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Series Preface

The International Library of Law and Legal Theory is designed to provide important research materials in an accessible form. Each volume contains essays of central theoretical importance in its subject area. The series as a whole makes available an extensive range of valuable material which will be of considerable interest to those involved in the research, teaching and study of law.

The series has been divided into three sections. The Schools section is intended to represent the main distinctive approaches and topics of special concern to groups of scholars. The Areas section takes in the main branches of law with an emphasis on essays which present analytical and theoretical insights of broad application. The section on Legal Cultures makes available the distinctive legal theories of different legal traditions and takes up topics of general comparative and developmental concern.

I have been delighted and impressed by the way in which the editors of the individual volumes have set about the difficult task of selecting, ordering and presenting essays from the immense quantity of academic legal writing published in journals throughout the world. Editors were asked to pick out those essays from law, philosophy and social science journals which they consider to be fundamental for the understanding of law, as seen from the perspective of a particular approach or sphere of legal interest. This is not an easy task and many difficult decisions have had to be made in order to ensure that a representative sample of the best journal essays available takes account of the scope of each topic or school.

I should like to express my thanks to all the volume editors for their willing participation and scholarly judgement. The interest and enthusiasm which the project has generated is well illustrated by the fact that an original projection of 12 volumes drawn up in 1989 has now become a list of some 60 volumes. I must also acknowledge the vision, persistence and constant cheerfulness of John Irwin and the marvellous work done by Mrs Margaret O'Reilly and Mrs Sonia Bridgman.

TOM D. CAMPBELL
Series Editor
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Introduction

The task of editing a collection of essays on legal rights has some peculiar difficulties. It is not only that, as usual, there are several conflicting criteria which press in different directions: whether to take into account the historical interest of the piece or its present influence in discussion; whether to consider the fact of its being either widely known and cited or little known and deserving to be so; or whether to give priority to the fact that the piece touches fundamental but abstract issues or that it deals with questions in the concrete and sometimes instrumental form in which they are posed in certain institutional settings. Nor is it solely the problem that some essays presuppose knowledge of others, which for different reasons could not be included. It is not even the challenge of being as pluralistic as possible regarding ideological stances, doctrinal positions, cultural influences, or of reflecting minimally some different legal and philosophical traditions, even when concentrating on the Anglo-American one. The main difficulty is that the selection of essays on this topic unavoidably reflects the theoretical views of the editor, however open-minded I try to be. This is so because the selection has a tree-like structure: the relevance of the works done at certain theoretical levels depending on the position taken in controversies developed at a more basic level. This is specially the case with regard to the conception of the relation between law and morality: if I had a different conception, I would still have selected the same articles discussing that relation, but there would be no reason to include other works concerned with the place of rights within moral theory or to intertwine the treatment of particular rights from an institutional point of view with purely moral discussions of those particular rights. Therefore, it is unavoidable that the Introduction to this collection of essays gives a long presentation of my views about the contours of the territory within which the articles selected could be located.

Before I begin, let me make brief reference to the relevance of rights in the social context in which I live. During the oppressive military regime which was in force in Argentina from 1976 to 1983 and which provoked the death of at least 9000 people, courageous lawyers were active invoking the rights which, even the legal system enacted by that regime, recognized as applying to the detained or disappeared people. But that legal system itself was the object of criticism by those lawyers and freedom fighters for not recognizing some fundamental rights. Both kinds of appeals to rights had some positive effects: there were occasions in which courts, even the Supreme Court, paid heed to the invocation of rights under the law, granting, for instance, habeas corpus which allowed the liberation of people unjustly detained. The resort to rights over the law in order to criticize Argentina's regime was also effective in producing some changes in it but, most of all, to weaken the military dominion of the country and to accelerate the democratic process.

Therefore, I may testify (against authors like Tushnet)[1] of the existence of at least some contexts in which the discourse of rights does matter for the application and criticism of the law so as to achieve valuable results. But what are those rights that matter?

The Concepts of Legal Rights

Since the famous contrast of views between Ihering and Savigny,[2] jurists and philosophers differ about characterizing legal rights, either in terms of legally protected interests or in terms of legally respected choices. It is advisable to begin with a task of differentiating between notions of legal rights before trying to detect underlying common conceptual structures which allow for a possible ulterior coalescence (until we reach that stage, I shall speak ambiguously either of different concepts or of different classes of rights). I have undertaken elswhere[3] the first task in relation to moral rights and I intend to extend it here with regard to legal rights. For carrying out that task, the work of Bentham, Hohfeld, Corbin, Kelsen and von Wright proves to be invaluable.[4]

In the reconstruction of the concepts of right, the methodological warnings of scholars like Williams, Ross and Hart are relevant. Williams warns us against the fallacies which are committed in legal theory and practice because of the equivocation between the different meanings of 'legal right'. Ross invites us not to see legal rights as denoting independent real phenomena but as logical constructs which connect some antecedent facts with certain normative consequences and which comply with several pragmatic functions; in some contexts in which antecedent facts are referred to, they stand for the normative consequences, whereas in other contexts, in which the latter are mentioned, they stand for the former. Hart maintains that both in the case of the concept of legal right and of legal person we must resist the temptation of thinking that the descriptions or names of particular tokens of them denote entities or phenomena. What we can do is to analyse the whole propositions in which those descriptions appear as referring to complex normative and factual relationships whose account would be much more complicated and cumbersome without resort to these convenient constructs. Whatever the doubts that these approaches may raise, it is good asepsis to dissociate legal rights from any entity or phenomenon other than certain normative relationships between a legal system and the conduct of individuals.

