attempts to show that, while objectivists may be able to rely on these arguments, anti-objectivists (in particular, perspectival relativists) cannot. In Section 1, I consider a general argument to the effect that judicial review is defensible only if objectivism is correct. In Section 2, I respond to the claim that anti-objectivists cannot defend judicial review as a way of protecting rights. Finally, Section 3 discusses whether perspectival relativists are committed to relativism of scope, and so must oppose judicial review.

Before proceeding, however, I need to clarify what it means to say that perspectival relativists can support judicial review. At a bare minimum, it is to assert

²³ Dahl (1989) 191. The substance/process distinction invoked here is notoriously problematic. Even the distinction that I draw, between the preconditions of democracy and all other matters, would need elaboration were judicial review to be justified solely on the present basis.

²⁴ Ely (1980) 77. In considering whether perspectival relativists can accept this argument, it is perhaps noteworthy that Ely is an anti-objectivist: Ely (1980) 54.

that perspectival relativism is *logically consistent* with support for judicial review. However, radical opponents of the no-difference thesis do not necessarily claim that there is a logical incompatibility between perspectival relativism and judicial review. Often, they make a more moderate claim – that it is difficult, if not impossible for an anti-objectivist to defend judicial review,²⁵ or that any attempt to defend judicial review is a ‘wild and unseemly scramble’ for anyone but an objectivist.²⁶ While vague, these formulations suggest that – even if it is logically possible for anti-objectivists to support judicial review – their meta-ethical position provides them with strong reasons not to do so.²⁷ Thus, whether perspectival relativists can support judicial review depends on whether their meta-ethical position provides any reason not to support judicial review and, if so, how strong that reason is. This is a matter of degree and judgment. There cannot be any bright-line test for determining whether a reason is strong enough to warrant the conclusion that perspectival relativists cannot support judicial review. Instead, we must consider the reasons that radical opponents of the no-difference thesis claim to exist, and decide whether they show that support for judicial review is not a viable option for a perspectival relativist.

1) A preference for aggregating preferences

²⁵ Hurd (1988) 1459 (discussing jurisprudence in general, not just judicial review).

²⁶ Moore (1992) 2476.

²⁷ Those reasons must be strong, or else they could easily be defeated, allowing anti-objectivists to support judicial review without undue difficulty. However, those reasons need not be undefeated, since radical opponents of the no-difference thesis need claim only that anti-objectivists cannot support judicial review *without great difficulty*.

Ronald Dworkin has suggested that one ground for opposing ‘judicial activism’ might be that it presupposes that moral principles can be objective, since it assumes that citizens have certain moral rights against the state that judges should enforce.²⁸ Perhaps something similar could be said about judicial review. Certainly, both of the arguments presented in Part A assume that citizens have moral rights that judges should enforce. However, Dworkin offers no argument to support the claim that only objectivism leaves room for the notion of moral rights, and so I shall postpone an examination of this claim until the next Section. For now, it is enough to note that there can at least be *right answers* to moral questions if perspectival relativism is correct. Perspectival relativism allows that moral statements can be true or false; it denies only that this truth or falsity is ultimately independent of our moral beliefs and desires, and that there could be a rational convergence upon certain moral beliefs. Moreover, we saw in Chapter II that perspectival relativism need not collapse into nihilism. Thus, the fact that the defences of judicial review presented in Part A presuppose that there are correct answers to moral questions (that judges should uphold) does not mean that they presuppose the truth of objectivism.

There is more to Dworkin's argument, however. While there can be right answers to moral questions if perspectival relativism is correct, those answers are right only relative to a perspective. Moreover, a particular answer is right relative to a particular perspective if it coheres best with the *other* moral beliefs and desires of the holder of that perspective. Thus, if perspectival relativism is correct, moral truth depends ultimately upon (coherence with) one's moral beliefs and preferences, and so

²⁸ Dworkin (1977) 138-140. Dworkin later abandoned this argument, embracing the irrelevance thesis instead: Dworkin (1986) 372-373. However, it continues to be advanced by other people: 234-236 below.

judicial review designed to uphold moral truths ultimately upholds nothing more than someone's (presumably the judge's) moral beliefs and preferences. Yet, Dworkin argues, if judges' claims about moral truth are ultimately merely an expression of their preferences, then courts usurp the role of the legislature when exercising the power of judicial review. It should be for the legislature to decide whose preferences shall govern, rather than having the preferences of a small number of judges prevail over the preferences of a majority of the electorate.²⁹

However, even if our moral beliefs are ultimately 'mere' expressions of our preferences, this argument underestimates the significance of those preferences. Our preference that (say) the right to free speech or to a fair trial be upheld may be sufficiently important to us that we would want the courts to overrule a legislature that thwarted that preference, even if this means that our preference prevails in the face of majority disapproval. (Remember that I argued in Chapter II that we are likely to continue to regard our moral beliefs or preferences as important even if we reject objectivism.) This may lead us to support judicial review on the basis that it is more likely to result in that preference being upheld.³⁰

More importantly, Dworkin's argument fails on its own terms. Let us assume that he is right in claiming that (if objectivism is false) one should not insist on having one's moral beliefs upheld in the political forum. If so, one should not insist on

²⁹ Dworkin (1977) 140. Dworkin rejects the premise that moral truth is relative to a perspective. Bork (1971) 9-10, on the other hand, accepts that moral beliefs are (in some sense) expressions of preference, and concludes from this that the majority's preferences should prevail.

upholding the (moral) belief that the legislature is the appropriate place to resolve moral disputes. This belief, too, is a 'mere preference' according to our current assumptions, since its truth ultimately depends upon (coherence with) one's other moral beliefs and preferences. If we are not entitled to uphold our moral preferences if perspectival relativism is correct, then we cannot uphold our belief in majoritarianism, and so we have no basis for arguing that – when preferences conflict – the majority's should prevail.³¹ Conversely, if we *are* entitled to uphold that belief, then we are also entitled to uphold our other moral beliefs, including our belief that there are rights that the majority must respect even if it does not want to.

However, is this not too quick a refutation of Dworkin's argument? Is there not a world of difference between saying that judicial review is justified because judges are more likely to uphold objective moral truths and saying that it is justified because judges are more likely to arrive at decisions that are correct relative to a particular perspective?

Certainly, there is a marked difference between these two possibilities for anyone who does not share the perspective being upheld. The fact that judges are more likely to arrive at decisions that are correct relative to X's perspective may carry little (if any) weight if one does not share X's perspective. However, if perspectival relativism is correct, one must decide whether to support judicial review from within some

³⁰ Though this depends on whether we believe that the courts are more likely to uphold our most important preferences than the legislature: Part D.

³¹ In his later writings, Dworkin seems to acknowledge this fact: Dworkin (1986) 373. However, this is not true of other advocates of this argument: 234-236 below.

perspective or other. There is no 'neutral' vantage point from which to reach this decision. Moreover, if the judge's decision is correct relative to one's perspective, then the judge decided in the morally right way. Her decision cannot be mind-independently correct or the subject of a rational convergence, but it can still be morally right (relative to one's perspective). Furthermore, the fact that our moral beliefs are not *objectively* correct does not necessarily mean that we should cease to attach importance to those beliefs.³² Therefore, whether perspectival relativism or ecumenical pluralism is correct, judicial review may be justified on the basis that judges are more likely to protect people's rights than the legislature, and that this is a valuable outcome.

At this point, Dworkin might argue that – while one *could* continue to value one's moral beliefs if perspectival relativism were correct, and so support judicial review to the extent that it does a better job of upholding those beliefs – few people would find this position attractive. If objectivism is correct, we can view judicial review as upholding objective moral principles that should operate as constraints upon the legislature in its task of balancing different people's preferences. If perspectival relativism is correct, on the other hand, the moral principles upheld by judicial review are simply further preferences, and so it becomes unclear why they should act as constraints upon the majoritarian process.³³

This argument assumes that whether objectivism is true or false affects whether judges are able to uphold objective moral principles, but does not affect the legislature's task of balancing mere preferences. However, if objectivism is correct, it is likely that

³² 111-116 above.

legislators will need to consider objective moral principles in order adequately to address many of the moral issues that come before them. Therefore, an objectivist who wishes to defend judicial review must explain why judges' views about objective moral principles should operate as constraints upon legislators' views about objective moral principles. This appears to be just as challenging a task as the perspectival relativist's job of explaining why the 'mere preferences' upheld by judges should operate as constraints upon the 'mere preferences' upheld by legislators.³⁴

I am not claiming that objectivists cannot meet this challenge. For example, an objectivist who wishes to defend judicial review could argue that judges are more likely to identify objectively true moral principles than are legislators. However, it is a challenge that can also be met by perspectival relativists. A perspectival relativist could argue that judges are more likely to uphold those moral beliefs that are true relative to her perspective, and that judicial review should be supported for this reason.

Is the objectivist's response to this challenge more appealing than the perspectival relativist's? This depends on whether there is a morally important difference between viewing the moral beliefs that are upheld by judges as objective in nature and viewing them as 'mere' preferences. If perspectival relativism is correct, there may be some perspectives according to which these two ways of viewing moral beliefs are importantly different. These will be perspectives that attach great moral

³³ This argument was suggested by John Tasioulas.

³⁴ This argument closely resembles Waldron's argument for the no-difference thesis. However, as I indicate in the next paragraph, I believe that (contra Waldron) this challenge can be met by both objectivists and perspectival relativists. Moreover, there are ways in which the choice between objectivism and perspectival relativism does affect the legitimacy of judicial review: Chapter VI.

significance to whether our moral beliefs are objectively valid. However, there may be other perspectives according to which what is important (or *most* important) is whether those moral beliefs are correct, not whether they are *objectively* correct. Not only is this latter view logically open to the perspectival relativist,³⁵ but there is no obvious pressure on her to adopt the former view. Even if we view our moral beliefs as ‘mere preferences’, we may still regard those preferences as sufficiently important that we would want to act on them even if this meant overriding the majority's preferences. I argued in Chapter II that the recognition that our moral beliefs are not *objectively* correct need not – indeed, is unlikely to – lead us to cease attaching importance to those beliefs. *Which* beliefs we should attach importance to (eg the preference for majoritarianism or the preference that certain rights be upheld whether the majority wishes this or not) depends on the nature of our perspective.

There might have been some merit to Dworkin's argument if perspectival relativism were committed to treating everyone's preferences as equally good. Such a commitment might indicate that we should defer to the majority – if everyone's preferences are equally good, then it makes sense to let the weight of numbers determine political outcomes. (Though this suggestion would itself be only equally good as rival views, such as support for judicial review.) However, we have seen that care must be taken when considering whether perspectival relativism is committed to treating everyone's preferences as equally good.³⁶ From a meta-ethical point of view,

³⁵ 111-116 above. See also 95-97 above, where I argued that moral beliefs do not contain an implicit claim to objectivity. If so, we can separate the question of whether a moral belief is true from the question of whether it is objectively true.

³⁶ 118-119 above.

there is a sense in which everyone's preferences are equally good, since none are objectively correct (or incorrect). However, from a moral point of view, whether everyone's preferences are equally good must be assessed relative to a perspective, and few perspectives are likely to treat everyone's preferences as equally good. Most perspectives will contain a preference as to whether (say) capital punishment is permissible or not, and will treat that preference as better than any alternative.³⁷ Thus, relative to most perspectives, it is mistaken to claim that everyone's preferences are equally good. Relative to those perspectives, the argument sketched at the start of this paragraph (which depends upon everyone's preferences being *morally* equal) cannot get off the ground.

2) Relative rights

I have argued that the fact that right answers to moral questions exist only relative to a perspective does not mean that judicial review cannot be justified if perspectival relativism is correct. However, Michael Moore claims that – even if there can be moral truths if anti-objectivism is correct – there cannot be moral rights. Since both of the arguments in favour of judicial review outlined in Part A assert that judicial review is needed to protect rights, I must show that Moore's claim that anti-objectivism leaves no room for rights is mistaken.

Moore argues that someone who accepts his version of moral realism is better placed to defend judicial review. For the moral realist, there is always a right answer to

³⁷ Remember that a moral perspective has its own standards of correctness (on the basis of which we can say that one preference is better than another): 113-116 above.

the question ‘what rights do people have?’, opening up the possibility that judges are better able to identify that answer than are legislators. For the anti-objectivist, on the other hand, people do not have any rights at all, and so judicial review cannot be justified on the basis that judges are better able to identify people's rights.³⁸

Moore concedes that anti-objectivists can *talk* about rights. However, he argues that, for the anti-objectivist, talk about rights (like any other moral assertion) is merely an expression of one's feelings. Thus, the anti-objectivist cannot justify judicial review on the basis that judges are better at identifying rights, since this would be to claim that judicial review is justified because judges are better at identifying a particular person's *feelings*. Any such claim would undervalue democracy, by expressing a willingness to have a particular individual's feelings prevail even when that individual is in the minority. Moore asks: ‘... since [our views about rights] are only feelings, why should we have our way if a majority of our fellow citizens have different feelings?’³⁹

However, this is simply a variation on the argument considered in Section 1 (namely, that judicial review is unjustifiably undemocratic unless objectivism is correct). It fails for the same reasons. In particular, if anti-objectivism is correct, to argue that judicial review is unjustifiably undemocratic is itself to express one's feelings. At this point, a supporter of judicial review could ask why our feeling that we should defer to the majority should trump our other feelings. There cannot be any *a priori* reason why the preference for majoritarianism should always prevail. Instead, for

³⁸ Moore (1992) 2477-2478.

³⁹ Moore (1992) 2479.

the perspectival relativist, whenever the preference for majoritarianism conflicts with a desire to uphold a different preference in the face of majority disapproval, we must ask which of these two preferences coheres best with the rest of our belief-set. For many people, the latter preference will prevail in some cases, for the reasons given in Part A.

In an earlier article, however, Moore offered a further argument to support his claim that anti-objectivists cannot defend judicial review on the basis that it protects people's rights. He argued that moral rights could not exist unless objectivism is correct, because anti-objectivism leaves no room for rights that '... are natural and independent of convention.'⁴⁰ What is it for a right to be 'natural and independent of convention'? Moore offers some guidance when he asserts that, to an anti-objectivist, '... it is unintelligible to speak of a right ... that is dependent neither upon the subjective expectations of its holder nor upon the conventions, or "shared expectations", of society.'⁴¹ Thus, Moore's view seems to be that a right is the kind of thing that is independent of social conventions and 'the subjective expectations of its holder', and that anti-objectivism leaves no room for such a thing.

There is some basis for looking at rights in this way. Arguably, part of the purpose of rights is to provide individuals or minorities with some protection from the majority. If so, the content of a right must not be determined solely by reference to social conventions (since these are presumably responsive to the majority and so would preclude rights from providing protection *from* the majority, except in cases where the

⁴⁰ Moore (1982) 1069.

⁴¹ Moore (1982) 1070.

majority is acting contrary to its own conventions). Yet nor do we think that a right has whatever content its holder expects it to have, and so the content of a right cannot be determined solely by reference to its holder's subjective expectations, either.

However, even if we assume for the sake of the argument that these are appropriate constraints upon the content of a right, they can be satisfied by perspectival relativism. Firstly, perspectival relativism allows for the content of a right to be independent of the expectations of its holder. Relative to my perspective, someone can have a right whose content is completely independent of her expectations (since its content is determined by reference to *my* perspective). Even relative to the holder's perspective, the right may have a content different from what she believes it to have, since she may be mistaken relative to her own perspective (for example, if she holds inconsistent beliefs about the right). Secondly, if perspectival relativism is correct, the content of a right can also be independent of social conventions. Relative to any particular perspective, those conventions can be dismissed as mistaken. Obviously, there will be many perspectives according to which those conventions are correct, but – if there is as much moral disagreement within societies as I suggested in Chapter II⁴² – then there are likely to be a significant number of perspectives according to which those conventions are wrong.

Admittedly, the content that a right has relative to my perspective cannot be completely independent of *all* expectations (since it depends on those beliefs or expectations that I would hold if I rendered my current belief-set fully coherent). However, there does not seem to be any reason why rights should be required to meet

such a stringent test. Rights can provide protection from the majority without having to meet that test. Our intuition that rights do not simply have whatever content their holder expects them to have can also be upheld without requiring them to meet that test. And I shall argue in Part C that one can still have reason to care about (or attach moral importance to) rights even if those rights exist only relative to one's perspective.

Not only does perspectival relativism leave room for the notion of rights, but I shall argue in Section 3 that it even allows for the notion of *universal* rights (though only relative to a perspective). Relative to a particular perspective, there may be rights that everyone possesses, and so that are universal. For example, relative to my perspective, *everyone* may have a right to free speech. The only thing that perspectival relativism does not allow for is the notion of a right that exists (with the same content) relative to every possible perspective (though, as an empirical matter, it is highly unlikely that there will be a right that exists even relative to every perspective held by members of a particular jurisdiction).