The account that Kelsen puts forward about the different relationships between diverse species of rights and the existence or absence of legal norms is illuminating and will be particularly taken into account in the following distinctions. It is useful to remember that Kelsen thought that a canonical structure of a legal norm was a conditional one and that its distinctive consequent was the prescription of a coercive act, that is the sanction. On the basis of this characterization of a legal norm, he constructed a system of legal concepts, so that each of them is defined on the basis of the former one. The primitive concept was that of sanction which was defined as a coercive deprivation of goods prescribed as a consequence of a certain conduct; then there comes the concept of unlawful act or delict which is characterized as the antecedent of the prescribed sanction in the legal norm; the following concept is that of legal obligatory conduct which is defined as the opposite to that which is antecedent of the prescribed conduct. How legal rights enter into this system depends on which notion we are employing, as will be seen later.

As Kelsen's whole construction of a system of fundamental legal concepts depends on the structure that, as we saw, he assigns to legal norms, the weakness of the Kelsenian notion of legal norms reflects on that construction. The idea that legal norms are judgements that predicate that a sanction ought to be applied, and all other legal statements are either parts of them, in the earlier version of the theory, or dependent on them, in the later one, has

been heavily criticized. It has been repeatedly argued that such a vision distorts the nature and function of law and implies an awkward criterion of individuation of its constituent parts.[5] This criticism extends to the characterization of the concepts mentioned above: the necessary connection between legal duties and sanctions has been disputed on the basis that there are situations, like many concerning officials, in relation to which it is normal and reasonable to ascribe those legal duties, notwithstanding the fact that they are backed by remedies other than sanctions or by no remedies at all. The characterization of an unlawful act as the antecedent of a prescribed sanction in a legal norm is defective since it is impossible to distinguish from other conditions of that sanction (for instance the accusation of a prosecutor) if one does not resort to prohibitive norms which are not reducible to those that prescribe sanctions[6]. This deficiency will be, of course, reproduced in other concepts to which volumes are devoted in this series, as we shall have occasion to notice in relation to some of the concepts of rights. Nevertheless, Kelsen's conceptual distinctions are still worth taking specially into account.

Rights as Absences of Prohibitions

In some contexts when somebody alleges a right he/she merely implies that there is no legal norm imposing a duty to perform the conduct which is the object of the right: that is, there is no prohibition to abstain from it. This is the kind of right that Hohfeld called 'liberty' and corresponds to the weakest sense of 'permission' distinguished by von Wright.

It is important to notice that when there is a right in this sense, the legal system has a 'normative gap' as characterized by Alchourron and Bulygin.[7] The conduct in question is not normatively qualified by the legal system; it does not predicate of that conduct that is prohibited, obligatory or permitted, in the strong sense to be studied below. (Kelsen maintains that legal systems have no legal gaps since they necessarily contain a principle to the effect that all that is not prohibited is permitted. But, as Alchourron and Bulygin show, Kelsen equivocates between two senses of 'permission': in the weak sense which is being analysed here, that principle is necessary because it is tautological. But it does not serve to close gaps, since it does not allow us to ascribe a positive deontic character to actions which are non-prohibited. In the stronger sense, to be analysed below, the principle would close gaps but there is no reason to think that it is necessarily contained in all legal systems; there are many instances of them or of part of them which do not recognize a positive permission to perform conducts which are not prohibited. At any rate, when there is such a closure principle in the law, rights of this kind merge into the following category, since they are the object of positive permissions.)

When we identify liberty-rights with gaps in the law we must realize that, even when they are important because of their being constituent elements of all other classes of rights, their role in legal discourse is quite limited: they do not imply any protection for the holder since they are compatible with all sorts of interference which do not amount to a prohibition at the time in which it is truly predicated. There might be no prohibition for other individuals or even for the authorities to physically impede the performance of the conduct. Hart[8] disputes this conclusion on the basis of the normal existence of some prohibitions – like that against assault – which offer a perimeter of protection to this sort of right and hence make it significant. But, as Lyons in his essay, Chapter 3, says, these prohibitions are not generally

related with these rights and would exist even in their absence. At any rate, these perimetral prohibitions could make other rights significant like the right of not being assaulted but not liberty-rights. In absence of further qualifications, like that provided by the principle of closure itself, which would submerge a liberty-right into some of the other kinds, there is no conclusion referred to the conduct of others which may be inferred from a premise about one's liberty-rights.

Rights as Positive Authorizations

Unlike the former one, this sense of right requires the existence of a legal norm, a norm positively permitting or licencing the performance of the act which is the object of the right. Hence, the isolation of this category of rights depends on the recognition of permissive norms as an irreducible part of a legal system.

As we saw, Kelsen himself in his first epoch denied the existence of permissive norms; they were to be assimilated to parts of norms prescribing sanctions. In the second edition of *The Pure Theory of Law*[9] he changed his mind and admitted permissive norms but as dependent on norms creating obligations. Hart in *The Concept of Law*[10] is strangely silent about permissive norms, since the rules which he adds to those of obligation – those of recognition, change and adjudication – are not purely permissive but are norms of competence (which give place to a different category of right).