Thus, there is no reason why perspectival relativists cannot recognise the existence of moral rights. However, to show that perspectival relativism leaves room for the concept of rights in general is not to show that it is compatible with any particular account of rights. In Part C, I consider whether perspectival relativism favours a particular account of rights, and whether this has implications for the legitimacy of judicial review.

3) An issue of scope

⁴² 83-84 above.

There is a further reason why someone might claim that perspectival relativists, in particular, cannot support judicial review. In Chapter II, I argued that perspectival relativism does not collapse into moral nihilism. Moral beliefs can be true or false even if perspectival relativism is correct. However, if perspectival relativism is correct, moral beliefs can be true or false only relative to a particular perspective. Does this mean that, while we can continue to hold moral beliefs, we must regard them as applying only to ourselves, rather than being universal in application? In other words, is perspectival relativism committed to a version of what (in Chapter I) I called ‘relativism of scope’, according to which one’s moral beliefs are true for only those people (if any) who share one’s perspective?

If so, judicial review cannot be justified if perspectival relativism is correct. Judicial review – at least in the type of case that is of interest when considering the implications of the meta-ethical debate – involves imposing moral beliefs upon other people. When a judge engages in moral reasoning to decide whether to strike down legislation as unconstitutional, she uses certain moral beliefs to determine how the parties to the case (and anyone else affected by the decision) will be treated. However, if perspectival relativism entails the version of relativism of scope outlined in the previous paragraph, then the beliefs used by the judge apply only to the judge herself (and perhaps also to anyone whose perspective overlaps with hers at the relevant point). Those beliefs do not apply to everyone affected by her decision, since it is almost certain that some of the people affected by her decision will hold perspectives that

diverge from hers at the point in question. Yet how can it be legitimate to treat those people in accordance with moral beliefs that do not apply to them?

However, the view sketched in the previous two paragraphs is based on a confusion. There is a sense in which, if perspectival relativism is correct, we must regard our moral beliefs as applying only to ourselves, and a sense in which we need not do so. If perspectival relativism is correct, our moral beliefs apply only to ourselves in the sense that they are correct relative to a perspective that we hold (assuming that we are not mistaken relative to our own perspective), but that other people do not. Relative to other perspectives, our moral beliefs may not be correct. However, there is a further question that we could ask ourselves. Granting that our moral beliefs are correct only relative to our own perspective (and any other perspective that overlaps with ours at the relevant point), *within our perspective* do those beliefs apply to everyone or only to us? For example, if I believe that murder is immoral, can I believe that (relative to my perspective) *no one* should commit murder, or must I assert only that *no one who holds my perspective*⁴³ should commit murder? Let us call this ‘the question of scope’.

It is hard to see why a perspectival relativist is supposed to be committed to the second answer to the question of scope, rather than the first. When I consider whether, relative to my perspective, it is permissible for people to commit murder, I am concerned with what people are permitted to do according to my perspective, not with what they are permitted to do according to their perspective. It may be that, relative to their perspective, they are permitted to commit murder, but what implications this has relative to my perspective depends on the moral assessment that I make of this fact

(provided that assessment coheres with the rest of my belief-set). Furthermore, the moral assessment that I will make is obvious – the fact that murder is permissible relative to X's perspective does not mean that, relative to my perspective, it is permissible for X to commit murder. There may be reasons why, relative to my perspective, I should be reluctant to require people to act in ways that are inconsistent with the requirements of their perspective. However, any such reasons are outweighed in this case by the importance, relative to my perspective, of ensuring that people do not commit murder.

Let me put the point another way. Imagine that someone claims that everyone may do whatever they are permitted to do relative to their own perspective. If this is meant to be a *moral* claim (and presumably it is, since it is concerned with what people are permitted to do), it must itself be made relative to a particular perspective. However, whether it is true relative to that perspective depends upon whether it coheres, better than any alternative, with the belief-set of the person who holds that perspective. Now let us focus the discussion further by considering my belief-set. My belief-set includes the belief that no one is permitted to commit murder. Moreover, my belief-set attaches a very high degree of importance to this belief. Yet the claim that everyone may do whatever they are permitted to do relative to their own perspective can conflict with this belief, since there will be some perspectives (fortunately, fairly rare) that permit murder. Given the importance that I attach to my belief that no one should be permitted to commit murder, that belief is likely to cohere better with the rest of my belief-set than the belief that everyone may do whatever they are permitted to do

⁴³ Or, possibly, *no one whose perspective overlaps with mine at this point.*

relative to their own perspective. In other words, it is highly likely that (to the extent that these two beliefs conflict) the latter belief is false relative to my perspective.

Finally, while perspectival relativism makes the meta-ethical claim that which moral beliefs are correct varies between perspectives, it makes no moral claim, especially not the claim that everyone is morally permitted to do whatever they are allowed to do relative to their own perspective. Moreover, no such claim could be deduced from perspectival relativism, for the reasons given in Chapter III.⁴⁴

Let us return now to the legitimacy of judicial review. If I am right, perspectival relativism does not require (though nor does it preclude) any version of relativism of scope *within* a perspective. In other words, a perspectival relativist can hold that, relative to her perspective, there are moral norms that apply to everyone. This leaves open the possibility that judges are justified, relative to that perspective, in imposing certain moral norms upon the people affected by their decisions, because – relative to the perspective in question – those norms apply to everyone. (This would not be sufficient to justify the court's decision. However, it *is* sufficient to refute the objection presented at the start of this Section, that perspectival relativism entails relativism of scope within a perspective and therefore prevents judicial review from being legitimate.)

Of course, if perspectival relativism is correct, judicial review will not be legitimate relative to *every* perspective. For example, it may be that, relative to some

⁴⁴ 144-146 above.

people's perspectives, one should not impose one's views on people who are rational⁴⁵ in rejecting those views. Combining this moral principle with perspectival relativism *does* suggest that we should not impose our moral views on (all) other people, since there are always likely to be some people who are rational in rejecting those views. Relative to such a perspective, judicial review would most likely be illegitimate (as would most, if not all, other forms of political decision-making).

However, while this conclusion may be correct relative to some perspectives, it will not be correct relative to all perspectives. Some, probably many, perspectives would reject the view that one should never impose one's moral beliefs on people who are rational in rejecting those beliefs. For example, many people would consider themselves justified in requiring X not to commit murder, even if murder is permissible relative to X's perspective. Moreover, while perspectival relativism entails that judicial review cannot be legitimate relative to every perspective, this does not preclude it from being legitimate relative to some perspectives. The latter is enough to show that perspectival relativists can (though they need not) support judicial review on the grounds suggested in Part A.

* * *

Perhaps a more moderate version of the objection presented above might be more successful. We have seen that a perspectival relativist is not logically committed to accepting relativism of scope within her perspective. However, perhaps the same

⁴⁵ In the 'thin' sense: 125-126 above.

pressures that push someone towards accepting perspectival relativism also push her towards accepting the version of relativism of scope described above.⁴⁶ On this more moderate position, a perspectival relativist is not logically committed to accepting relativism of scope within her perspective, but there is nonetheless substantial pressure upon her to do so.

How might one go about arguing for this more moderate position? One possibility is to point out that underlying the argument in favour of perspectival relativism in Chapter II was the claim that we should not portray large numbers of people as mistaken about a wide range of issues over a long period of time, since this underestimates their intellectual capabilities. If so, perhaps we should avoid holding moral beliefs that apply to other people, since those beliefs will conflict with the views of at least some of those people about how they should behave. However, as explained in Chapter II, it does not underestimate people's intellectual capabilities to say that they are radically mistaken relative to *my* perspective, since they are not seeking to identify the truth relative to my perspective. Moreover, far from providing a way to avoid portraying people as radically mistaken, this approach involves portraying virtually *everyone* as radically mistaken, since virtually everyone holds moral beliefs that purport to apply to some other people. For example, on this approach, I am mistaken about the moral status of murder, since I believe (relative to my perspective) that *no one* should commit murder.

⁴⁶ This possibility was suggested by John Gardner & Timothy Macklem.

There may be another way to argue for the more moderate position. We saw in Chapter III that perspectival relativism does not logically entail normative relativism (the moral view that we should refrain from imposing our other moral beliefs on other people). However, it might be thought to derive much of its motivation from a ‘spirit of tolerance’, according to which we should respect other people’s differing moral beliefs. One way of giving concrete form to this spirit of tolerance might be to regard one’s moral beliefs as applying only to oneself, rather than as constituting claims about how other people should behave.⁴⁷

This argument could be supported by pointing out that the case for perspectival relativism presented in Chapter II was not concerned solely with avoiding underestimating people’s *intellectual* capabilities. It also involved claiming that perspectival relativism can explain moral disagreements between two people by reference to their different basic commitments, and so has less need than ecumenical pluralism to claim that one or both are self-interested or prejudiced. Does *this* not establish a connection between perspectival relativism and a spirit of tolerance? Are we not more likely to tolerate the beliefs of people whom we regard as having adopted different basic commitments from ourselves, rather than as being self-interested and prejudiced?

This argument may show that there is *some* pressure upon perspectival relativists to embrace a spirit of tolerance (though see below). However, that pressure is not great

⁴⁷ Talking about ‘tolerance’ in this context may not be entirely appropriate. However, the phrase is often used when discussing whether moral relativism has this sort of implication, and I shall adhere to this common practice.

enough to preclude them from supporting judicial review. There is no obvious reason why we should refrain from imposing our basic commitments on other people (possibly via judicial review). Assume, for the purpose of illustration, that Anna and Brian have different basic commitments regarding free speech. Anna believes that free speech should always be protected, whereas Brian believes that inciting racial hatred should not be protected. Viewing their disagreement as a clash between different basic commitments, Anna might leave the issue to the legislature to resolve. However, the fact that Anna views Brian's position as the result of a different basic commitment does not mean that she must agree with him. Moreover, she may well believe that this issue is so important to the integrity of the political process that her preferred outcome should be upheld via a system of judicial review in case the legislature reaches the wrong conclusion.

Admittedly, there are a variety of reasons why a perspectival relativist might be reluctant to impose her moral beliefs upon other people (depending, for example, on her beliefs about the nature and value of autonomy). However, those beliefs are true relative to only some perspectives, rather than representing core commitments of perspectival relativism. Moreover, even people who share that reluctance may conclude that it needs to be weighed against other considerations (such as the importance of prohibiting murder or genocide committed by *anyone*). If so, they may not be precluded from supporting judicial review as a way of upholding those considerations that outweigh this reluctance.⁴⁸

⁴⁸ See further 307-309 below.

In fact, it is unclear whether perspectival relativism is more compatible with a spirit of tolerance than is objectivism. Bernard Williams has suggested that anti-objectivists may be more willing to tolerate opposing points of view than some objectivists, because some forms of objectivism supply motives for bigotry (or at least for dogmatism). For example, a form of objectivism that holds out the promise of divine rewards for true believers might encourage a lack of tolerance towards opposing moral viewpoints.⁴⁹ However, anti-objectivism could also supply motives for dogmatism. For example, an anti-objectivist might believe that – since there is nothing objective that she could be mistaken about – she should continue to adhere to her current beliefs, no matter what anyone else might say or do. She might even believe that, since she cannot be objectively mistaken, she should feel no restraints in imposing her moral beliefs on other people. (I argued in Chapter III that this ‘anything goes’ attitude is not entailed by perspectival relativism. However, nor is it inconsistent with perspectival relativism.)

This suggests that neither objectivists nor anti-objectivists have a monopoly (or even a better claim) on either dogmatism or toleration. An objectivist could be dogmatic because she thinks that she is objectively right, but an anti-objectivist could be dogmatic because he believes that his moral beliefs determine what is right for him. Similarly, an anti-objectivist might be tolerant because she recognises that there are no objective grounds for requiring people to conform to her moral beliefs, but an objectivist might be tolerant because he believes that toleration is itself objectively required.

⁴⁹ Williams (1991) 202.

Perhaps perspectival relativism more overtly reminds us that other people have views different from our own, since it posits the existence of an indefinite number of moral perspectives. However, what we make of this depends on our moral assessment of that fact,⁵⁰ and nothing about perspectival relativism determines (or, by itself, influences) that assessment.

Williams suggests two further reasons why anti-objectivism might be linked to a spirit of toleration, of which I shall consider one.⁵¹ Imagine that Anna is an objectivist who disagrees with Brian about a particular moral issue. Reflecting on their disagreement, Anna might conclude that – if Brian were to come to agree with her – not only would there be less conflict between them, but Brian's views would be closer to the truth. This might provide Anna with a motive for trying to change Brian's mind, rather than tolerating his different moral viewpoint. In particular, she might be motivated by paternalistic considerations to help Brian realise the truth.⁵²

Williams asserts that these paternalistic considerations could not exist if objectivism were false. However, it is far from clear why this is so. If perspectival relativism is correct, Anna can still believe that Brian's views diverge from the truth (relative to her perspective). Moreover, she might attach importance to the recognition of what is true relative to her perspective, and so might believe that it is in Brian's

⁵⁰ As Williams acknowledges: Williams (1991) 203.

⁵¹ His other main argument (that anti-objectivism is more likely to lead to toleration of people who are remote in time from oneself: Williams (1991) 203-205) is not particularly relevant to judicial review, which is generally concerned with the treatment of people in relatively close temporal proximity to the decision-maker. Moreover, Williams is somewhat ambivalent about the success of this argument.

interests for him to believe whatever is true relative to her perspective. On this view, Brian will be better off (relative to Anna's perspective) if he comes to realise the truth about (say) the wrongness of genocide, rather than continuing to hold his current, mistaken belief. Of course, he may not be better off relative to his own perspective, but – in deciding whether Brian should be encouraged to change his mind – Anna will be assessing matters relative to her perspective, not his. Thus, the same paternalistic considerations might apply even if perspectival relativism is correct.

Admittedly, this is not the only line of reasoning open to Anna. She might believe that it is far less important that Brian believe what is true relative to her perspective (if perspectival relativism is correct) than that he believe what is objectively true (if objectivism is correct). Nevertheless, there is no obvious reason why Anna should adopt this line of reasoning, rather than the line of reasoning sketched in the previous paragraph. If she came to believe that objectivism is false, Anna *might* cease to believe that Brian is morally better off if he realises that murder is wrong. However, it does not seem far-fetched to speculate that many other people in her position would continue to regard it as desirable (not just for his potential victims, but for Brian himself) that he comes to believe that murder is unacceptable.⁵³

C. What Would an Anti-Objectivist Account of Rights Look Like?

⁵² Williams (1991) 205.

⁵³ Some people might not attach importance to Brian's beliefs, as opposed to his actions. However, Williams' argument proceeds on the basis that people may be better off holding correct moral beliefs, and I have granted him this premise in assessing his argument.

In Part A, I presented two bases on which one might seek to defend judicial review. Both were concerned with the protection of rights (either for their own sake, or to the extent that those rights represent preconditions of a meaningful democracy). There are numerous grounds on which one might be sceptical about any attempt to defend judicial review as a way of protecting rights. For example, one might believe that there are so many rights relevant to the constitutional validity of legislation, and those rights are so often in conflict, that judicial review designed to protect rights would involve judges taking on an Herculean task that would end with them controlling most facets of society.⁵⁴ However, I shall leave such concerns to one side, since the purpose of this chapter is to consider whether the arguments outlined in Part A are available to perspectival relativists, not to consider whether those arguments can be defended against all objections. (I do consider one such concern – that judges will not do any better at upholding rights than legislators – in Part D.)

Nevertheless, it might be thought that there is a connection between an anti-objectivist position like perspectival relativism and a sceptical approach to rights (or to the appropriateness of protecting rights via judicial review). In Part B, I argued against Moore's attempt to show that meta-ethical positions like perspectival relativism leave no room for the notion of rights. However, while perspectival relativism leaves room for the notion of rights, it may require a particular account of rights that is incompatible with the arguments in favour of judicial review presented in Part A.

⁵⁴ Tushnet (1999) 139-140.

The present Part is devoted to considering this possibility. I begin by outlining an account of rights offered by Raymond Geuss that seems to cast doubt on whether judicial review could be justified on the grounds suggested in Part A. I then assess the suggestion that this account of rights should prove particularly attractive to anti-objectivists. I reject this suggestion, instead arguing that perspectival relativists are free to adopt Joseph Raz's more positive account of rights.

By focusing solely upon the accounts of rights offered by Geuss and Raz, I do not mean to imply that a perspectival relativist must choose between these two options. There are other accounts of rights that she might prefer to both Geuss' and Raz's. However, by limiting my attention to just two theorists, the following discussion becomes much more manageable. Moreover, Geuss' account is an influential⁵⁵ example of a theory of rights that appears to be both motivated (in part) by anti-objectivism and incompatible with the justifications of judicial review offered in Part A. Similarly, Raz's account is an influential example of a theory of rights that appears to be both objectivist in spirit, if not in content, and much less sceptical than Geuss'. Therefore, a consideration of whether perspectival relativists have reason to prefer Geuss' account of rights to Raz's provides an appropriate test case for the hypothesis that perspectival relativism favours accounts of rights that are incompatible with the arguments in favour of judicial review presented in Part A.

1) Geuss' account of rights

⁵⁵ eg James (2003) 136-138.

According to Geuss, a right exists only if there is a specifiable, and sufficiently effective, mechanism for enforcing that right.⁵⁶ Geuss argues that, leaving to one side the possibility that there is a God who provides such an enforcement mechanism, there is no specifiable and sufficiently effective mechanism for enforcing moral rights. This means that there are no moral rights.⁵⁷ To call something a moral right is simply to suggest that it would be a morally good idea if it were enforced. For example, to say that there is a right to self-determination is to suggest that relevant groups ought to be able to determine their own political future and that it would be a good thing if there was a mechanism that could be invoked to produce this outcome (whereas the behaviour of various governments around the globe shows that there is no such enforcement mechanism).⁵⁸ Moreover, even if an effective enforcement mechanism were created, this would not show that a moral right to self-determination really does exist, but rather would involve the transformation of someone's moral beliefs into a system of *legal* rights. This is because the right to self-determination would exist only because we made it exist, rather than being something that we discovered and that could serve as the basis for judging the merits of legal rights. Instead, the only thing that can provide a basis for judging the merits of legal rights '... seems to be the flickering light of our variable moral beliefs.'⁵⁹

If Geuss is right, then neither of the arguments presented in Part A can vindicate judicial review. Judicial review cannot be defended as a way of protecting people's

⁵⁶ Geuss (2001) 143.

⁵⁷ There can, however, be legal rights. There could even be social rights (if, for example, social opprobrium provided a sufficiently effective enforcement mechanism).

⁵⁸ The example is Geuss': Geuss (2001) 144.

moral rights, since there are no moral rights. Nor can it be justified on the basis that it protects the preconditions of democracy, at least as this basis was presented in Part A, since this argument also appeals to the notion of moral rights (to participation, free speech, etc). Instead, when exercising the power of judicial review in cases that require moral reasoning to determine whether legislation is unconstitutional, judges could be guided only by 'the flickering light of our variable moral beliefs'.

Moreover, Geuss' account of rights appears to be particularly attractive to anti-objectivists. Not only does it deny that rights can be discovered, as opposed to created, but it appears to be sceptical about the status of our moral beliefs, referring to them as 'variable' and as offering only a 'flickering light'. The claim that moral truths can be discovered is often associated with moral objectivism, whereas the claim that moral truths are created is often championed by anti-objectivists. There are exceptions to this rule, but this is enough to suggest that there may be a connection between Geuss' sceptical account of moral rights and a more general anti-objectivist approach to meta-ethics. This suggestion is reinforced by the sceptical terms in which Geuss refers to moral beliefs, terms that are more commonly associated with anti-objectivism than with objectivism.

However, Geuss' account of rights is not logically entailed by perspectival relativism. To the extent that his account is concerned with an analysis of the concept of rights, it is concerned with matters that are distinct from those addressed by perspectival relativism (since it is concerned with conceptual analysis, rather than moral or meta-ethical reasoning). Alternatively, to the extent that his account is based on

⁵⁹ Geuss (2001) 145.

moral considerations, it cannot be entailed by perspectival relativism for the reasons given in Chapter III. Nevertheless, the previous paragraph suggests that – while there may not be a *logical* connection between Geuss' account and perspectival relativism – the former may be particularly attractive to adherents of the latter, since both views share a similar attitude towards moral reasoning. In the next Section, I seek to refute this suggestion, arguing that a perspectival relativist is free to prefer Raz's account of rights instead.

2) Raz's account of rights

Before we can decide whether perspectival relativists should favour Geuss's account of rights over Raz's, I must first outline Raz's account of rights. According to Raz, someone has a right if and only if she can have rights, and (other things being equal) an aspect of her well-being (her interest) is a sufficient reason for holding someone else to be under a duty.⁶⁰ Therefore, a right exists only if the purported right-holder's interest justifies holding someone else to be under a duty to protect, promote or not interfere with that interest. For example, I have a right to free speech only if my interest in being able to speak freely justifies holding someone else to be under a duty not to interfere with (or possibly even to promote) my ability to speak freely.

However, is Raz's account of rights compatible with the arguments in favour of judicial review offered in Part A? The purpose behind considering Raz's theory is to determine whether perspectival relativism is compatible with an account of rights that

⁶⁰ Raz (1986) 166.

could support the arguments offered in Part A, and this goal will not be achieved unless Raz's account is compatible with those arguments.

There are two reasons why Raz's theory might be regarded as incompatible with those arguments. Firstly, he denies that the primary role of rights is to protect an individual's interests in situations where her interests conflict with the public good or the claims or needs of other people. Instead, he argues, the importance of many rights depends, in large part, on the fact that respecting those rights would promote the common good. Whether a right exists depends (*inter alia*) on whether it protects or promotes the right-holder's interest, but how important that right is may depend on whether protecting or promoting that interest serves the common good. For example, the importance of the right of free speech stems not only from the fact that recognising this right is in the right-holder's interests, but also from the fact that promoting the right-holder's interest in free speech promotes the common good (by facilitating the free exchange of information throughout society).⁶¹ This, it might be thought, represents a very different view of rights from the one suggested by Part A, where judicial review was justified on the basis that it is necessary to protect rights against infringements by the majority.

However, this tension is only superficial. The first defence of judicial review canvassed in Part A included the claim that the majority may be mistaken (objectively or relative to one's perspective) about what rights people have, and those rights need to be protected against such mistakes. This argument may be valid whether rights are seen

as upholding individual interests against the majority, or as both protecting individual interests and promoting the common good at the same time. Either way, the majority could be mistaken about the relevant issue, and this mistake might be sufficiently important to justify constraining the majority's decision-making power via a system of judicial review.⁶² Moreover, the second argument in favour of judicial review – that it is needed to protect certain rights that represent preconditions of meaningful participation in political processes – lends itself to Raz's claim that many rights are important because they promote the common good, not merely the interests of the right-holder. The rights protected under the second argument for judicial review could well be considered important precisely because they promote the common good, by ensuring meaningful participation.

There is, however, a second reason why someone might regard Raz's account of rights as incompatible with the arguments for judicial review presented in Part A. On Raz's account, it may be that not all rights are especially important. The distinctive features of rights are their source in the right-holder's interests and the fact that they involve holding someone to be under a duty.⁶³ However, not every interest is an important one. Moreover, on Raz's account, duties are special not because of their weight, but because of their pre-emptive force. Thus, while all rights impose duties that exclude certain considerations from the balance of reasons determining how the duty-bearer should act, the excluded considerations may not be of much weight, and so the

⁶¹ Raz (1995) 52-55. There is some suggestion at 55 that the common good is also relevant to whether (some) rights exist, not merely to their importance, but Raz is not entirely clear on this point.

⁶² Again, this argument presupposes that judges will do a better job of protecting people's rights than legislators. This presupposition is considered in Part D.

⁶³ Raz (1986) 192.

right itself may not be particularly important.⁶⁴ This threatens to undermine the claim that judicial review is necessary to protect our most vital interests, since some of the rights it protects may be of relatively little importance.

My purpose in this chapter is not to become embroiled in the debate about the merits of judicial review. However, there are ways in which a supporter of judicial review could accommodate the claims made in the previous paragraph. One way would be to focus on the second justification for judicial review offered in Part A. The rights relevant to this argument (rights to free speech, association, etc) clearly are important (especially if we consider the way in which the protection of the relevant interests serves the common good), even if there are other rights that are less important. Secondly, even if we focus upon the first justification in Part A, we should not necessarily conclude from the fact that some rights are relatively unimportant that judicial review cannot be justified as a way of protecting rights. Instead, judges could consider the importance of the right in question when deciding whether to strike down legislation as unconstitutional. The more important the right, the more willing judges should be to replace the legislature's judgment with their own where this is necessary to protect that right. Conversely, in cases of relatively trivial rights, judges should be more willing to defer to the legislature, because there is less need to protect the interest underlying that right. (Obviously, this is only one factor relevant to whether a particular right should be upheld by judicial review. Another factor is whether judges have legal authority to treat the moral right in question as relevant to the constitutional validity of the statute that they are considering. However, by treating the importance of the right as

⁶⁴ Raz (1986) 186.

a relevant factor, judges can allow for the fact that not all rights may be especially important.)

While more could be said here, the preceding discussion should suffice to show that Raz's account of rights is compatible with the justifications for judicial review presented in Part A. However, is it compatible with perspectival relativism? In answering this question, I begin by arguing that perspectival relativism is logically consistent with Raz's account of rights, before considering whether – even if there is no logical inconsistency – Raz's account is less compatible with perspectival relativism than Geuss' rival account.

Raz is an objectivist, not a perspectival relativist, but this alone is insufficient to show that perspectival relativists cannot make use of his account of rights. I argued in Chapters III & IV that one's meta-ethical position may make a difference to a range of issues, but I certainly did not claim that we must adopt different accounts of every basic moral concept depending on whether we are objectivists or not. I also argued that one's meta-ethical position does not have any *direct* moral implications; it has moral implications only when combined with certain moral premises. Thus, if one wishes to argue that perspectival relativists cannot make use of Raz's account of rights, one needs to focus on something specific to the nature of rights, or on some specific moral premise that combines with perspectival relativism to produce that result.

One possibility is to argue that, on Raz's account, rights exist to protect or promote interests, and interests – by their very nature – are objective. To say, for

example, that a plant has an interest in being watered is to make a claim about what is conducive to the plant's well-being, a claim that presents itself as being open to rational resolution (and hence as being objective). Yet, if Raz's account of rights is premised on the assumption that there are objective interests, how can the perspectival relativist employ that account?⁶⁵

A perspectival relativist *could* respond by claiming that interests are objective, but morality (including rights) is not. On this view, to say that X is in someone's interests is not to make a moral claim; it is simply to state that they will be better off in some non-moral way if they have X. One would still need to determine what follows *morally* from the fact that X is in A's interests.

However, it seems incongruous to claim that morality is not objective, but interests are, when it is generally accepted that morality and ethics (and hence interests) are closely related (even though the exact nature of the relationship is a matter of controversy). Moreover, it is unlikely that the sorts of 'objective' interests referred to in the previous paragraph will yield anything like the list of rights used in the second argument in favour of judicial review in Part A. For example, it is unclear whether the right to free speech always leaves us better off in some non-moral way. And, even if it does, this will involve justifying that right on a quite different basis from the one that Raz offers.⁶⁶

⁶⁵ This objection was suggested by John Tasioulas.

⁶⁶ 255 above.

A better strategy for the perspectival relativist is to *deny* that interests are objective. A relativist about morality may also be a relativist about ethics (including what is in a person's interests). Indeed, these two positions appear to go hand-in-hand.⁶⁷ On this view, X can be in A's interests only relative to an *ethical* perspective, and only if – relative to that perspective – having X would be conducive to A's well-being (making A's life go better in whatever sense of 'better' is recognised by that ethical perspective).

This alternative involves denying that the claim that X is in A's interests is open to rational resolution.⁶⁸ Such a denial regarding ethics is consistent with the perspectival relativist's opposition to the rational convergence thesis when applied to morality. It is not, however, consistent with Raz's attitude towards interests. Raz believes that interests are objective, not relative. However, this need not affect his account of rights. Rights may be needed to protect or promote interests whether interests are objective or not. Whether rights are in fact needed to protect or promote interests depends on (inter alia) the moral significance of the interest in question, and interests can be morally significant even if they exist only relative to an ethical perspective. I argued in Chapter II that the fact that a moral consideration exists only relative to a moral perspective does not prevent it from being a genuine moral consideration. The same is true of ethical considerations. Even if they exist only relative to an ethical perspective, this does not prevent them from being genuine ethical considerations (in which case, they may well be morally significant).⁶⁹

⁶⁷ Possibly because there is no valid distinction between morality and ethics.

⁶⁸ At least in the 'thin' sense of 'rational': 125-126 above.

⁶⁹ Perspectival relativism is also consistent with Raz's claim that certain rights are important because their protection promotes the common good. Perspectival relativism leaves room for the notion of the common

However, perhaps this is too quick. One of the factors that determine, for many interests, whether they are capable of giving rise to rights is the moral importance of those interests. In many cases, it is only if the protection or promotion of an interest is morally important that it could justify placing somebody under a duty to achieve this result.⁷⁰ Yet what could a perspectival relativist mean when she claims that the protection or promotion of an interest is morally important?

We saw in Chapter II that our practice of judging certain matters to be morally important need not be undermined by an acceptance of perspectival relativism. A perspectival relativist can allow that some interests are important in the sense that she should sacrifice (some) other goals to promote those interests, or should not recognise certain considerations as providing reasons not to promote those interests. Whether something is morally important (in either of these senses) relative to one's perspective depends on whether the belief that it is important coheres with the rest of one's perspective, and there is no reason why the belief that an *interest* is important cannot satisfy this requirement. For example, there will be many perspectives relative to which one's interest in bodily integrity is of very great moral importance indeed.

good, since (relative to a particular perspective) something could be in *everyone's* interests. However, what is in the common good will vary between perspectives.

⁷⁰ The interest in question must not only be morally important; it must also have the right *kind* of moral importance to give rise to a duty. On Raz's account, this means that the interest must give rise to a protected reason. However, if interests can be morally important if perspectival relativism is correct, there does not seem to be any reason why they cannot give rise to protected reasons. For example, there could be perspectives relative to which our interest in having promises kept gives one a reason to keep one's promises and excludes considerations of convenience from counting as reasons *not* to keep one's promises.

If perspectival relativism is correct, an interest is morally important only relative to a particular perspective, and the corresponding right also exists only relative to that perspective. However, relative to that perspective, this fact need not affect the significance attached to that interest or to the corresponding right. For example, the fact that someone's interest in free speech is morally important only relative to my perspective (and any other perspective that overlaps with mine at this point) does not undermine the claim that (relative to my perspective) that interest is sufficiently important to give rise to a right to free speech. More generally, relative to her perspective, there is no reason why a perspectival relativist cannot attach great importance to particular interests and their corresponding rights, possibly leading her to support judicial review as a way of protecting those rights.

The above is, I think, sufficient to show that Raz's account of rights is logically consistent with perspectival relativism. However, it might be argued that, while a perspectival relativist could in theory accept Raz's account, her meta-ethical position should lead her to prefer Geuss' account instead. Like the claim that it is difficult, if not impossible, for perspectival relativists to support judicial review, the claim that perspectival relativism should lead one to prefer Geuss' account of rights is vague. The best way of interpreting it is as claiming that there is something about perspectival relativism that provides its adherents with a strong reason to prefer Geuss' account to Raz's. In other words, while perspectival relativism is logically consistent with Raz's account of rights, it could be argued that her meta-ethical position provides the

perspectival relativist with strong reasons to prefer Geuss' account instead. So let us consider whether any such reasons exist.⁷¹

Before doing so, however, it is worth noting that – to show that there are not strong reasons for a perspectival relativist to prefer Geuss' account of rights to Raz's – I do not have to show that perspectival relativism fits as well with Raz's account as ecumenical pluralism does. It is enough if a perspectival relativist can accept Raz's account without too much difficulty,⁷² even if an ecumenical pluralist might be able to accept it with even less difficulty. (Radical opponents of the no-difference thesis claim that it is difficult, if not impossible, for anti-objectivists to support judicial review. To refute this position, it is not necessary to show that perspectival relativists face no greater hurdles than objectivists in this regard, provided it can be shown that supporting judicial review is a plausible option for perspectival relativists.)

With this in mind, what sort of argument could be offered to support the claim that her meta-ethical position provides a perspectival relativist with strong reasons to prefer Geuss's account of rights to Raz's? Perhaps the strongest argument is that perspectival relativists should regard claims about rights as reflecting 'mere beliefs'. Perspectival relativism tells us that a correct assessment of the moral importance of protecting particular interests simply reflects (a fully coherent version of) someone's beliefs and attitudes. Furthermore, if *ethical* relativism is correct, those interests themselves ultimately depend on someone's beliefs and attitudes. Therefore, while the

⁷¹ Those reasons must be strong, but need not be undefeated: n 27 above. Determining whether a reason counts as 'strong' for present purposes requires the exercise of judgment: 227 above.

⁷² In other words, that there are no *strong* reasons for her to reject that account.

perspectival relativist may not be logically required to accept Geuss' account of rights, should she not be strongly attracted to that account, since it explicitly recognises that claims about moral rights reflect mere beliefs?