In truth, the recognition of independent and irreducible permissive norms is one of the incognities of the general theory of law. On the one hand, there are a host of legal materials which are expressed in terms of permission, authorization, licence, and it seems to imply one of the conceptual disequilibria which Carrio condemns[11] to strait-jacket those materials into other conceptual pigeon-holes for norms. But, on the other hand, it is difficult to characterize the role of permissions in practical legal systems as different to that of other kinds of norms. Some authors[12] have suggested that legal permissions may be seen as abrogation of pre-existent or future norms of obligations. But there are three comments that may be made with regard to this suggestion: first, it would make this sense of right collapse into the first since it would end up describing the absence of a prohibitive legal norm; secondly, it is not always the case that a prescription is granted when there is a pre-existent prohibition or it is foreseen that it could be enacted (and in that case, why it would abrogate a posterior norm of the same level?): thirdly, as Alchourron and Bulygin[13] make clear, an abrogation is not a legal norm but an act which has the effect of excluding a norm from the legal system.

Of course, the alternative of reducing the permission to *A* to do *x* to the obligation of *B*, or of all the people at large, not to interfere with *x* would make this sense of right collapse into the following. But the suggestion has the difficulty that this is not always implied: a permission to use the seats in public parks or to sell on a street corner is not always exclusive in the sense that it forbids others from doing the same without assaulting the first beneficiary. What would indeed be incompatible with a permission is that the authority itself coerces or prohibits the action (the first would violate the permission, the second would abrogate it). This suggests that permissions might be analysed as promises of the granting authority not to prohibit or to interfere otherwise with the action. But this would again reduce permissions to some kind of norm of obligation, since promises may be seen as self-imposed obligations.[14] Permissive-rights would again collapse into the following category.

Rights as Reflections of Obligations

The analysis of the two former categories of rights strongly suggests that the class of rights which are both irreducible to other classes and significant in legal practical discourse is that which denotes rights that are correlatives to the obligations of others. In effect, we saw that liberty-rights are nothing without at least a perimeter of obligations and that permissive rights are plausibly reducible to an obligation of the granting authority. Hence, many scholars, beginning with Bentham and his beneficiary theory, conceived of legal rights as the circumstance of being benefited by some legal obligation, and made a valuable work of classifying rights according to the kind of duties to which they correlate. That is, negative or positive according to whether the correlative duties are of passive behaviour or active ones; special or general, according to whether the subjects of the correlative obligations are identified by proper names or definite descriptions or by descriptions based on general properties; conjunctive or disjunctive, according to whether the obligation is of all the plural subjects, however identified, or of any of them. The right of property in particular was identified by authors of this frame of mind as a reflection of a kind of passive universal conjunctive obligation.[15]

But this characterization of rights has also been powerfully resisted. The main problem is how to identify the beneficiary of the duties of others and, thus, the holder of the right. According to Hart, Bentham thought that this can be overcome in relation to rights of assignable individuals since the detriment is that which constitutes the offence that violates the right (for instance, the death of the victim of murder). But this seems to be circular because to determine whether an offence has been committed one must know first which is the interest that the violated right protects.

Raz, in his essay, Chapter 6 in this volume, offers a characterization of rights, within the margins of the beneficiary theory, which perhaps may solve the problem: somebody has a right when some of his/her interests, or an aspect of his/her well-being, is a reason for imposing a duty to others. At first sight this suggestion has the advantage of proposing a connection between rights and duties which is close enough to satisfy our intuitions that the reference to duties is relevant to the conclusion that some right exists. But this is not so close as to imply that legal rights cannot exist without the legal duties which protect the corresponding interest existing, which also seems agreeable to our intuitions. Raz says, in effect, that the existence of a legal right does not always justify the legal statement that a duty exists; when it is necessary to resort to additional moral premises for grounding the duty, the statement of the legal right justifies the judgement that a legal duty should be created. However, things are not so easy: How does the law establish that an interest is a reason for a legal duty protecting it? What is the content of the corresponding legal norm? How should it qualify deontically certain conduct for this normative effect ensuing? Raz is rather obscure over these points; he just says in passing that the law may use the very term 'right' and that we should resort to the intention of the authority enacting it. But this is not enough if we seek a deep understanding of the structure of legal norms which have different normative effects of the sort illuminatingly provided by Raz himself in previous writings.[16] Until this analysis is not provided one is left with the suspicion that the same structure of the norm which creates a legal right generates duties to others, and, thus, that the relationship between rights and duties is not merely justificational but logical and conceptual as maintained by the traditional beneficiary theory.

This is not, of course, incompatible with the fact that the interests which constitute the content of the right be the reason for imposing duties to others. But this amounts to the traditional view that the holder of the right is the intended beneficiary; in effect, to say that the reason for imposing a certain duty is some interest which is the content of the correlative right is the same as saying that he who benefits from the imposition of a duty is the holder of the right. Raz himself is clear about the need to search for the motives for creating the norm, and I agree with him, notwithstanding the criticisms of subjectivity raised against the beneficiary theory. I think that the problem we face here is the same as the problem mentioned above in passing about the identification of an unlawful act or delict in the context of Kelsen's theory. We cannot discriminate between the conditions of the sanction and the effect of identifying the unlawful act without resorting to the reason for imposing the sanction, that is, which acts the sanction is intended to prevent or to retribute. This reason or intention behind the Kelsenian legal norm (which may be as subjective or objective as you wish) may be represented as the content of another kind of norm, which Binding distinguished from the former.[17] It is no wonder that the problem of identifying unlawful acts is similar to the problem of identifying rights, since in fact one is the reflection of the other, as an unlawful act is the violation of a legal right.