This argument proceeds too quickly. A perspectival relativist's meta-ethical position tells her that moral truths (including whether particular rights exist) are ultimately dependent on our moral beliefs and desires. However, her meta-ethical position also suggests that, if she seeks to identify the morally correct answer to some question, she should strive to reach the answer that is correct relative to her perspective, since it is her perspective that contains the moral beliefs that are true for her. Moreover, relative to her perspective, the interests protected by a particular right may be very important, and she may resist any attempt to denigrate this conclusion as reflecting *mere* beliefs. Nor need she be mistaken in doing so. There is no reason why a perspectival relativist *must* cease to value her moral beliefs upon realising that those beliefs are not objectively valid. Indeed, I suggested in Chapter II that it is *unlikely* that she would do so.⁷³

Among the moral beliefs that the perspectival relativist is likely to continue to value are her beliefs about (some) rights. Because (some) rights protect interests that many people regard as among the most important (such as the interest in physical integrity or free speech), many people are likely to continue to value rights even if they reject objectivism. Even if they think that the falsity of objectivism gives them some reason to refrain from imposing their moral beliefs on other people, they are likely to

⁷³ 112-113 above.

conclude that this reason is outweighed when it comes to the sorts of rights that judicial review would be most concerned to protect (such as rights to life or free speech). Therefore, while recognising that the truth about moral rights is ultimately dependent upon her moral beliefs and desires, the perspectival relativist is likely to regard those beliefs and desires as highly important, and so is likely to oppose any attempt to dismiss them as *mere* beliefs.

This suggests that, far from having strong reasons to reject Raz's account of rights, many perspectival relativists may have strong reasons to prefer it to Geuss'. Since they are likely to attach moral importance to the protection or promotion of certain interests, they may well be attracted to the idea that rights exist to achieve that end (by placing someone under a duty). Conversely, the perspectival relativist may regard Geuss' account of rights as inappropriate, since its attempt to downplay the importance of our moral convictions (by describing them as 'variable' and as shedding only a 'flickering light') is inconsistent with the importance that those convictions have relative to her perspective. In other words, the perspectival relativist can – indeed, is likely to – treat our moral beliefs more seriously than Geuss' account of rights does. Even if she *says* that she agrees with Geuss on this point, her actions are likely to demonstrate that she in fact places more importance on our moral beliefs than Geuss allows.

Geuss' account does represent *one* approach that a perspectival relativist could take towards rights. Upon discovering that there are no objectively true moral beliefs (including beliefs about rights), she *could* conclude that purported moral rights reflect

‘mere beliefs’, and that genuine rights must be based on something more tangible (such as effective enforcement mechanisms). However, we have just seen that this is not the only approach open to perspectival relativists. Indeed, I have suggested that perspectival relativists are *unlikely* consistently to adopt the dismissive attitude towards their moral beliefs that Geuss champions. It is likely that, even if we accept that there are no objectively true moral beliefs, we will continue to attach importance to moral issues and to our beliefs about those issues. Moreover, the perspectival relativist can do so in a way that is compatible with her meta-ethical position, since perspectival relativism provides a way in which we can sensibly strive after correct moral beliefs even if objectivism is false.⁷⁴ Yet, if the perspectival relativist regards moral truths (including truths about rights) as more than ‘mere beliefs’, then she is less likely to be attracted to Geuss’ account of rights (which *does* regard putative moral rights as reflecting ‘mere beliefs’) and is more likely to be attracted to Raz’s account (with its more positive view of moral rights). If so, she has available to her an account of rights that could provide a basis for supporting judicial review on the grounds suggested in Part A.

D. Judicial Protection of Rights

I have sought to show that there are two arguments in favour of judicial review that could be accepted by perspectival relativists, not just by objectivists. If so, Dworkin and Moore are wrong when they suggest that, while objectivists can support judicial review, it is very difficult (if not impossible) for anti-objectivists to do so. The

⁷⁴ 113-116 above.

difference that the meta-ethical debate makes to the legitimacy of judicial review cannot be as great as they have claimed.

Indeed, it may be possible to generalise this conclusion beyond judicial review. That is, there may be no context in which perspectival relativists need to oppose moral decision-making by judges. This could be compared with the conclusion that some anti-objectivists have drawn from their meta-ethical position – namely, that they should oppose moral decision-making by judges in general.⁷⁵ However, I shall leave open whether the conclusion that I have reached can be generalised in this way. It may be that there are considerations relevant to judicial review that do not apply in other contexts, and the presence or absence of these considerations may make a difference to the justifiability of moral decision-making by judges if objectivism is false.

However, even the more limited conclusion that perspectival relativists can endorse two of the arguments in favour of judicial review that are open to objectivists might make one wonder whether the meta-ethical debate makes any difference to the legitimacy of judicial review after all. If objectivists and perspectival relativists can both support judicial review on the same grounds, then perhaps I was too hasty in rejecting the no-difference thesis in Chapter IV. It is with these concerns that Chapter VI shall be preoccupied.

1) The proviso

⁷⁵ eg Posner (1999) (though Posner is opposed only to moral theorising by judges, not to the use of moral intuitions). That some anti-objectivists have reached this conclusion does not show that it is correct. For example, they may have made the mistake that I attributed to Dworkin at 229-234 above.

Before proceeding to the next chapter, however, there is an important proviso that must be attached to both of the arguments outlined in Part A. While this proviso applies whether objectivism or perspectival relativism is correct, it is worth considering because I shall suggest in Chapter VI that the meta-ethical debate can affect the conditions under which the proviso is satisfied.

What is this proviso? It arises from the fact that it makes no sense to endorse judicial review on the basis that it protects rights and/or the preconditions of democracy (whether objectively or relative to a particular perspective) unless one has grounds for believing that courts will in fact provide adequate protection of rights and/or the preconditions of democracy. This means that any acceptance of the arguments in Part A must come with a qualification (henceforth, ‘the proviso’): judicial review is legitimate only if the protection that it provides for rights and/or the preconditions of democracy is no worse than the protection provided by alternative, feasible institutional arrangements.⁷⁶

Determining whether the proviso is satisfied will rarely be a straightforward task. Where a system of judicial review already exists, one can obtain some guidance by asking whether (on balance) judges have protected people’s rights against legislative infringement, or else have undermined those rights recognised by the legislature and/or

⁷⁶ This is a minimum requirement. It may be that, not only must judicial review be *no worse than* the alternatives, it must be *better than* them. However, partly in recognition of the possibility that judicial review and its rivals represent incommensurable options (318-321 below), I shall focus on the minimum requirement expressed in the text.

failed to protect rights that were infringed by the legislature.⁷⁷ More precisely, when the legislature has infringed rights, have the courts done as much to protect those rights as they have done to harm them? And, equally important, when the legislature has respected rights, have the courts undermined those rights?⁷⁸ If the courts have done as much to protect rights as they have done to harm them (in cases where the legislature infringed rights), and if this offsets the ways in which the courts have undermined rights that the legislature *has* respected, then judicial review may be justified. However, even here, one must still consider how alternative institutional arrangements would fare. For example, how would the legislature perform if there were no power of judicial review?

Which institution is better at protecting rights and the preconditions of democracy will depend upon a host of contingent factors, and so is likely to vary between jurisdictions. This means that one cannot sensibly defend (or oppose) judicial review in the abstract. Any defence of (or opposition to) that institution must be sensitive to the particular characteristics of the jurisdiction being considered. While there are certain considerations that apply wherever there are legislatures and courts, these are likely to be sufficiently finely balanced that neither institution will be preferable in every jurisdiction.⁷⁹ For example, it has been argued that the legislature is more likely to be aware of the impact of its decisions upon members of society (because

⁷⁷ Sadurski (2002) adopts a similar approach to determining whether judicial review is beneficial from a rights-protection viewpoint.

⁷⁸ This includes the right of participation: one must decide whether the protection that judicial review offers to other rights outweighs the extent to which it undermines this right. As Sadurski (2002) 285 notes, we should include in this calculation cases where courts *uphold* legislation that protects rights, because this makes it harder for Parliament to undermine those rights in future. Conversely, when courts uphold legislation that infringes rights, this makes it harder for Parliament to correct its error.

⁷⁹ Nor are they are likely *always* to be equally good or incommensurable, because of the influence of local factors on the issues discussed in the rest of this paragraph.

the electorate can communicate to legislators via the ballot box), and is more likely to make decisions in line with the electorate's values (for the same reason).⁸⁰ However, it could equally be argued that, because the legislature needs the support of only a majority of the electorate, it will pay attention only to the interests of that majority, and so may not reach better decisions after all.⁸¹ Which of these arguments is correct depends not on any general property of legislatures or courts, but rather on factors specific to the society in which those institutions exist. Similarly, against the argument that legislatures have more members and so can pool a greater number of experiences and insights,⁸² must be balanced the fact that they can also pool a greater number of prejudices. Whether membership of the legislature (or the judiciary) brings out the best or worst in people depends upon the people in question, the history of the institution, its public standing, and so on. Finally, the quality of political participation might diminish if legislative decisions were subjected to judicial review, because legislators might put less effort into making those decisions, knowing that the courts will review them. However, alternatively, the quality of political participation might improve, if legislators believed that they could no longer get away with rights violations. Which of these outcomes eventuates depends (partly) upon the psychology of the legislators in question, something that is likely to vary between jurisdictions.

2) Can the proviso ever be satisfied?

⁸⁰ Sandalow (1975) 695.

⁸¹ Dworkin (1985) 24-25.

⁸² Waldron (1999) 85.

Both supporters and opponents of judicial review might seek to resist the conclusion that its legitimacy varies between jurisdictions. However, since my primary concern in this chapter is with whether perspectival relativists can support judicial review, I shall confine myself to considering how opponents of judicial review might seek to establish that judicial review is *never* legitimate.

The introduction of the proviso will not alleviate one of Waldron's major concerns about the judicial protection of rights. He argues that people disagree about what rights are, what rights we have and what those rights require (just as they disagree regarding other political questions). This means that whether courts protect rights will also be disputed. We cannot know how well courts have protected rights unless we know what rights people have, yet it is precisely this that is in dispute. Since people disagree about rights, they cannot (in their collective capacity) follow the instruction 'leave these disputes to be settled by the institution most likely to yield the right answer', because they will disagree regarding how to follow that instruction.⁸³

Waldron is right to claim that people will disagree regarding the respective track records of the legislature and the courts. One's view on this issue depends partly on what rights one believes to exist, and – where rights conflict – which of them one considers more important. For example, depending on one's point of view, *Roe v Wade*⁸⁴ could be seen either as upholding the rights of pregnant women or as violating the rights of unborn babies. However, *any* political question will be controversial,

⁸³ Waldron (1999) 252-254.

⁸⁴ 410 US 113 (1973).

including whether we should adopt a form of majoritarianism that rejects judicial review (which is Waldron's favoured position). Thus, any position concerning the legitimacy of judicial review must treat *some* things as correct in the face of disagreement. My claim is that the crucial issue on which one must take sides is whether judicial review will – on balance – provide no worse protection for rights than would leaving their protection to the legislature alone. The fact that we will disagree about this issue means that we will have to impose an answer on some people against their will, but the same is true of any political decision-procedure.⁸⁵

A different objection is that, even if we know how well the legislature currently does in protecting rights and (if judicial review already exists) whether the courts do any better, how can we know whether a proposed change to the existing arrangements will improve matters?⁸⁶ In a society that currently lacks judicial review, how can we know how courts will perform if judicial review is introduced, or whether the introduction of judicial review will improve or diminish the legislature's performance? In a society that currently possesses judicial review, how can we know whether the legislature will act more or less conscientiously when the check on its actions is removed?

This is a genuine problem, but not an insurmountable one. The fact that we cannot be certain of the consequences of a proposed change does not mean that we cannot reach justified beliefs about its merits. For instance, we can look at analogous

⁸⁵ This paragraph summarises an argument that I make at greater length in D Smith (2001) 72-74. See Raz (1998) 44-47 for a similar argument.

⁸⁶ This objection was suggested by Joseph Raz.

political systems (both now and in the past), and draw conclusions about how political systems similar to our own perform with judicial review and without it. Indeed, this problem, and the solution that I have just suggested, is quite common. Every time a change in the law is proposed, we must decide whether the proposed system will be better or worse than the current system, without being certain how well the proposed system will work in practice. We often do so by examining how that system works in other jurisdictions that have adopted it. Admittedly, introducing or eliminating judicial review is a more radical change than most law reforms. However, while the size of the proposed change may affect our confidence in our conclusion, it is only one relevant factor. Also important is whether there are other jurisdictions that have made the proposed change, and how confident we are that those jurisdictions are relevantly similar to our own.

Finally, it has been suggested that, in practice, courts cannot prevail against the legislature. On this view, judicial review is ineffective in opposing violations of rights by the legislature, because the legislature both appoints the members of the court and has other ways of putting pressure on judges (eg via public opinion, by stacking the court or by removing judges from office). Dahl argues that, in the United States, this has meant that ‘... the views of a majority of justices of the Supreme Court are never out of line for very long with the views prevailing among the lawmaking majorities of the country.’⁸⁷

⁸⁷ Dahl (1989) 190. See also Tushnet (1999) 151-153.

Whether this is so may vary between jurisdictions. Not all of the possible ways for the legislature to influence judges exist in every jurisdiction, and some may be ineffective or politically unattractive in some jurisdictions. For example, stacking the bench is often an unpopular option for legislators to take, and there are many jurisdictions in which the removal of judges (or the reversal of their decisions) is difficult to achieve. Moreover, there are notable instances of judges who were appointed by a government of a particular political persuasion but who went on to champion causes opposed to that ideology. Finally, evidence that, in a particular jurisdiction, the views of judges are rarely out of line for very long with the views of the legislature is ambiguous as between the possibility that the court changes its tune to appease the legislature and the possibility that the legislature alters its views to fit in with the court (either because it lacks the power or will to oppose the court, or because the court's decision prompts the legislature to rethink its stance). Most likely, sometimes one is the case, and sometimes the other.

3) Conclusion

As already mentioned, the proviso introduced in this Part applies whether one is an objectivist or a perspectival relativist. Either way, it makes no sense to support judicial review as a way of protecting rights if judges would do a worse job of protecting rights than legislators. Of course, the status of the proviso depends on which meta-ethical position one accepts. If one is an objectivist, one will ask whether it is objectively true that judges provide no worse protection for rights than the legislature; if one is a perspectival relativist, one will ask whether it is true relative to one's perspective that

judges provide no worse protection for rights than the legislature. However, this does not *in itself* make a difference to the legitimacy of judicial review. Why, then, discuss the proviso, when my focus is meant to be on whether the meta-ethical debate makes a difference to the legitimacy of judicial review, rather than on the circumstances under which judicial review is legitimate? I shall suggest in Chapter VI that, while the proviso applies regardless of one's meta-ethical position, the truth or falsity of objectivism has implications for when the proviso is satisfied.

CHAPTER VI: THE NO-DIFFERENCE THESIS REVISITED

At the start of the previous chapter, I stated that I want to tread a middle path between the two most common views of the relationship between the meta-ethical debate and judicial review. In other words, I want to argue against the no-difference thesis without endorsing the position, embraced by more radical opponents of that thesis, that objectivists can support judicial review but anti-objectivists cannot. The question that I seek to answer in the present chapter is whether I can succeed in this endeavour. Is there really a middle path between accepting the no-difference thesis and accepting the view championed by its more radical opponents, and – if so – can I succeed in keeping to that path?

This question arises because there is a tension between the positions defended in the previous two chapters. In Chapter IV, I rejected the no-difference thesis, arguing that one's meta-ethical position should affect one's views concerning the arbitrariness of adjudication. In particular, I suggested two ways in which the truth or falsity of objectivism may affect the legitimacy of judicial review. In Chapter V, on the other hand, I contended that perspectival relativists are not precluded from supporting judicial review. Indeed, I argued, a perspectival relativist can make use of some of the same arguments as an objectivist to justify judicial review.

All of this is logically consistent. Even if I had gone further in Chapter V, and argued that the meta-ethical debate makes no difference at all to the legitimacy of

judicial review, I could still have rejected the no-difference thesis. To argue that one's meta-ethical position should make a difference to one's views towards adjudication is not to argue that it should affect *every* aspect of those views. The truth or falsity of objectivism could make a difference to the arbitrariness of adjudication without having any impact upon the legitimacy of judicial review. Adjudication encompasses much more than judicial review, and the meta-ethical debate might have made a difference to other issues relevant to adjudication even if it had no effect upon the legitimacy of judicial review.

However, I did *not* argue in Chapter V that the meta-ethical debate makes no difference to the legitimacy of judicial review. While such an argument would have been consistent with my rejection of the no-difference thesis, it would not have been consistent with my further claims in Chapter IV that there are at least two ways in which the truth or falsity of objectivism *does* affect the legitimacy of judicial review. Instead, I argued in Chapter V that perspectival relativists can support judicial review for some of the same reasons as objectivists. This argument *is* consistent with the further claims in Chapter IV. The truth or falsity of objectivism could have distinctive implications for the legitimacy of judicial review even though some of the same arguments in favour of judicial review can be used whether objectivism or perspectival relativism is correct.