But Hart's strong criticism of the beneficiary theory is not in fact related to the problem of identifying the interest which is the content of the right and the object of protection of the duty. His main criticism is that this theory ignores a whole dimension which gives distinctiveness to at least a central kind of right: the dimension of choice and control. For assessing this point we turn to a further category of rights.

Rights as Powers

This dimension of rights which consists in granting choice and control is acknowledged by Bentham, with a fine distinction between the powers which may be involved in those rights; Hohfeld, with his category of power-rights, Kelsen, who deems rights that grant powers 'strict rights or rights in the technical sense'; Hart, who, as we just have seen, emphasizes the choice that central rights offer of relinquishing the correlative duty, or its enforcement or the compensation for its violation; Feinberg, with his insistence that what is distinctive about rights (he speaks mainly of the moral ones) is the activity of claiming; and Wellman, who maintains that rights, both legal and moral, are ways of granting and parcelling autonomy.

It is necessary to distinguish permissive-rights or liberty-rights from power-rights by the fact that the latter do not merely allow a physical conduct but ascribe to it legal normative consequences like obligations, or other rights and responsibilities, for the agent and other people. As Raz rightly says, here again it is necessary to resort to the reason for ascribing those consequences to a conduct, since otherwise the author of a crime would have had a legal power to commit it, as Kelsen happily acknowledges. The reason which allows us to identify a legal power is, according to Raz, that it is desirable to enable some people to perform that act as a means to achieve those consequences.

The advantage of Kelsen's analysis of 'strict rights' is that it enables us to see the similarities between the possibility of control that individuals may sometimes have over 'private' rights as correlative of duties and political rights, like the right of voting: in both cases an act of will is the antecedent of normative consequences.

The question is whether this analysis can also be extended to clarify the power of officials. This depends, as in the case of permissions, on whether we can recognize rules of competence – like Hart's rules of change and adjudication – as independent and irreducible norms. Again, here we have the conflict between the phenomenology of legal materials abundantly expressed in terms of the powers of authorities and the difficulty in understanding what is the role of these rules in guiding action. There is the possibility of reducing them to permissive rules, but, apart from the difficulties of these rules that we mentioned, this does not serve to explain how rules of competence transmit their validity to the norms created on their basis. There is also the possibility of understanding these rules as a sort of technical rules or hypothetical imperatives which indicate the way of achieving certain results on condition of willing them; in this case, power-conferring rules would indicate the way of making, for example, a statute or a will if one intends to do so. But this kind of rule or imperative presupposes a factual arrangement or regularity – described by what von Wright deems[18] an 'anakastic proposition' which is independent of the rules or imperatives themselves, while power-conferring rules are determinant of that arrangement or regularity. There is also a proposal[19] to understand these rules as definitions of some legal situations like that of valid statute or a valid will, but this again does not explain the transmission of normative force to the norms creating those situations and mistakes the role of definitions in legal reasoning (which allows for changing the scope of some rule in so far as it refers to a concept used by it, which is not necessary at all in the case of granting legal powers).

To my mind, the best explanation so far given of power-conferring rules is the simple one of Ross's in terms of indirect obligations:[20] they are rules which impose on citizens the duty to perform those conducts prescribed by certain authorities under certain conditions. This explanation implies an immediate answer to the query of whether Kelsen's analysis of strict rights and political rights can be extended to the power or competence of authorities: the answer is that the analysis fits exactly, since also in this case there is an act of will which is the condition of the normative consequences – here the duty to abide by its content – according to what a rule prescribes.

Now, what is the relevance of power-rights so defined, in relation to all its sub-classes, of the fact that a voluntary act of some person is a condition of normative consequences according to a legal rule? Kelsen deemed this kind of right, as we saw, 'strict' or 'technical' since it is the only one which is not reducible to the presence or absence of some duties. In fact, it depends on the existence of duties, if the proposed analysis holds, but it requires something more than a norm establishing them and that is that the norm in question includes in its antecedent an act of will of the holder of the right (remember Raz's remark that this requires consulting the reason behind the norm). But together with this specificity of power-rights there comes a limitation: as Kelsen remarked, the existence of this sort of rights is contingent (except, I must add, for the power of authorities – if Hart is to be followed in his characterization of a mature legal system); in the civil sphere, it is typical of the capitalist economic system and, in the political sphere, the fact that the will of citizens is a condition for the enactment of legal norms is typical of democracy. That is why R.H.S. Tur recommends that we remove the talk of rights altogether from the domain of legal science: they are either superfluous for being the reflection of rights or they are contingent and, as such, not appropriate to be employed by general jurisprudence.[21] I do not think that the idea of a legal science committed to employing only non-superfluous and universally applicable concepts is that

attractive, but nevertheless before making a final assessment of the relevance of legal rights we still have to analyse a last category.

Rights as Immunities

This last category of legal rights is discussed by almost all the authors we are following, beginning with Hohfeld who, as Corbin reminds us, characterized it as contrary to the liability to the power of others and the correlative of a disability, that is of the lack of power. Immunity-rights are supremely important since they comprize constitutional rights and guarantees, which reflect human rights, like the freedom of expression or of religion. Hart confesses that his analysis of rights as protected choices does not cover, among others, this sub-class.

But what is the normative relationship which gives room to these rights? The Hohfeldian analysis is useful in providing an answer since we have to look for the opposite of a situation of power and liability. Since this situation is given when there is a norm which makes an act of will of a certain person a condition of normative consequences, its negation implies that there is no such norm.

But, alas, once again we seem to be facing a situation similar to that of the category of legal rights – as absence of prohibition: all that an immunity implies is the absence of certain legal norms, but from that absence no protection to individuals follows except if it is accompanied by the presence of other norms, creating duties which provide that protection. The situation is not improved by Alchourron and Bulygin's proposal[22] to see constitutional guarantees as anticipated abrogations of norms which would infringe them. As they themselves say, and as we saw in the cases of permissions, abrogations are acts which have the effect of excluding some norms from the legal systems; therefore, we still face the question that a mere absence of a norm does not seem to provide any relevant protection.

However, there is a difference between permissive rights and immunities: whereas in the case of the first, as we argued contra Kelsen, there is no necessary closure principle, the latter seem to imply such a principle. This is so because a legal system would not have a rule of recognition, which serves to identify it as a whole, if there were not a *numerus clausus* of rules of competence recognized by that rule; otherwise, the system would have valid rules whose validity could not be traced up to the rule of recognition. Therefore, if there is no valid rule of competence ascribing normative consequences to the acts of will of a certain person or a class of persons, those acts of will cannot have such normative consequences. This provides a kind of protection of people against those acts. But, in the end, such protection would materialize in factual effects in so far as the system in force contains other norms of duty which prohibit people, especially officials controlling the coercive power of the state, not to interfere with individual choices if it is not on the basis of valid norms. In a way, this is implied by the very rule of recognition of the system, since together with its prescription to apply some norms, there must be implicit some prohibition to apply some other norms, though there could be a class of norms which is facultative to apply or not. Otherwise, what would be the significance of the duty to recognize, for instance, the laws enacted by the British Parliament if judges and others who followed this rule of recognition were left at liberty by it to recognize a higher source of binding norms, for instance the American Congress?

This final remark provides a possible explanation of the general dominant role of duties in the analysis of legal rights: in the end, legal relationships are determined by the rule or

rules of recognition of the system, through the intermediation of acts and events; and the most sound analysis of those rules[23] is in terms of duties – both to apply and observe some rules and not to apply and observe others.

However, the duties which determine the generation of rights are, as we saw, extremely varied and complex and this may justify speaking of rights in order to highlight the common feature that an interest of somebody is protected by those varied duties. Besides, there is another complication which may justify further the talk of legal rights: we do not only individuate rights as simple legal relationships in which a certain interest of a class of people is protected by some duty to perform or to omit a certain class of actions. Besides this type of thin individuation of rights, there is a thick one, in which we refer, as Wellman remarks in his contribution and in his important book on the subject,[24] to a whole cluster of legal relationships. To this gross kind of discourse belongs our reference to the right of property, or to freedom of expression. I am not sure whether these rights refer to a conglomerate of individual interests or whether they coalesce in a single or dominant one, but what is obvious is that they are correlative to an extremely complex variety of duties which correspond to the diverse categories of rights thinly individuated in the manner referred to above: there is the absence of different prohibitive and power conferring rules; the presence of rules creating duties some of which are passive and others active; some of which are universal and others refer to specific class of people; there are duties protecting the relevant interest which depend on some acts of will of their holders and others which do not; there are perimetral duties and others fairly specific, etc. I am not sure that Wellman is right, that in each case of a thickly individuated right a thinly individuated one is dominant and the rest are ancillary to it. But in any case, the fact that interests of people are protected by such complex clusters of rights thinly individuated, that is by a great variety of duties, justifies further that we concentrate our attention on this side of the duties, that is on the interest protected by them and on the choice of the bearer of that interest concerning that protection. This legitimizes our discourse of rights notwithstanding its logical superfluity. (What I have just said implies that there are diverse sub-classes of legal rights covered by single concepts rather than different concepts, though there may still be conceptual variations according to the descriptive or prescriptive concepts of law employed in the identification of the relevant legal norms.)

But it is not enough to explain the relevance of legal rights. I have been supposing all along that the resort to rights in legal practical discourse can be grounded in self-sufficient units which I called 'legal norms'. It is time to challenge this assumption, so as to achieve a wider understanding of the operation of rights in that legal practical discourse.

The Dependence of Legal Rights on Morality

The question that we must face is the old one about whether legal discourse, in whose context legal rights are alleged, is an autonomous and self-sufficient species of practical discourse, which is capable by itself of justifying actions and decisions, or is a special case of, and dependent on, moral discourse (the last view is what Alexy[25] deems the '*Besonderesfall* thesis'). This is the question which lurks behind the vexed controversy between legal positivists and natural lawyers, notwithstanding that it presents itself under the facade of the defence of either a descriptive or a normative concept of law. (This is a banal dispute, since a non-

essentialist approach to concepts allows for a plurality of notions of law to be employed in different contexts. Nothing impedes the use of a descriptive concept which refers to the standards which are in fact recognized in certain social settings in the context of sociological or historical discourse, and prevents the employment of a concept which refers to the standards which ought to be recognized in the context of practical legal discourse of lawyers and judges.[26])

I have defended elsewhere[27] the thesis of the dependence of justificatory legal propositions – like those which state legal rights – on moral assumptions and principles. I think that this thesis may be demonstrated in a quasi-formal fashion. In order to rehearse here, very succinctly, that demonstration, let me make first a stipulation and then a distinction: the stipulation is that I shall understand by a justificatory statement a statement whose formulation under certain circumstances is practically inconsistent with some actions and decisions.