Nevertheless, while this is a logical possibility, it is far from clear that it is in fact the case. If, as I argued in Chapter V, perspectival relativists are not precluded from supporting judicial review, in what way does their meta-ethical position commit them to

a distinctive stance towards the legitimacy of judicial review? The most obvious way – that perspectival relativists are committed to rejecting judicial review, whereas objectivists are not – has been ruled out. The onus is on me to suggest an alternative way in which the meta-ethical debate affects the legitimacy of judicial review, or else to concede that there is more truth to the no-difference thesis than I allowed in Chapter IV.

In the present chapter, I take up this challenge. In Part A, I consider what must be shown to establish that the meta-ethical debate makes a difference to the legitimacy of judicial review, despite the conclusions reached in Chapter V. I then seek to satisfy these requirements in Parts B & C. In Part B, I discuss (what I consider to be) implausible versions of objectivism and anti-objectivism, and I show how these positions have distinctive implications for the legitimacy of judicial review. In Part C, I compare (what I consider to be) the most plausible versions of objectivism and anti-objectivism – namely, ecumenical pluralism and perspectival relativism. I argue that, while the differences that these positions make to the legitimacy of judicial review are less marked than the implications of some less plausible meta-ethical positions, the choice between ecumenical pluralism and perspectival relativism still has important implications for the legitimacy of judicial review.

A. Some More Ground Rules

In Chapter IV, I discussed in some depth what it means to claim that the meta-ethical debate makes no difference to adjudication. I argued that it is enough to refute this claim if it can be shown that there is a moral belief that combines with different meta-

ethical positions to produce different consequences for adjudication. It is not necessary to show that those meta-ethical positions have consequences for adjudication independently of all moral beliefs, or even to show that they have consequences for adjudication when they are combined with *true* moral beliefs.¹ In the present Part, I shall say more about what is required to refute the no-difference thesis, paying particular attention to the legitimacy of judicial review.

In Chapter V, I argued that perspectival relativists can support judicial review on the two grounds presented at the start of that chapter. I shall assume that objectivists can also support judicial review on those grounds. That is, there is nothing in their meta-ethical position that precludes objectivists from doing so. Particular objectivists may hold other (eg moral) commitments that are inconsistent with support for judicial review, but objectivists are not required to hold those commitments simply because of their meta-ethical views.

This means that both objectivists and perspectival relativists can support judicial review on the same two grounds. However, it is not necessary to deny this fact in order to refute the no-difference thesis (even if we confine our attention to the legitimacy of judicial review, rather than considering the difference that the meta-ethical debate might make to *other* facets of adjudication). Instead, to show that the meta-ethical debate makes a difference to the legitimacy of judicial review, it is sufficient to show that:

¹ 188-190 above.

- 1) there are some anti-objectivist theories that, unlike perspectival relativism, cannot support judicial review on the two grounds considered in Chapter V;
- 2) there are *other* arguments for or against judicial review whose acceptability depends partly upon the truth or falsity of objectivism; or
- 3) while both objectivists and perspectival relativists can support judicial review, the situations in which they can do so differ because of how their meta-ethical positions combine with certain moral beliefs.

I shall discuss each of these possibilities in turn.

Firstly, it is sufficient to refute the no-difference thesis if *any* meta-ethical position has implications for the legitimacy of judicial review. It is not necessary to show that *every* meta-ethical position has such implications. For example, if (as I shall argue in Part B) the choice between moral nihilism and objectivism has implications for the legitimacy of judicial review, then the no-difference thesis is refuted. We cannot reach a fully reasoned conclusion concerning the legitimacy of judicial review without engaging in the meta-ethical debate, at least to the extent necessary to determine whether moral nihilism is correct.

Admittedly, if moral nihilism is the *only* meta-ethical position with distinctive implications for the legitimacy of judicial review, our participation in the meta-ethical debate need only be fairly limited. We could restrict our involvement to a consideration of whether moral nihilism is correct. Thus, while it is sufficient to refute the no-difference thesis if *any* meta-ethical position has implications for the legitimacy of

judicial review, my discussion in this chapter will be much more significant if I can show that there are a number of important meta-ethical positions that have such implications.

Secondly, even if all objectivists and all anti-objectivists could accept the two arguments in favour of judicial review outlined in Chapter V, the no-difference thesis would still be refuted if there are other arguments for (or against) judicial review that are acceptable to only some meta-ethical positions. Imagine, for the purpose of illustration, that – in addition to the two arguments presented in the previous chapter – there is a third argument in favour of judicial review. However, this third argument is acceptable only to ecumenical pluralists. In this case, while both perspectival relativists and ecumenical pluralists can support judicial review, the latter have a further ground for doing so that is not available to the former. This is sufficient to refute the no-difference thesis. We should not be interested solely in the bottom line of whether someone can support judicial review or not. We should also be interested in the *grounds* on which they can or cannot do so, both because this is important in its own right and because it may have practical implications. For example, it may be that this third argument in favour of judicial review is not subject to the proviso that applies to the first two, and so may be valid in situations where the first two are not.

Finally, even though both objectivists and perspectival relativists can support judicial review on the two grounds presented in Chapter V, their meta-ethical positions may commit them to doing so in somewhat different circumstances. For example, we saw at the end of Chapter V that the arguments in favour of judicial review outlined

earlier in that chapter are subject to a proviso. Judicial review is justified only if the protection that it provides for rights and/or the preconditions of democracy is no worse than the protection that would be provided by alternative feasible institutional arrangements. This raises the possibility that – while both objectivists and perspectival relativists can support judicial review on the same grounds – the situations in which they can do so may differ, because the situations in which the proviso is satisfied may vary depending upon which meta-ethical position is correct. Obviously, any argument along these lines requires an explanation of *how* the satisfaction of the proviso depends upon the truth or falsity of objectivism. However, if such an explanation can be provided, then the no-difference thesis is refuted, because whether the proviso is satisfied in a particular jurisdiction (and hence whether judicial review is legitimate within that jurisdiction) will depend upon which meta-ethical position is correct.

Of course, nothing that I have said so far establishes that any of these three possibilities is in fact the case. However, it does highlight three ways in which the no-difference thesis could be mistaken even though both perspectival relativists and objectivists can support judicial review on the two grounds presented in Chapter V. In other words, it suggests three ways in which the conclusions of Chapters IV & V could be reconciled. In the next two Parts, I shall argue that each of these three possibilities is in fact the case.

B. Moral Nihilism and Moore's Moral Realism

In this Part, I consider a version of objectivism and a version of anti-objectivism that I regard as implausible, and argue that both of these positions have significant implications for the legitimacy of judicial review. I will first consider the implications of moral nihilism, a version of anti-objectivism that was discussed briefly in Chapter II. I shall then explore further the implications of Moore's version of moral realism, which were briefly considered towards the end of Chapter IV.

1) Moral nihilism

We saw in Chapter II that moral nihilists claim that, far from there being mind-independent moral truths, or moral propositions that could be the subject of a rational convergence, there are no true or false moral propositions at all. While a non-cognitivist might also accept this claim, this is because he believes that, while moral utterances have assertability conditions, they are not truth-apt. The nihilist, on the other hand, accepts this claim because she believes that no moral utterance can ever properly be asserted. According to the nihilist, we should abandon our practice of engaging in moral discourse and debate because meta-ethics reveals that practice to be unsound.²

This meta-ethical view has obvious and dramatic implications for judicial review. In particular, a moral nihilist cannot support judicial review on either of the two grounds suggested in Chapter V. Both of those arguments rely on certain moral premises – eg about the importance of protecting rights or the preconditions of democracy – and the

² For example, she might regard objectivism as mistaken, but deny that there are any acceptable anti-objectivist standards of moral validity: cf 113-116 above.

moral nihilist is committed to regarding any argument that draws upon moral premises as misguided.

This highlights an important limitation of the conclusion reached in the previous chapter. In that chapter, I argued that perspectival relativists can use certain arguments to support judicial review, but I did not claim that *all* anti-objectivists can do so. Indeed, as we have just seen, moral nihilists cannot do so. This alone is sufficient to justify adopting a middle path between the no-difference thesis and its more extreme opponents. On the one hand, the fact that perspectival relativists can support judicial review shows that it is an exaggeration to claim that it is difficult, if not impossible, for any anti-objectivist to endorse that institution. On the other hand, the fact that moral nihilism is incompatible with the arguments in favour of judicial review presented in Chapter V shows that the no-difference thesis is mistaken. There is at least one meta-ethical position with quite clear implications for the legitimacy of judicial review, since the truth of moral nihilism would entail that judicial review cannot be defended on the grounds suggested in Chapter V.

I should emphasise that I am not claiming that moral nihilists are committed to *opposing* judicial review. Indeed, any opposition to judicial review on moral grounds would also be rejected by moral nihilism. Rather than being committed to opposing judicial review, moral nihilists are committed to rejecting any attempt to discuss the moral merits of that institution. They can argue neither for nor against judicial review on moral grounds. This is in stark contrast to both ecumenical pluralism and

perspectival relativism, which do allow for discussion of the moral merits of judicial review.

I should also emphasise that I am not claiming that moral nihilism is *correct*. In fact, I regard it as an implausible meta-ethical position. However, any attack upon moral nihilism (even a charge of incoherence) requires participation in the meta-ethical debate, and so cannot be used to support the no-difference theorist's claim that this debate has no implications for the legitimacy of judicial review.

Moral nihilists may be able to support or oppose judicial review on *non*-moral grounds (eg by appealing to pragmatic or aesthetic considerations³). This might lead them to reach the same conclusion regarding judicial review as objectivists (either that it is or is not worth having in a particular jurisdiction). However, even if this were the case, one's *reasons* for supporting (or opposing) judicial review would differ markedly depending on one's meta-ethical position. Indeed, any discussion of the merits of judicial review by moral nihilists would look very different from the discussions that currently occur. The vast majority of arguments offered in favour of (or against) judicial review are moral in nature (such as the two arguments presented in Chapter V). Pragmatic (and perhaps even aesthetic) considerations may be relevant to assessing those arguments (for example, they may affect whether judicial review is successful in promoting moral ends), but those arguments contain a significant moral element (for example, in setting the ends – such as the protection of rights or the preconditions of democracy – that judicial review is meant to serve). Therefore, even if a *purely*

³ This assumes that there is a distinction between moral considerations, on the one hand, and pragmatic or aesthetic considerations, on the other hand. If there is no such distinction, moral nihilists cannot assess the merits of judicial review on these grounds, either.

pragmatic or aesthetic argument in favour of judicial review could be constructed, this would require a significant change in the way that the merits of judicial review are debated.

Moreover, this might have a variety of practical consequences (beyond affecting the nature of the arguments used to defend or oppose judicial review). For example, if one's reasons for supporting judicial review are purely pragmatic, then whether judicial review is worth having is a contingent matter, depending upon practical considerations that may vary between jurisdictions. The desirability of judicial review is also a contingent matter if one accepts the proviso suggested in Chapter V, but the factors that one can consider when determining whether judicial review is desirable will differ depending on one's meta-ethical position. If one is an objectivist, one can canvass moral (possibly in addition to pragmatic) considerations; if one is a moral nihilist, one is limited to considering pragmatic factors. This is likely to lead to divergent results when considering which jurisdictions should adopt or retain judicial review, since moral and pragmatic factors may well push in different directions in some jurisdictions (even if they push in the same direction in other jurisdictions). There could be jurisdictions, for example, where judicial review promotes my self-interest, but in a morally unacceptable way.

* * *

The argument in this Section shows that the no-difference thesis is mistaken even when our attention is confined to the legitimacy of judicial review. However, the no-

difference theorist could still seek to salvage much of her position. While the truth or falsity of moral nihilism has implications for the legitimacy of judicial review, I have not yet shown that the truth or falsity of any *other* meta-ethical position has such implications. Therefore, it is open to the no-difference theorist to argue that we need to become involved in the meta-ethical debate only to the extent necessary to determine whether we should accept moral nihilism. This may involve only a very limited participation in that debate, since there are very few (if any) people who defend the form of moral nihilism outlined above. Thus, the no-difference theorist could argue that we can ignore the overwhelming majority of the debate that actually occurs between objectivists and anti-objectivists. To make *substantial* inroads against the no-difference thesis, I need to show that there are other, more interesting, meta-ethical positions that also have implications for the legitimacy of judicial review.

2) Moore's moral realism

Let us start with a meta-ethical position that – arguably unlike the form of moral nihilism discussed in the previous Section – has been defended in print. We saw in Chapter IV that Moore's version of moral realism has at least one implication for judicial review. Moore's moral realism contains a distinctive epistemology, under which moral reality has a causal impact upon our moral beliefs, increasing the likelihood that we will hold correct moral beliefs.⁴ This epistemology may influence

⁴ Some ecumenical pluralists agree that objective moral truths can have a causal impact upon our beliefs or actions (claiming, for example, that the fact that slavery is wrong causes us to believe that slavery is wrong): eg Wiggins (1990-91). However, they may be less willing to claim that this results in a *general* increase in the likelihood that we will hold correct moral beliefs (and it is this claim that is of crucial importance in the rest of this Section). Moreover, they would reject the claim that the objective moral

our assessment of the relative abilities of judges and legislators to identify moral truths (though see below). If so, it will affect whether the proviso in Chapter V is satisfied in a particular jurisdiction, and hence whether judicial review is legitimate within that jurisdiction.

This possibility is compatible with the conclusion in Chapter V that perspectival relativists can support judicial review. There can be jurisdictions in which judicial review is justified, whether Moore's moral realism or perspectival relativism is correct. Moreover, the *grounds* upon which judicial review is justified may be the same in either case (namely, that one or both of the arguments in favour of judicial review offered in Chapter V are correct, and that the proviso is satisfied). However, the distinctive epistemology available to Moore's moral realist may affect the *situations* in which judicial review is justified. That epistemology might lead to the conclusion that the proviso is (or is not) satisfied in a jurisdiction in which acceptance of perspectival relativism would lead to the opposite conclusion.

While anti-objectivists (with the exception of moral nihilists) also have epistemologies that they can use to assess how judges compare with legislators in identifying moral truths, those epistemologies will differ from the one available if Moore's version of moral realism is correct. Therefore, to the extent that his epistemology produces a distinctive assessment of judges' ability to identify moral truths, Moore's moral realism would appear to affect the legitimacy of judicial review.

truths in question are not only mind-independent, but independent of all human capabilities, needs, etc (a claim that Moore seems to accept: 24 above).

There is reason to believe that Moore's epistemology *will* produce a distinctive assessment of judges' ability to identify moral truths, at least when compared with perspectival relativism. On Moore's view, the causal influence exerted by moral reality ensures that judges have some likelihood of arriving at the objectively correct result when exercising the power of judicial review in cases requiring moral reasoning.⁵ If perspectival relativism is correct, on the other hand, judges may be quite likely to arrive at the result that is correct relative to their own perspective, since the truth relative to their perspective ultimately depends upon their moral beliefs and attitudes. However, when assessing the merits of judicial review, one is unlikely to be using the judge's perspective (given the amount of moral diversity claimed to exist by perspectival relativists even within a society). Moreover, judges are much less likely to achieve the result that is correct relative to *other people's* perspectives. This is because, when judges seek to identify the moral truth concerning a particular issue, perspectival relativism tells us that the truth in question is truth relative to *their* perspective. And, if perspectival relativism is correct in claiming that significant divergences in moral beliefs exist even within a society, the judge's perspective is likely to differ in significant ways from other perspectives.⁶

Of course, much depends here on how similar one's perspective is to the judges'. The greater the similarity, the happier one is likely to be with judicial review (everything else being equal). Conversely, the greater the differences between judges'

⁵ Moore acknowledges that the causal relationship between moral reality and people's moral beliefs is fragile. Nevertheless, he argues that it provides us with an important insight into moral truths that would not be available if anti-objectivism were correct: 199-200 above.

⁶ See further 311-313 below.

perspectives and one's own, the less likely it is that the proviso will be satisfied relative to one's perspective. However, to show that the choice between perspectival relativism and Moore's moral realism makes a difference to the legitimacy of judicial review, I need only show that it makes such a difference relative to some perspectives (if perspectival relativism is correct). I do not need to show that it would make a difference relative to all possible perspectives. The former requirement would appear to be satisfied if there are some perspectives relative to which judges are right less often than if Moore's moral realism (with its distinctive epistemology) is correct.

As noted in Chapter IV, however, there is a problem with the argument presented in the previous few paragraphs. Moore's moral realism increases the likelihood that people will hold correct moral beliefs (due to the causal impact of moral reality upon their beliefs). However, this is as true of legislators as it is of judges. If Moore's meta-ethical theory is correct, moral reality has a causal impact upon legislators, just as it does upon judges, and so *both* groups are more likely to be able to identify moral truths than if another meta-ethical view (such as perspectival relativism) were correct. This suggests that Moore's moral realism does not affect whether the proviso in Chapter V is satisfied, after all, because it gives judges no advantage *when their performance is compared with that of legislators*.