The distinction which I want to propose is that between different concepts of legal norm or legal rule:

1. There is a concept, emphasized by Hart, which refers to a kind of social practice, that is a complex of actions and attitudes of a plurality of people;
2. There is another concept, highlighted by authors like Austin,[28] which denotes a sort of speech act performed by individuals who bear a certain relationship with the addressee of that kind of act;
3. A further notion, which is employed in some contexts, such as those in which we speak of the interpretation of norms, identifies legal rules with some texts;
4. Lastly, there is a concept of legal norm, underscored by Kelsen, which refers to normative judgements which are the propositional content of the phenomena referred to by the former concepts.

Equipped with these tools let us see a case of a typical legal statement which employs the concept of legal rights in order to justify a decision. Take the statement

'the landowner Jones has the right to evict the tenant Smith' – statement (a)

as formulated by a judge. Of course, for this statement to be able to justify the decision of the judge to order the eviction of Smith, it must be of a justificatory kind, that is its formulation, without qualification, must be practically inconsistent with the action of the judge of rejecting the claim for eviction.

But, of course, this statement must be in its turn justified in order to carry any conviction. One of the most likely justifications of it is provided by a statement of the kind

'landowners have the right to evict their tenants if the latter owe more than two months rent' – statement (b)

which, together with some factual statements, most probably are anticipated by the judge as grounds for his decision.

It is normally said that statement (b) expresses a legal norm. But what concept of norm is being employed here? It cannot be those which refer to a practice, a speech act or a text

since they or their descriptions have no justificatory force. For instance, the description that there is a social practice to the effect that tenants should be evicted when they do not pay more than two months of rent has no practical incompatibility whatsoever with any action or decision, in particular with the refusal of the judge to evict the tenant. The only sense of 'legal norm' whose expression by statement (b) has justificatory force is that which refers to normative propositions, that is to propositions which predicate of acts that they are obligatory, prohibited or permitted.

So statement (b) expresses a normative proposition. But how can we know that that normative proposition is a legal norm? Kelsen would say that we know it by the content of the norm: if the act normally qualified is a coercive act, a sanction, the norm is legal, otherwise it must be a moral, religious, or a norm of any other kind. But we already saw that this answer of Kelsen is widely rejected. The most common objection is that there are many recognizable legal norms which do not provide for sanctions. I think that it is even stronger to object that there are norms which are not legal which deontically qualify coercive acts or sanctions: if somebody says, without describing any legal system or with the intention that they should be reformed, 'drug-traffickers should be punished with the death penalty' it is not formulating a legal norm but a moral judgement.

It does not seem possible to distinguish legal norms from other normative propositions by their content. If this is so, the most common alternative way of distinction which has been proposed takes into account their origin: legal norms are those normative judgements which have been formulated by some authority. This is still inaccurate since the proposition about death penalty, exemplified above, could have been formulated by some authority or other and that does not convert it into a legal one. This is a better criterion: a normative proposition is a legal one if it is accepted for the reason that it has been formulated by some authority (this is close to what Raz calls 'the sources thesis').

This criterion implies that in order to know whether the judge who formulates statement (a) on the basis of statement (b) is or is not applying a legal norm we must probe deeper into his practical reasoning and see what are the grounds for accepting statement (b). Suppose that his grounds are the judgement

> 'authority L is legitimate', or 'authority L should be obeyed' – statement (c)

plus the judgement

> 'authority L has formulated statement (b)' – statement (d).

Now this would mean statement (b) operates as a legal norm in the judge's reasoning, according to the criterion proposed. But we are allowed to ask whether statements (c) and (d) are legal norms in the context of such reasoning. Statement (d) is undoubtedly a legal norm, but in the sense which refers to a description of a speech act or a social practice, and as such, as we saw it lacks all justificatory force. With regard to statement (c), it should be a normative proposition; again, it cannot be a legal norm in any of the other senses. But then the same problem as that related to statement (b) ensues: it will be a legal norm only if it is accepted for the reason that it is enacted by some authority. I do not need to iterate the problems and the answers to conclude that at some stage, let us suppose that of statement (c) itself, the

judge must accept a norm which justifies the acceptance of another norm for reasons than because it has been formulated by some authority; otherwise, the judge would be involved in an infinite regress. At that stage, the judge must accept the norm in question because of its intrinsic merits.

Now, a norm with a certain content which is accepted for its intrinsic merits is, by definition, a moral norm. This is precisely one aspect of the idea of the autonomy of moral norms stressed by Kant: the rational will accepts them not because they are enacted by an authority, divine or human, deliberate or conventional, but by their inherent validity. If we accept that a proposition which derives from a moral norm and some factual premises is also a moral norm, we come to the somewhat paradoxical conclusion that in order to identify a justificatory proposition as a legal norm in the context of a certain practical reasoning we must identify it as a certain kind of moral norm. Justificatory legal norms, like those which state legal rights, are a specific class of moral norms which derive from moral judgements which ascribe legitimacy to a certain authority and descriptive propositions of some enactment of that authority (legal norms in a different, descriptive, sense). Of course, once we identify those norms as moral they cannot be isolated from other moral principles which may ground, complement, override or exceptuate them; for instance, the legitimation of certain authority must be grounded on certain principles of political legitimacy and is surely excepted or overridden if the authority enacts some sort of abhorrent prescriptions.