I responded to this concern in Chapter IV by pointing out that Moore's moral realism may make a difference to the legitimacy of judicial review even though it gives judges no direct advantage vis-a-vis legislators. For example, if we have some *other* reason for preferring judicial review, then Moore's epistemology may play a defensive

role, by blocking the objection that – while judicial review would otherwise be desirable – judges should not be given that power because they are not well placed to identify objective moral truths.⁷

However, for Moore's moral realism to make this difference, we must have a reason for preferring judicial review to an unconstrained version of majoritarianism, and that reason must be independent of judges' ability to identify objective moral truths (since our reason for preferring judicial review is meant to exist before we consider whether judges are well-placed to identify such truths). Neither of the arguments presented in Chapter V satisfies this condition, since both rely crucially on the claim that judges are no worse than legislators at identifying certain moral truths. Nevertheless, there may be other arguments in favour of judicial review that *can* satisfy this condition.⁸ For example, judicial review could be defended as enhancing the system of checks and balances within a particular jurisdiction. On this view, judicial review is desirable, not because of any special skill that judges have at identifying moral truths, but because it is desirable – for a number of well-known reasons⁹ – to place (and enforce) limits upon the power of legislators. Moore's epistemology can then be used to block the objection that – while checks and balances are important – judges are likely to make such a hash of protecting rights that they should not be given the power of judicial review, after all. If Moore's version of moral realism is correct, there is more reason to

⁷ 208 above.

⁸ It is not necessary to show that Moore's moral realism affects the acceptability of *every* argument for or against judicial review. If it affects the validity of *any* such argument, then it has implications for the debate over the legitimacy of judicial review.

⁹ The exact nature of those reasons is not crucial for present purposes, but they concern (in part) the allegedly corrupting influence of power. That concern was well expressed by Jefferson (1954) 120-121 (though, as Jefferson shows, that concern *need* not lead one to support judicial review).

think that judges will do a satisfactory job of identifying rights than there is (relative to some perspectives) if perspectival relativism is correct.

It might be responded that the *ultimate* reason why it is desirable to place limits upon legislators' power is to ensure that better political outcomes are obtained, and so this argument in favour of judicial review is not in fact independent of judges' ability to identify moral truths. However, the 'checks and balances' argument is not directly concerned with judges' ability to identify and uphold moral truths, but rather with the ability of legislators to do so (if they were given too much power). Therefore, that argument can initially be advanced without considering whether judges are well placed to identify moral truths. The fact that the purpose behind the argument is to produce better political outcomes explains why someone might object to that argument on the basis that judges are *not* well placed to identify moral truths (since this suggests that judicial review might not produce better political outcomes, after all). It is in responding to this objection that Moore's moral realism has a role to play, since his distinctive epistemology makes it less likely that the objection is valid.

Admittedly, Moore's moral realism may make it less likely that legislators will abuse their power in the way that the 'checks and balances' argument suggests, because they are more likely to be in touch with moral reality. Even if they know what is morally required of them, there is no guarantee that legislators will act appropriately, but (everything else being equal) it will at least increase the chances of them doing so. However, any such improvement may be undermined by the corrupting influence of legislators' power that is claimed to exist by the 'checks and balances' argument. If the

‘checks and balances’ argument is correct, the dangers posed by legislators’ extensive power may negate any improvement in their performance that would otherwise result from the causal influence of moral reality. The same need not be true of judges, at least in those jurisdictions in which judges (even when given the power of judicial review) possess less power than legislators.

Alternatively, if legislators *are* less likely to abuse their power under Moore’s version of moral realism, this is itself an implication of his meta-ethical position that has consequences for the desirability of judicial review. The better the performance of legislators, the less need there is for judicial review of their decisions (and this may remain true even if judges’ performance would also be improved). Thus, whether Moore’s moral realism supports or undermines the case for judicial review depends in part on whether any improvement in legislators’ performance due to the causal effect of moral reality is negated by factors such as the allegedly corrupting influence of their power. This in turn may depend upon the nature of the jurisdiction that we are considering. Whatever our final conclusion, however, Moore’s moral realism will play an important role in the way that we reach that conclusion.

Moore’s moral realism also makes a further difference to the legitimacy of judicial review. The causal influence of moral reality upon their moral beliefs makes it more likely that judges will hold correct moral beliefs. This in turn means that, everything else being equal, judges are more likely to decide cases in accordance with correct moral beliefs. The causal influence of moral reality also makes it more likely that *citizens* will hold correct moral beliefs. As Moore argues, this should increase the

predictability of judicial decision-making, since judges are more likely to decide cases upon the basis of correct moral beliefs, and citizens are more likely to know what those beliefs are (and hence are more likely to be able to predict how judges will decide cases).¹⁰

This has implications not only for the predictability of judicial decision-making, but also for its legitimacy. By increasing citizens' ability to predict how judges will decide cases, Moore's moral realism increases the ability of judicial review to promote those values that are served by predictability in judicial decision-making. For example, the more predictable judicial decisions are, the better able citizens are to make both long- and short-term plans without having those plans undermined by unanticipated judicial decrees. This in turn increases their autonomy (that is, their ability to control and direct the course of their own life).¹¹ Similarly, the more predictable those decisions are, the less basis citizens have for claiming that they have been unfairly surprised by those decisions, making adjudication fairer than it would otherwise be. Both of these outcomes obviously make it easier to defend judicial review.

Again, Moore's moral realism may have a similar effect upon the predictability of *legislative* decisions. However, because judicial decision-making is generally retrospective, whereas legislative decision-making is generally prospective, the issue of

¹⁰ Moore (1992) 2473-2474. These claims were introduced at 199-200 above.

¹¹ Raz (1979) 220; Finnis (1980) 272.

predictability is of more importance for judges than for legislators.¹² Therefore, even if Moore's moral realism results in an equivalent increase in the predictability of legislative decisions, it may still tilt the balance of reasons in favour of judicial review, by solving (or at least ameliorating) a problem that is more pressing for judicial decision-making than for legislative decision-making.

* * *

The drift of this Section has been towards arguing that judicial review is easier to defend for Moore's moral realist than for an anti-objectivist (in particular, for a perspectival relativist). However, this does not vindicate the claim that it is difficult, if not impossible, for an anti-objectivist to support judicial review. Moore himself concedes that the advantages possessed by a moral realist should not be exaggerated, since they depend upon the somewhat fragile connection between moral reality and our moral beliefs.¹³ Moreover, to show that a moral realist has some advantages over a perspectival relativist when defending judicial review is not to show that it is difficult, if not impossible, for the latter to defend judicial review. We saw in Chapter V that it is open to a perspectival relativist to support judicial review, even if the present Section suggests that it may be somewhat harder for her to do so than for Moore's moral realist. Finally, it is not clear that all of the implications of Moore's moral realism point in the same direction. For example, I suggested earlier in this Section that – if Moore's moral

¹² Since one cannot change one's past behaviour to bring it in line with an unexpected retrospective decision, whereas one will sometimes be able to change one's planned behaviour to bring it in line with an unexpected prospective decision.

¹³ n 5 above.

realism is correct – legislators may be less likely to abuse their power, in which case the need for judicial review may be less pressing than if perspectival relativism were correct.

C. Ecumenical Pluralism and Perspectival Relativism

The discussion in Part B shows that the no-difference thesis is mistaken even when we confine our attention to the legitimacy of judicial review. There are meta-ethical positions that have been defended in print (if not moral nihilism, then at least Moore's moral realism) and that have implications for the legitimacy of judicial review. However, the no-difference theorist could respond to the conclusions reached in Part B by arguing that, while implausible meta-ethical views have implications for judicial review, more plausible meta-ethical positions do not. If this were right, meta-ethics would play a role with regard to judicial review somewhat similar to that which Wittgenstein envisaged for philosophy more generally.¹⁴ We would have to use meta-ethics to show that implausible meta-ethical views are mistaken and so their implications for judicial review should not be accepted, but this would be the only relevance that meta-ethics would have for the legitimacy of judicial review. Once we had corrected certain foolish meta-ethical errors, we could then discuss the legitimacy of judicial review without needing to choose between the remaining, more plausible, meta-ethical positions.

¹⁴ Wittgenstein (1968) ss 119, 124, 309.

In this Part, I shall argue that the meta-ethical debate has a more significant role to play when considering the legitimacy of judicial review than is envisaged in the previous paragraph. I shall argue that this debate affects the legitimacy of judicial review even when we confine our attention to what I claim to be the most plausible versions of objectivism and anti-objectivism (namely, ecumenical pluralism and perspectival relativism, respectively). I shall not seek to defend my claim that these are the most plausible versions of objectivism and anti-objectivism, though I have suggested (in Chapters I & II) some reasons why ecumenical pluralism is more plausible than Moore's moral realism and some considerations that favour perspectival relativism. Instead, I shall proceed directly to a consideration of the implications for judicial review of the choice between these two meta-ethical positions.

It must be conceded at the outset that the implications for judicial review of these two meta-ethical positions are less radical than (some of) the implications of the less plausible meta-ethical views considered in Part B. For example, I argued in Chapter V that perspectival relativists can support judicial review on moral grounds, whereas I argued in Part B of the present chapter that moral nihilists cannot. Given that objectivists can (though they are not compelled to) support judicial review on moral grounds, the contrast between objectivism and moral nihilism is clearly greater than the contrast between objectivism and perspectival relativism. Nevertheless, I shall argue that ecumenical pluralists and perspectival relativists should support judicial review in somewhat different circumstances and for somewhat different reasons. While the implications of these two meta-ethical positions are subtle, they are enough to show that we need to determine which meta-ethical position is correct when deciding exactly

when and why we should support judicial review (if, indeed, we should support it at all).

1) The relativisation of rights

In Chapter V, I argued that perspectival relativists can make use of some of the same arguments as objectivists to support judicial review. However, the *precise* content of those arguments will vary depending on one's meta-ethical position. Take, for example, the first of the two arguments presented in Chapter V. When offered by a perspectival relativist, this argument is that judicial review is necessary to protect rights because – even if the majority acts correctly relative to its perspectives – it may not act correctly relative to the perspective being used to assess the merits of judicial review. The majority could protect all the rights recognised by its perspectives, and yet breach the rights recognised by my (or your) perspective. While, in a modern liberal democracy, there will be overlap between perspectives regarding the rights that people possess, there will also be divergences, raising the possibility that the rights that exist relative to the majority's perspectives will differ in important ways from the rights that exist relative to my (or your) perspective. Hence the need for judicial review, to protect rights in cases where the majority's assessment of those rights, while correct relative to its perspectives, differs in important ways from the assessment that is correct relative to my perspective (or yours).¹⁵

¹⁵ Judicial review may also be needed in cases where the majority does not act correctly relative to its own perspectives. However, I shall focus on the situation described in the text, since it most clearly brings out the different implications of perspectival relativism and ecumenical pluralism for judicial review.

Clearly, the same cannot be said by an ecumenical pluralist. Instead, she could argue that judicial review is necessary to protect rights because – even if the majority acts in accordance with its sincerely held beliefs about the objective moral truth – those beliefs may not be correct. Moreover, if one realises that the majority's beliefs regarding rights are mistaken, one may feel compelled to support judicial review as a way of protecting rights from the majority's errors (so long as the proviso in Chapter V is satisfied).

The arguments offered by the perspectival relativist and the ecumenical pluralist are very similar. Both argue that judicial review may be necessary to protect people's rights against sincere mistakes made by the majority (either objectively or relative to one's perspective). This is why I claimed in Chapter V that they could both use (what is, at a certain level of generality) the *same* argument to defend judicial review. However, there are subtle differences between the content that the ecumenical pluralist and the perspectival relativist give to that argument, and these differences may have implications for the success of that argument in certain circumstances.

To see this, let us consider an argument offered by Waldron in favour of pure majoritarianism (that is, a majoritarian system unmarred by judicial review). In response to the claim that pure majoritarianism leaves minorities vulnerable to oppression at the hands of the majority, Waldron points out that nothing oppressive happens to minorities simply because their opinion is not acted upon by their community, provided that the opinion that *is* acted upon takes their interests (along with

everyone else's) into account.¹⁶ Once we distinguish between what *is* in an individual's interests and what she *thinks* is in her interests, there is no reason for allowing minority opinions, as opposed to minority interests, to prevail.¹⁷ The fact that the majority makes a political decision does not necessarily mean that the minority's interests are being ignored. While this assumes that the majority generally votes on its considered and impartial opinion regarding what is best, rather than in its own self-interest, Waldron claims that this assumption is empirically defensible.¹⁸

As presented, this argument is incomplete. Even if the majority's opinion takes the minority's interests into account, there might be other reasons for allowing minority opinions to prevail in some cases. For example, it is sometimes argued that the need to respect other people requires one to defer to their opinions in some circumstances.¹⁹ However, I shall leave this concern to one side and consider whether the choice between ecumenical pluralism and perspectival relativism makes a difference to the argument presented in the previous paragraph, without considering the qualification just mentioned. If that choice does make a difference to this argument, then there are indeed differences between the ways in which ecumenical pluralists and perspectival relativists should argue for judicial review, whether or not those differences extend to the qualification just mentioned. (This qualification may apply whether one is an ecumenical pluralist or a perspectival relativist. In either case, it could be argued that –

¹⁶ Waldron (1999) 13. While that opinion may be mistaken, Waldron claims that it is no more likely to be mistaken than the minority's opinion.

¹⁷ Indeed, there may be no reason to allow minority *interests* to prevail, either. If, when making collective decisions, it is virtually impossible to avoid harming *someone's* interests, the mere fact that a decision harms a minority's interests does not mean that the decision is illegitimate: Dahl (1989) 166.

¹⁸ Waldron (1999) 14.

¹⁹ eg Dworkin (1977) 272-278.

objectively or relative to one's perspective – the need to show respect for others means that we should defer to their opinions in some circumstances. However, what those circumstances are may vary depending on one's meta-ethical position, for reasons similar to those canvassed in Section 2.)

Ironically (given his meta-ethical leanings), Waldron's argument might provide a response to the case for judicial review presented in Chapter V if ecumenical pluralism is correct, but it fails (relative to a significant number of perspectives) if perspectival relativism is correct. If perspectival relativism is correct, and if the majority acts in good faith, then it will act on its opinion as to what rights people have, but (assuming it does not make a mistake relative to its own perspectives) the rights in question will be those that exist relative to its perspectives. They may not be the rights that exist relative to the perspective that one is using to assess the merits of judicial review. While, in any society, there is likely to be overlap between perspectives, there will also be divergences, raising the possibility that the rights recognised by the majority's perspectives will differ in important ways from the rights that exist relative to the perspective being used to assess the merits of judicial review.

Of course, things will be different if we assess the merits of judicial review relative to one of the *majority's* perspectives. In this case, the majority will (assuming that it acts in good faith, and is not mistaken relative to its own perspectives) provide adequate protection for people's rights. (Though the majority may not be a monolithic entity, as opposed to being constituted on a case-by-case basis. If so, a member of the majority on one issue may regard the majority on another issue as providing inadequate

protection for rights.) However, it is enough to show that perspectival relativism makes a difference to the legitimacy of judicial review if such a difference exists relative to some perspectives; it does not have to exist relative to all perspectives. Therefore, it is sufficient that there are some perspectives relative to which the implications discussed in the previous paragraph exist. Even if one accepts that the majority acts in good faith, and is well-suited to identifying the truth relative to its own perspectives, if one adopts a *different* perspective to assess the legitimacy of judicial review, then one may well find that a check upon the majority is required. Moreover, given the amount of moral diversity claimed to exist by perspectival relativism, and the effect that this is claimed to have on people's perspectives, there are likely to be a significant number of people in this position in most societies.

This can be compared with the situation if ecumenical pluralism is correct (and if both the majority and minority act in good faith). In this case, both sides are seeking to identify the truth about rights, and that truth is the same for both of them (rather than varying between perspectives).²⁰ This eliminates the concern that what is true for the majority may differ from what is true for us, and so may assuage our fear that the majority will ignore people's rights.²¹ Therefore, if we trust the majority to take everyone's interests into account when determining what rights people have, we may not need judicial review as a check on legislative decisions if ecumenical pluralism is

²⁰ This ignores the possibility that (some of) the relevant options are incommensurable. An exploration of this possibility exposes further implications for judicial review of the choice between ecumenical pluralism and perspectival relativism, and these are discussed in Section 4.

²¹ Provided we have faith in the majority's ability to identify the shared truth about rights (a caveat that is considered in the next paragraph). One reason why the majority may *not* be able to identify that truth is if they are mistaken about its meta-ethical status, and this leads them to go about identifying that truth in the wrong way.

correct. If perspectival relativism is correct, on the other hand, even if everyone acts in good faith, the truth that they are all seeking differs depending on which perspective they hold. The truth for the majority depends on what rights people have relative to the majority's perspectives, whereas the truth for the minority depends on what rights exist relative to the minority's perspectives.

There is an obvious response to this line of thought. As already noted, the ecumenical pluralist could still support judicial review as a way of providing a second opinion regarding rights, in recognition of the fact that – even when the majority acts in good faith – it may be mistaken. However, whether it is desirable to have judicial review as a check on the majority's judgment depends on the relative expertise of judges and the majority in identifying (and acting upon) objective moral truths. I shall argue in Section 3 that the choice between ecumenical pluralism and perspectival relativism has implications for this issue of expertise as well. For now, it is enough to note that the terrain on which the battle over judicial review is fought may differ depending on whether one is an ecumenical pluralist or a perspectival relativist. If ecumenical pluralism is correct, the case for judicial review depends (in part) on how successful the majority is at identifying the objective truth regarding rights, where the same things are true for the majority and for the minority.²² If perspectival relativism is correct, on the other hand, the case for judicial review depends (again, in part) on the fact that what is true relative to the majority's perspectives may differ from what is true relative to one's own perspective.

²² Again, leaving the possibility of incommensurability to one side until Section 4.

2) Rational persuasion

There is one striking implication of the choice between ecumenical pluralism and perspectival relativism that I have not yet mentioned. If perspectival relativism is correct, judicial review cannot be justified relative to every possible perspective, or else it would be *objectively* justified (since there could be a rational convergence upon the proposition that it is justified).²³ Indeed, if moral diversity is as prevalent within societies as was suggested in Chapter II,²⁴ it is highly unlikely that judicial review can be justified even relative to every perspective that is held within a particular jurisdiction. This suggests that, even within a jurisdiction, not everyone can (correctly, relative to their own perspective) support judicial review.²⁵ If ecumenical pluralism is correct, on the other hand, then – within a particular jurisdiction – judicial review is justified for everyone or for no one. (Things are more complicated if judicial review and pure majoritarianism represent incommensurable options. I consider this possibility in Section 4.)

However, this fact need not affect any particular person's stance towards judicial review. We have seen that, if perspectival relativism is correct, the fact that a certain

²³ This is not to claim that all (or even many) objectivists would accept that a moral proposition is objectively true if it is true relative to every possible perspective (or fully coherent belief-set). However, such a view satisfies the definition of objectivism offered in Chapter I, and is not dissimilar from Michael Smith's version of objectivism: 17 above. Note that the proposition would have to be true relative to every *possible* perspective, and so a contingent overlap between all actual perspectives would not be sufficient.

²⁴ 83-84 above.

²⁵ This conclusion depends not only on the existence of moral diversity, but also on the connection that perspectival relativism makes between people's moral beliefs and what is true relative to their perspective. Perspectival relativism suggests that, where people hold different beliefs about the legitimacy of judicial review, it is likely (though not certain) that their perspectives differ with regard to the legitimacy of judicial review.

moral proposition is false relative to someone else's perspective does not prevent it from being true relative to one's own perspective. Thus, the fact that judicial review cannot be legitimate relative to everyone's perspective does not mean that it cannot be legitimate relative to one's own perspective. Similarly, the fact that – if ecumenical pluralism is correct – it is either objectively true or objectively false that judicial review is legitimate within a particular jurisdiction (again, assuming that the legitimacy of judicial review is not affected by the incommensurability thesis) does not tell us whether judicial review is legitimate or not. We are no closer to determining whether judicial review is legitimate if *all* we know is that its legitimacy or otherwise is a matter of objective fact.²⁶

Nevertheless, we saw in Chapter IV that – when we combine this implication of the choice between ecumenical pluralism and perspectival relativism with certain moral beliefs – it *does* make a difference to the legitimacy of judicial review. If perspectival relativism is correct, judicial review cannot be legitimate relative to every possible perspective, and is unlikely to be legitimate relative to every perspective held by people within the jurisdiction in question. The perspectival relativist need not treat this fact as meaning that judicial review cannot be legitimate relative to *her* perspective, but this is certainly a *possible* approach that she could take. For example, she might adopt the moral belief that we should not require people to act in ways that they cannot be rationally (in the 'thin' sense) persuaded are correct. (Henceforth, I shall refer to this as 'the principle of rational persuasion'.) There is nothing in her meta-ethical position that requires her to adopt this principle, but nor is there anything that prevents her from

²⁶ This is the grain of truth in the first interpretation of Waldron's argument for the no-difference thesis: 197-198 above.

doing so. If she does adopt that principle, combining it with perspectival relativism produces the result that judges should not exercise the power of judicial review. Given the range of perspectives that exist within Western societies, and the number of people who are affected (directly or indirectly) by binding decisions concerning rights or the preconditions of democracy, the exercise of that power would almost certainly require some people to act in ways that they could not be rationally persuaded are correct.²⁷

If, on the other hand, we combine the principle of rational persuasion with a version of ecumenical pluralism that accepts the rational convergence thesis, no such conclusion follows. In this case, there will be moral beliefs that judges could uphold and that everybody could be rationally persuaded are correct. Of course, it is unlikely that everyone will *in fact* be persuaded that the beliefs in question are correct. However, any version of ecumenical pluralism that accepts the rational convergence thesis holds that rational persuasion is a possibility, and this is all that is required by the principle of rational persuasion.

Thus, the choice between ecumenical pluralism and perspectival relativism, when combined with the principle of rational persuasion, has significant implications for the legitimacy of judicial review. Obviously, not everybody will agree that the principle of rational persuasion is correct. Indeed, one might be uncomfortable with that principle precisely because it entails that one should not support judicial review²⁸ if perspectival

²⁷ 210 above. *Prima facie*, the same is also true of any other exercise of political power. In other words, it may not be only judicial review that would be illegitimate, but all other forms of political authority as well. Thus, this particular implication of the choice between perspectival relativism and ecumenical pluralism appears to extend far beyond the issue of judicial review.

²⁸ Or, quite possibly, *any* form of political authority: n 27 above.

relativism is correct. However, a weaker version of the principle (according to which the possibility of rational persuasion is one, but not the only, relevant consideration when deciding how to treat other people) may enable us to defend judicial review in some circumstances (where that principle is outweighed by other considerations) and yet may still make a difference to judicial review (since that principle is always *a* relevant factor, and produces distinctive consequences when combined with perspectival relativism). Moreover, this weaker version of the principle, being less extreme than the original version, may prove more attractive to many people.

This leads into a further issue. I argued in Chapter IV that it is enough to refute the no-difference thesis if different meta-ethical positions combine with the same moral belief to produce different implications for adjudication, whether the moral belief in question is true or not. Any attempt to focus only on true moral beliefs runs into the problem that whether a particular moral belief is true for a particular person may itself depend on the outcome of the meta-ethical debate (since perspectival relativism relativises moral truth in a way that ecumenical pluralism does not). Thus, one could follow the instruction to focus on true moral beliefs only after one had engaged in the meta-ethical debate, at which point the no-difference thesis has already been undermined.²⁹

This means that I can rely upon the stronger version of the principle of rational persuasion to show that the choice between ecumenical pluralism and perspectival relativism has implications for judicial review, even if it turns out that this version of

²⁹ For a fuller explanation of this point, see 188-189 above.

the principle is false (either objectively or relative to certain perspectives). However, it would further undermine the no-difference thesis if I can show that the choice between ecumenical pluralism and perspectival relativism has implications for judicial review, not only when those positions are combined with (what might be thought to be) an extreme moral belief, but also when they are combined with a more moderate (and more popular) moral belief. The weaker version of the principle of rational persuasion satisfies this requirement. Many people believe that it is sometimes justifiable to require people to act in ways that they cannot be rationally persuaded are correct. For example, many people would believe that it is justifiable to stop committed Nazis or murderers from acting on their beliefs, even if it turned out that such people cannot be rationally persuaded that their beliefs are wrong. On the other hand, a number of philosophers have expressed qualms about requiring people to act in ways that they cannot be rationally persuaded are correct.³⁰ People sympathetic to both of these positions might well be attracted to the weaker version of the principle of rational persuasion, since it allows for a compromise between these two conflicting considerations. Moreover, we have seen that even the weaker version of the principle combines with ecumenical pluralism and perspectival relativism to produce different consequences for the legitimacy of judicial review.

If one accepts either version of the principle of rational persuasion, one may agree with Moore that we should be more hesitant about imposing true moral beliefs on other people if we are anti-objectivists than if we are objectivists.³¹ The fact that

³⁰ eg Tasioulas (2002) 236-237.

³¹ Moore (1992) 2469-2470.

everyone could be rationally persuaded of the truth of certain moral beliefs if ecumenical pluralism is correct, but not if perspectival relativism is correct, provides us with a conclusive (on the strong version of the principle) or a pro tanto (on the weaker version of the principle) reason not to impose those beliefs upon other people if perspectival relativism is correct, but provides us with no such reason if ecumenical pluralism is correct.

However, this is true only if the principle of rational persuasion is correct, a qualification that Moore overlooks. If that principle is mistaken, perspectival relativists are free to support judicial review on the grounds suggested in Part A. Moreover, unless we accept the extreme version of that principle, Moore vastly over-states the relevant difference. On the weaker version, whether people could be rationally persuaded of the truth of our moral beliefs is always a relevant factor, making it somewhat more difficult to justify judicial review if perspectival relativism is correct. However, it is only one relevant factor, and so may be outweighed in a variety of situations. Therefore, a perspectival relativist who accepts the weaker version of the principle of rational persuasion can also accept the arguments in favour of judicial review presented in Chapter V, since the importance of protecting rights and the preconditions of democracy may outweigh concerns about our inability rationally to persuade others of the truth of our moral beliefs. It is just that it is somewhat easier for an ecumenical pluralist who accepts the weaker version of the principle to support judicial review, since the problem of the impossibility of rational persuasion need not arise given her meta-ethical position.

3) Another look at moral expertise

There is a further way in which the debate between ecumenical pluralism and perspectival relativism affects the legitimacy of judicial review. Consider the claim that judicial review is desirable because judges possess moral expertise and so will reach better decisions than the majority (or parliament).³² On this view, the proviso established in Chapter V is satisfied because judges are more capable moral reasoners than legislators (or the majority represented by the legislature). Now consider the position if ecumenical pluralism is correct. In this case, it is possible for people to possess moral expertise, because there are objectively correct answers that they may be experts at identifying.³³ This means that we may (justifiably) want judges' moral opinions to prevail over legislators' opinions (or even over our own opinions), provided we can be persuaded that judges in fact have superior expertise. On this view, if ecumenical pluralism is correct, and if judges can be shown to possess moral expertise, then we should desire to be treated in accordance with judges' moral beliefs rather than legislators' (or our own), because the former are more likely to be true.

Judges could possess superior moral expertise because of personal or institutional factors (or both). As individuals, judges could have superior moral expertise to legislators (or to members of the public). Alternatively, the institutional role of judges may provide them with superior moral insight. For example, Moore argues that – due to their institutional position – judges have a variety of epistemic advantages compared

³² This claim was introduced at 184 above.

³³ cf 185-186 above.

with legislators. Judges deal with concrete moral problems, have experience in reasoning about general principles, are not beholden to the majority for re-election, and so on.³⁴ According to Moore, these epistemic advantages make it more likely that judges possess moral expertise when compared with legislators. At least some of those epistemic advantages might also be relevant when judges are compared with you or I.

Even if an ecumenical pluralist accepts that judges have superior moral expertise, she need not conclude that this legitimates judicial review. She may instead conclude that it is better that we make our own decisions, even if these are less likely to be correct than if we relied upon judges' opinions. Nevertheless, to the extent that she attaches importance to reaching the right answer in cases involving the protection of rights or the preconditions of democracy, she has a reason to defer to judges' opinions (again, provided that judges in fact possess superior expertise), even if that reason is outweighed by other considerations (such as the importance of being allowed to make one's own mistakes).

It is much less likely that, if perspectival relativism is correct, we will have even a pro tanto reason to want judges' opinions to prevail over our own. If perspectival relativism is correct, what is true relative to judges' perspectives is likely to differ in significant ways from what is true relative to one's own perspective (given the amount of moral disagreement claimed to exist, even within a society, by perspectival relativism). While judges may well have expertise at identifying what is true relative to their perspective (since the truth relative to their perspective ultimately depends on their

³⁴ Moore (1992) 2477.

moral beliefs), they are much less likely to have expertise relative to another person's perspective (since what is true relative to *her* perspective depends on which moral propositions cohere best with her belief-set, and judges are not particularly well-placed to identify other people's beliefs, let alone to work out how best to produce coherence among those beliefs).³⁵ Yet relative to her perspective, what is important when determining whether judges' beliefs should prevail over her own on the basis of expertise is whether judges have expertise relative to her perspective, not relative to their perspective. What matters is how good judges are at identifying true moral beliefs, and (relative to her perspective) the beliefs that are true are contained in her perspective, not the judge's.

This is not to deny that we may want judges to uphold their own moral beliefs if we think that this is more likely than any viable alternative to produce decisions in accordance with *our* moral beliefs (eg if the only viable alternative is pure majoritarianism, and the proviso in Chapter V is satisfied). Indeed, this is the cornerstone of the defence of judicial review presented in Chapter V. I am concerned here with the different situation where judges' moral beliefs *conflict* with ours, and it is argued that the former should prevail because judges have superior moral expertise. In that situation, it may be easier to justify judicial review if ecumenical pluralism is correct, because not only may we be correct in ascribing greater moral expertise to judges than to legislators (or the majority) but we may even be correct in ascribing

³⁵ John Tasioulas has suggested that judges could have expertise relative to some perspectives. For example, if Anna seeks to hold correct Christian beliefs, then it is possible that Christian judges may be better at identifying those beliefs than Anna is (and so they may have expertise relative to her perspective). I suspect that this underestimates the extent to which people have distinctive views about what the correct Christian belief-set looks like, differences that may result in differences in perspectives. More importantly, however, even if many perspectives are like Anna's, there are a significant number that are not, and judges are much less likely to have expertise relative to *these* perspectives.

judges greater expertise than ourselves. This is less likely to be the case if perspectival relativism is correct, since it is unlikely that judges will possess moral expertise relative to our (cf their) perspective.

This is one implication of the fact that – if ecumenical pluralism is correct, and leaving incommensurability to one side – even when people disagree about what is morally right, they still share a common goal, in the sense that (whether they realise it or not) the same things are true for all of them.³⁶ If one person or group is better than another at identifying this shared (objective) truth, then it makes sense for the latter to rely upon the former. If perspectival relativism is correct, however, there is no such common goal (because what is true for each person varies depending on which perspective they hold), and so this sort of mutual reliance is a much less attractive proposition. This is not to claim that mutual reliance of this sort is *never* justifiable if perspectival relativism is correct. It may sometimes be a sensible strategy where two people's perspectives overlap with regard to a particular set of moral issues. However, given the partial nature of overlap between perspectives, such mutual reliance will be on a smaller scale than may be justified if ecumenical pluralism is correct.

The fact mentioned at the start of the previous paragraph has another implication that is relevant for present purposes. If ecumenical pluralism is correct, then the fact that other people disagree with me (and continue to do so even after we have debated the relevant issues) might give rise to concerns about whether I have in fact identified

³⁶ In Chapter I, n 54, I noted that there are two meanings of 'true for X'. In this Section, I use the phrase not to refer to the moral issue of scope (eg whether I should believe that everyone, or only some people, should refrain from murder), but rather to refer to the meta-ethical issue of whether something is objectively true or true only relative to certain perspectives.

the objectively correct answer. One possible explanation of the disagreement is that they are right and I am wrong. If perspectival relativism is correct, on the other hand, I should be less concerned about the fact that other people disagree with me. This is because what is true relative to other people's perspectives is likely to differ in significant ways from what is true relative to my perspective. Given this, the fact that they disagree with me need not cast doubt on my ability to identify the truth relative to *my* perspective.³⁷ This provides a reason to be *more* hesitant about upholding our moral beliefs via judicial review if ecumenical pluralism is correct. The fact that other people disagree with us should make us less confident that our moral beliefs are correct, and so we should be less willing to impose our beliefs on other people.

However, this difference should not be exaggerated. If ecumenical pluralism is correct, the fact of disagreement will not always cast doubt upon the correctness of our moral views, since we may sometimes have good reason to believe that the other side to the dispute is mistaken.³⁸ Also, if perspectival relativism is correct, some moral disagreements may lead one to question whether one has identified the answer that is correct relative to one's perspective.³⁹ Nevertheless, for the reasons given in the previous paragraph, the fact that other people disagree with us may sometimes give us

³⁷ The perspectival relativist claims that there is significant moral disagreement not just between, but also within, societies: 83-84 above. Given the link that she claims to exist between one's moral beliefs and what is true relative to one's perspective, this suggests that we should expect significant divergences between the perspectives held by members of a single society.

³⁸ Raz (1998) 51.

³⁹ 117-123 above.

more reason to question the truth of our own beliefs if ecumenical pluralism is correct than if perspectival relativism is correct.⁴⁰

This shows that the implications for the legitimacy of judicial review of the choice between ecumenical pluralism and perspectival relativism do not all point in the same direction. Most of the implications of that choice suggest that it is somewhat harder to justify judicial review if perspectival relativism is correct. However, we have just seen one implication that pushes in the opposite direction. It is possible that these conflicting implications may cancel each other out, so that it is neither easier nor harder to justify judicial review if one is a perspectival relativist (though, given that most of these implications point towards it being somewhat harder for a perspectival relativist to do so, this conclusion is unlikely to be correct). Nevertheless, it would still be true that the choice between ecumenical pluralism and perspectival relativism has implications for the legitimacy of judicial review, and one could not present a complete argument in favour of judicial review without taking those implications into account.