This demonstrates in my opinion that legal practical discourse is a special case of moral discourse. In so far as it is directed to formulating justificatory propositions, those propositions cannot be recognized as legal if they are not related to some kind of moral reasons.

If legal rights can only have a justificatory character if the propositions which state them are a species of moral norms, this means that justificatory legal rights are themselves a species of moral rights, that is they are rights established by moral norms. This does not mean that they would still be moral rights if a certain authority had not enacted a certain prescription or if it abrogated it. Remember that, in the example given, the justificatory legal right stated by statement (b) did not derive from (c) alone but in conjunction with (d), that is that a legal norm, in the descriptive sense, was relevant to establishing it. This is what I think is meant by Raz when he maintains that those legal rights stated by 'committed' legal statements, that is those statements formulated from an internal point of view, are also moral rights; though it is not completely clear to me how this is compatible with his assertion that legal right-statements are those whose truth can be established without resort to moral argument.

This connects with the following question: Granting that all justificatory legal rights are moral rights, are all moral rights legal rights? The answer is negative, but to understand it we must remember that together with the descriptive concepts of law – like the one which refers to the standards that are in fact accepted by primary organs such as the judges – there are several normative concepts of law. One, which we may call the 'broad judicial concept of law', refers to all the standards that judges ought to recognize or apply, whatever the reason of this bindingness. Another, a 'narrow judicial concept of law', denotes only the standards that judges ought to apply for the reason that they have been prescribed by certain legitimate authorities. A third, let us call it the '*de lege ferenda* concept of law', refers to the standards that legitimate authorities ought to prescribe. We must keep in mind these different concepts of law in order to combine them with the following distinction.

There are different kinds of moral rights according to their bindingness for different people

and authorities. There are moral rights which everybody, including judges, ought to recognize and respect whether they have been, or not, previously recognized by certain authorities, like legislators or constitution-framers (for instance, the right to life or to freedom of speech) - call them fundamental moral rights. There is another kind of moral rights which legislators and constitution-framers ought to recognize but that judges and the people at large are only obliged to respect and apply them in their decisions if they have been actually recognized by those institutions (for instance, the right to acceptable levels of health care) - call them mandatory-institutional moral rights. There is a further class of moral rights which is optional for legislators to recognize but that, if they do, judges and the people at large are obliged to respect them (for instance, the right that what has been the object of certain contracts be complied with) - call them conventional-institutional moral rights. Finally, there is a further class of moral rights that legislators and constitution-framers *ought not* to recognize. There could be a division of this class according to whether or not they should be judicially enforced if, nevertheless, legislators recognize them. They comprise rights like that of faithfulness of the spouse, that informal and gratuitous promise be complied with, possibly to be told the truth about our health by the doctor - call them private moral rights, in the sense that they could only operate between private individuals.

Now, whether a moral right is or is not a legal one depends, first, on the kind of moral right that it is, secondly, on the prescriptions of authorities, and, thirdly, on the concept of the law we employ. Fundamental rights are in any case legal rights according to the broad judicial and the *de lege ferenda* concepts of law mentioned before, but, if there has not been emitted the corresponding prescription by the legitimate authority, they would not be legal rights under the narrow judicial concept, nor under most descriptive concepts of law (of course, this does not affect the obligation of judges and the people at large to respect them). Mandatory-institutional moral rights are always legal rights according to the *de lege ferenda* concept of law; but they are only legal rights under the broad judicial, the narrow judicial and most descriptive concepts of law if the authorities enacted the corresponding prescription. As for conventional-institutional moral rights, they are never legal rights under the *de lege ferenda* concept of law, but they could be under the broad judicial, the narrow judicial and most descriptive concepts of law, if they have been authoritatively prescribed. Private moral rights are not legal rights under the *de lege ferenda* concept of law and they only are so under the narrow judicial concept if they have been authoritatively prescribed and if this obliges judges to enforce them (of course, for being legal rights under most descriptive concepts of law, only the first condition suffices).

Given that justificatory legal rights are a species of moral rights, we must face again the question of the sort of normative relationships which are this time involved in the notion of a moral right, since this could reflect into the more specific concept of legal right and alter the conclusions of the analysis in the previous section. This issue is connected with the interesting debate about whether there could be a moral theory based on rights, or whether any plausible moral theory should take as basic elements either duties or goals. The work of Alexy, Chapter 8 in this volume, contains interesting suggestions about the distinction between rights and the collective goods which are the object of goals.

I agree with Mackie that the most plausible moral theory is one grounded on rights[29], since, to say it rather quickly, goals are inherently aggregative and do not take into account, as Hart says with regard to the utilitarian theory, the independence of persons. On their part,

duties seem to be intrinsically relevant only in so far as they are connected with the valuation of the moral character of people, which implies that an intersubjective or 'narrow' morality would be necessarily tied up with ideals of personal virtue (which has objectionable perfectionist implications). The intuitive acceptance of this sort of moral theory is manifested by the fact that we generally argue in favour of moral duties as a means for protecting moral rights.