4) Incommensurability and judicial review

There is one final consideration that should be mentioned. So far, the discussion in this chapter has largely ignored the fact that ecumenical pluralists need not claim that there is a single right answer to every moral question. They can claim that some moral questions have no determinate answer and/or that some moral questions have a number of incommensurably good answers. Moreover, the greater the amount of

⁴⁰ This may mean that perspectival relativists have *somewhat* less reason to engage in moral debate than ecumenical pluralists. Again, however, this difference should not be exaggerated, especially given the explanation of the purposes of moral debate for perspectival relativists offered in Chapter II.

incommensurability or indeterminacy recognised by ecumenical pluralists, the less difference the considerations discussed in Sections 1-3 make. In cases of indeterminacy or incommensurability, there is no unique outcome that everyone can be rationally persuaded to accept. While incommensurability theorists claim that there are objective reasons supporting each of two incommensurably good options, there is no objective, all-things-considered reason for preferring one option to the other. Therefore, the choice between the two options must inevitably depend partly on *non*-rational factors (and these are likely to vary between individuals). Nor, when deciding which of two incommensurable options to prefer, is there a common goal (in the sense of a unique outcome that is correct for everyone) that judges might be experts at attaining, since there is no objective fact of the matter as to which of two incommensurable options is best all-things-considered. While it is objectively true that both options are incommensurable (and discovering this fact could represent a common goal), this will not provide judges with a way of choosing *between* the incommensurable options. If we confine our attention to the choice between incommensurable options, there is no common goal, because there is no uniquely right way in which the choice should be made.⁴¹

Thus, there might be thought to be little practical difference between judicial decision-making if perspectival relativism is correct and judicial decision-making between incommensurable options (but *only* between incommensurable options). If the options between which a judge must choose are all incommensurable, then the case

⁴¹ In denying that there is a common goal in this situation, I am using that phrase in the way it was used in Section 3. This is compatible with the possibility that there may be a common goal in a different sense (eg if the relevant options represent incommensurable ways of resolving a coordination problem).

must be decided by choosing one incommensurable option over another. That choice is no more dictated by rationality⁴² than is the choice among moral beliefs if perspectival relativism is correct. While there could be a rational convergence upon the arguments in favour of each of the incommensurable options (since each option is supported by objective *pro tanto* reasons), there could not be a rational convergence regarding which option is best all-things-considered. Instead, a choice must be made based partly on non-rational factors.

However, this does not vindicate the no-difference thesis, even if we confine our attention to the choice between ecumenical pluralism and perspectival relativism. If ecumenical pluralism is correct, there will be some (probably many) answers to moral questions that are not indeterminate or incommensurably good, but rather objectively wrong. While objective, all-things-considered reasons cannot be given for preferring one incommensurable option to another, they *can* be given for preferring either of those options to an objectively wrong option. Thus, under a version of ecumenical pluralism that accepts the rational convergence thesis, judges may be able to exclude some options (those that are objectively wrong) by the use of reason (in the ‘thin’ sense), even if there are no objective, all-things-considered reasons for accepting the judge's choice from among the remaining (incommensurably good) options.⁴³ No such claim can be made if perspectival relativism is correct. Similarly, judges may possess expertise in

⁴² In the ‘thin’ sense discussed at 125-126 above.

⁴³ Though, in some jurisdictions, objectively wrong options may not commonly be available for judges to choose when exercising the power of judicial review, having been ruled out by the constitution or past cases.

identifying objectively wrong options, even if such a claim would be out of place if made with regard to the choice between incommensurably good options.

Moreover, some ecumenical pluralists claim that there is an objectively correct procedure for choosing between indeterminate or incommensurably good options in certain political contexts. For example, Raz suggests that we should prefer one incommensurably good form of government to another if the former is already established (and generally accepted) in the relevant community.⁴⁴ Assuming that what holds for forms of government also holds for individual political decisions, this suggests that – once a judge has chosen an incommensurably good option – people may be rationally (in the ‘thin’ sense) required to comply with that decision, even if they did not have objective, all-things-considered reasons to prefer the selected option before the judge chose it. While this will not help the judge to decide which incommensurably good option to select, it may help to legitimise her decision once she has made her choice (especially if one accepts the principle of rational persuasion). Again, nothing comparable can be said if perspectival relativism is correct.

Incommensurability is also relevant in another way. It is not only the answers to a dispute concerning the content of a right (or a precondition of democracy) that may be incommensurable. If ecumenical pluralism is correct, whether judges do a better job than legislators of protecting rights and/or the preconditions of democracy (in a particular jurisdiction) may also be a matter of incommensurability. There may be reasons for regarding judges as doing a better job and reasons for regarding judges as

⁴⁴ Raz (1998) 48-49. It is not necessary, when arguing against the no-difference thesis, to show that the moral belief relied upon by Raz is *true*: 188-189 above.

doing a worse job, and no objective way of balancing those conflicting reasons to reach an all-things-considered conclusion. Indeed, given the various fundamental rights at stake when considering judges' performance in a particular jurisdiction, a conclusion of incommensurability might appear not just possible, but likely. How can we weigh up, in an objective fashion, the better protection of one fundamental right (eg free speech) by the courts against the better protection of another fundamental right (eg the right of political participation) by the legislature? Should we not conclude that judicial review is better than pure majoritarianism in some respects but worse in others, and neither option is better, worse or equally good overall?

This would still be enough to satisfy the proviso established in Chapter V. The proviso is satisfied if judges provide *no worse* protection for rights and/or the preconditions of democracy than legislators. If (in a particular jurisdiction) judicial review is better than pure majoritarianism in some respects but worse in others, and is not better, worse or equally good overall, then the proviso is satisfied. The protection provided by judges is (all things considered) no worse than that provided by legislators. Moreover, if ecumenical pluralism is correct, it will be *objectively true* that the proviso is satisfied, since it will be objectively true that judicial review and pure majoritarianism represent incommensurably good options. If the rational convergence thesis is true, this means that people could be rationally persuaded of the fact that the proviso is satisfied, whereas they could not be rationally persuaded of this fact if perspectival relativism were true.

Of course, not everyone will agree that the proviso is appropriate (at least, not in the form in which it was expressed in Chapter IV). For example, we have seen that Raz suggests that we should prefer one incommensurably good form of government over another if the former is already established (and generally accepted) in the relevant community. On this approach, it is not enough to show that judicial review is no worse than pure majoritarianism when it comes to protecting rights and/or the preconditions of democracy. If judicial review and pure majoritarianism represent incommensurable options – and if Raz's suggestion is correct – then we should persist with whichever option is currently entrenched in our legal system (assuming that it is generally accepted in the relevant community). This suggests that we should continue to reject judicial review if we currently have a system of pure majoritarianism that is incommensurable with judicial review, even though the proviso is satisfied (since judicial review would provide no worse protection of rights and/or the preconditions of democracy than pure majoritarianism).

However, if we replace the proviso with Raz's suggestion, the choice between ecumenical pluralism and perspectival relativism still makes an important difference to the legitimacy of judicial review. If perspectival relativism were correct, there would be no objective principle governing the choice between judicial review and pure majoritarianism, because perspectival relativism leaves no room for such a principle. While a perspectival relativist could adopt a moral principle that endorses whichever option is currently adopted in the legal system in question,⁴⁵ that principle would be valid only relative to her perspective (and any other perspective that overlaps with hers

⁴⁵ Possibly with the qualification that the options must be incommensurable, although perspectival relativists have much less need for the incommensurability thesis than ecumenical pluralists: 51-52 above.

at this point). This differs from Raz's solution to the problem of choosing between incommensurable options, since that solution purports to be objectively valid, leaving room for the possibility that everyone could be rationally persuaded of its truth.

D. Conclusion

I argued in Chapter V that Dworkin and Moore are wrong to suggest that judicial review is illegitimate unless objectivism is correct. However, we have seen in the present chapter that, when we combine ecumenical pluralism and perspectival relativism with certain moral beliefs, there is a grain of truth in their position. The arguments for judicial review offered in Chapter V may be correct whether one is an ecumenical pluralist or a perspectival relativist. However, the obstacles in the way of accepting those arguments are greater if one is a perspectival relativist *and* if one accepts the principle of rational persuasion (that one should not require people to act in accordance with moral beliefs that they cannot be rationally persuaded are correct).⁴⁶ How *much* greater those obstacles are depends upon whether one accepts the strong or weaker version of the principle.

Secondly, while both ecumenical pluralists and perspectival relativists can (though they need not) support judicial review, we have seen that there are different factors that must be considered depending on one's meta-ethical position. For example, if ecumenical pluralism is correct, it is possible that judges possess greater expertise in identifying rights and/or the preconditions of democracy than we do. Such a claim is

⁴⁶ I have left to one side the question of whether the application of this principle should itself depend on whether people can be rationally persuaded that it is correct.

much less plausible if perspectival relativism is correct. Therefore, even if one's meta-ethical position need not affect the ultimate conclusion that one reaches concerning the legitimacy of judicial review, it may affect how one should argue for that conclusion.

Thirdly, the choice between ecumenical pluralism and perspectival relativism may affect the *situations* in which judicial review is justified. Since the factors that are relevant to the legitimacy of judicial review differ somewhat for ecumenical pluralists and perspectival relativists, there may be situations in which those different sets of factors point in different directions. Therefore, while both ecumenical pluralists and perspectival relativists can regard judicial review as legitimate, the situations in which they can do so may differ.

Finally, when we turn our attention from ecumenical pluralism and perspectival relativism towards less plausible meta-ethical positions, the implications for judicial review become more easily discernible and (in some cases) more far-reaching. For example, if moral nihilism were correct, there would be no possibility of offering intelligible moral arguments either for or against judicial review. Alternatively, if Moore's moral realism were correct, then certain strategies for defending judicial review would become available that would not otherwise exist. For example, we could counter certain objections to judicial review by pointing out that Moore's moral realism makes it more likely that judges will uphold correct moral beliefs. His meta-ethical theory also makes it more likely that citizens can predict the decisions that judges will arrive at when exercising the power of judicial review, and this also has implications for the legitimacy of judicial review.

CONCLUSION

The primary goal of this thesis has been to combat the recent trend in legal philosophy towards regarding the truth or falsity of moral objectivism as irrelevant to adjudication in general and to the legitimacy of judicial review in particular. In Chapters III-VI, I argued that legal philosophers must re-engage in the debate between moral objectivists and anti-objectivists, because that debate has implications for adjudication (and, in particular, for the legitimacy of judicial review). To establish this conclusion, I first needed to counter the arguments of two theorists who have suggested that the meta-ethical debate is irrelevant to adjudication. In Chapter III, I addressed two important contentions made by Ronald Dworkin – that the truth or falsity of objectivism would leave our moral and adjudicative practices untouched (the irrelevance thesis) and that purportedly meta-ethical views are in fact unintelligible unless reinterpreted as moral views (the no-sense thesis). Neither of these contentions, I claimed, is correct.

Chapter IV focused on the other leading figure in the movement towards regarding meta-ethics as irrelevant to adjudication – namely, Jeremy Waldron. Waldron argues that, even if moral objectivism were true, its truth could have no implications for adjudication (the no-difference thesis). However, the exact nature of his argument is unclear, and so I considered four possible interpretations of Waldron's views. Each, I argued, suffers from a fatal flaw, though the nature of that flaw differs depending upon which interpretation one has in mind.

In addition to seeking to refute Waldron's arguments for the no-difference thesis, Chapter IV began the positive task of tracing the differences that the truth or falsity of objectivism would make to adjudication. To render this task manageable, I focused on only one aspect of adjudication – namely, whether judicial review is defensible. In Chapter IV, I suggested two ways in which the truth or falsity of objectivism could affect the legitimacy of judicial review. This was then expanded upon in much greater depth in Chapter VI, where I compared four different meta-ethical positions (moral nihilism, Moore's moral realism, perspectival relativism and ecumenical pluralism) and argued that each has distinctive implications for the legitimacy of judicial review.

However, I also sought to show that many of the differences that these four meta-ethical positions make to the legitimacy of judicial review are relatively modest, at least when compared with the differences that are claimed to exist by most opponents of the no-difference thesis. While some less plausible meta-ethical positions (in particular, moral nihilism) have quite dramatic implications for judicial review, the choice between more plausible meta-ethical positions (such as ecumenical pluralism and perspectival relativism) has less far-reaching implications. Thus, my goal was to tread a middle path between those theorists who deny that the meta-ethical debate has any implications for the legitimacy of judicial review (or for adjudication in general) and those theorists who claim that the meta-ethical debate has radical implications (eg because anti-objectivists will find it difficult, if not impossible, to support judicial review).

It was in light of this goal that I sought to show in Chapter V that perspectival relativists are free to support judicial review on some of the same grounds as

objectivists. Most theorists who have resisted the trend towards regarding the truth or falsity of objectivism as irrelevant to adjudication argue that an anti-objectivist would find it difficult, if not impossible, to support judicial review. In Chapter V, however, I argued that at least one type of anti-objectivist – namely, the perspectival relativist – *can* support judicial review. Perspectival relativism is not logically inconsistent with the legitimacy of judicial review, and nor does it provide strong reasons for rejecting judicial review.

Thus, while I have argued that the truth or falsity of objectivism has implications for adjudication (and, in particular, for judicial review), I sought to show that these implications are more modest than some people have thought. It is not the case that all objectivists can support judicial review and no anti-objectivist can do so. Instead, the implications of the meta-ethical debate are more fine-grained. They depend in part on the particular version of objectivism or anti-objectivism that one has in mind. They also depend upon the way in which different meta-ethical positions combine with particular moral beliefs. And many of the differences are matters of degree. For example, while I argued in Chapter V that perspectival relativists are free to support judicial review, I suggested in Chapter VI that it may be *somewhat* harder for them to do so than it is for an ecumenical pluralist (if, for example, both accept the weaker principle of rational persuasion discussed in Chapter VI). However, this is a question of degree. The obstacles before a perspectival relativist who wishes to defend judicial review are surmountable, but they may be *somewhat* higher than the obstacles confronting an ecumenical pluralist.

Nevertheless, while I have just emphasised the relative modesty of my conclusions, the implications of the meta-ethical debate for adjudication are far from trivial. They are significant enough that legal philosophers will be led astray if they continue to regard that debate as irrelevant to their concerns. To develop a full and accurate account of adjudication (or, more modestly, of the legitimacy of judicial review), legal philosophers must re-engage in the meta-ethical debate. The truth or falsity of objectivism may not be the most significant influence upon the legitimacy of judicial review (let alone upon adjudication more generally), but it is a relevant factor, and so needs to be considered.

This, by itself, complicates the task confronting those legal philosophers who are concerned with adjudication or the legitimacy of judicial review. If I am right, not only do they need to have a good grasp of the moral and legal debates concerning adjudication or judicial review, but they must also come to grips with the controversy regarding the truth or falsity of objectivism, and be able to trace the sometimes subtle implications of that controversy for their primary area of interest. Things become even worse, however, when we take into account the conclusions argued for in Chapter II. In that chapter, I contended that the proper resolution of the meta-ethical debate is not as obvious or straightforward as it might appear to many moral philosophers. I sought to cast some doubt upon the correctness of ecumenical pluralism, and to defend perspectival relativism from certain objections. My aim was not to argue that perspectival relativism is correct and ecumenical pluralism is wrong (something that, even if true, could not be established in the space of a single chapter), but rather to cast doubt upon the increasingly popular view that some version of ecumenical pluralism

must be correct. If I am right, it is much harder to show that perspectival relativism is mistaken than is often thought, and the obstacles in the way of accepting ecumenical pluralism are greater than they might appear.

Thus, not only have I argued that legal philosophers need to re-engage in the meta-ethical debate, but I have also sought to show that a resolution of that debate may be more elusive than is commonly believed. This makes the legal philosopher's task even more daunting. It is bad enough to be told that one must engage in a major debate in moral philosophy; it is worse still to be told that this debate is more difficult to resolve than is generally recognised. Nevertheless, if she is to develop a full and accurate account of adjudication (or judicial review), this is the task that the legal philosopher must undertake. This thesis does not purport to indicate how legal philosophers should go about fulfilling that task. Rather, its contribution is more basic: namely, to highlight an aspect of the problem confronting anyone who seeks to develop a theory of adjudication or of judicial review, an aspect that is increasingly being overlooked. However, this itself is an important step on the way to developing a solution to that problem. Unless we have a clear view of the problem before us, any attempted resolution may well go astray. Hopefully, as a result of this thesis, we are in a better position to begin the task of developing a theory of adjudication that is sensitive to the implications of the truth or falsity of moral objectivism.

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