But this adoption of theory of intersubjective morality whose primitive elements are rights and within which duties are justified as means for protecting those rights would be frustrated if our concept of moral right in general were of the same structure as the notions we saw of legal rights, that is if it were also analytically connected with a variety of duties. If this were the case, duties would be more fundamental in the context of the theory and they could not be grounded on the protection of rights.

In order to see if we can escape this conceptual trap, let us see the implication of the most illuminating characterization of moral rights that has been lately proposed: Ronald Dworkin distinguishes rights from goals by two features, which are also taken into account by Alexy. First, rights are distributive and individualized, so that they suppose an advantage for each member of the class of their holders. Secondly, rights are 'trump-cards' against claims based precisely on collective goals, so that they may only be displaced when the reason for recognizing them is not at stake, when they are in conflict with more important rights or when they would frustrate not an ordinary but an extremely urgent goal.

As I argue in another place,[30] these features of Dworkin's characterization of rights are more formally expressed in MacCormick's characterization of a moral right, though he does not connect it with Dworkin's:

> to ascribe to all members of class C a right to treatment T is to presuppose that T is, in all normal circumstances, a good for every member of C, and that T is a good of such importance that it would be wrong to deny it to or withhold to any member of C.

This is in my opinion a very illuminating definition of a moral right and I only would suggest slight modifications, like replacing 'treatment T' for 'access to situation S', since the latter is also compatible with rights whose content is an abstention of others from interference or an action of the right-holder. Now, how does it reflect the features underscored by Dworkin? With regard to the distributive and individualized nature of rights this is reflected in that the situation whose access is a good is so for each member of class C and in the remark that it is wrong to deny that good to any member of that class. How about the second feature of rights serving as barriers of collective goals? This is more obscure, but I think that it is implied in the operator which gives normative character to the definition, that is the notion of wrongness, as it qualifies the deprivation of the good to any member of class C. That notion is not usually defined in relation to goals, nor can it be if rights should not be dependent on those goals, in the utilitarian fashion defended for instance by Scanlon. But notice, and this is what interests us for our main concern, that MacCormick himself does not characterize it as a breach of duty. This would lead us to the idea of defining rights on the basis of duties and hence of rejecting the possibility of grounding duties for their protection of rights. MacCormick remarks explicitly that rights are logically and temporarily prioritary to duties.

There are things which are wrong without violating a duty. The idea of something wrong is opposed to a thing that ought to occur or be performed, but not everything which ought

to happen or be produced is the object of a duty. Raz[31] implicitly rejects the idea that moral rights might be conceptually tied with what ought to be done instead of with duties, not only because of his explicit definition but because he alleges that right-based moralities do not take account of reasons for action based on what ought to be done. I think that he associates too closely these judgements of what ought to be done with supererogation, which by definition excludes rights. There are other kinds of moral ought-judgements: for instance, it is perfectly appropriate to say that misery and illnesses ought to be alleviated and that those who suffer them have, thus, a moral right to that alleviation. This does not yet imply that somebody has a duty to that alleviation, since that would depend at least on two additional factors: first, of course, on the possibility of that alleviation (I would defend not the principle that 'ought implies can', but that 'duty implies possibility'); secondly, on questions of distribution and assignation of roles (for instance, the richer and healthier people are first in the duty to alleviate the poor and the sick; the same with people more closely related; the same with people with special skills like doctors).

Of course, to characterize moral rights as suggested would not reflect Feinberg's view that the distinguishing mark of those rights is that they give place to the activity of claiming. In order for that activity to have sense there must be people who are the proper addressees of the claims, that is people subject to duties. But given the propensity of moral rights to ground duties when certain factual and additional normative premises are true, it is difficult to distinguish whether the possibility of making claims is grounded on rights-propositions alone or only when conjoined with these additional premises.

If moral rights are defined as valuable situations, access to which ought to be provided to each member of the relevant class of individuals, we can understand their transformation into legal rights that, as we saw, do imply duties. Moral rights of some of the kinds distinguished above, but not in the case of conventional or private rights, imply that some prescription of some sort or other ought to be enacted in their protection when the distributional and role-assignation problems are solved and the conduct prescribed is possible. These prescriptions when they are actually enacted create legal duties, and the legal rights which are correlative to them. The duties are also of a moral character either because the above-mentioned problems have been rightly solved or because of the general moral duty to obey the law. Of course, moral rights might also be grounds for holding people under moral duties even without the operation of the law, if the factors which separate what ought to be done from what there is a duty to provide are overcome.

But more must be said about the structure of a moral theory which grounds moral rights and hence legal ones before we can have a fuller grasp of the latter.

The Structure of a Right-based Theory

The above characterization of rights may neutralize Raz's move to demonstrate that there cannot be a right-based moral theory. According to him, if rights are based on the value of personal autonomy, they depend on a host of collective goods, such as the existence of religious practices, of agreeable urban environment, or of institutions which are the necessary context of professions. People have no right to those collective goods, since no one has the duty to provide for them; hence, rights depend on certain goods and values which are not

the object of further rights and are not fundamental in the context of moral theory. But if rights do not necessarily presuppose duties but only that certain states of affairs ought to be produced, there can be rights to the collective goods mentioned by Raz despite the fact that they are not the object of duties. I do not think that it is counterintuitive to claim that people have a right, for instance, to a collective good, like a clean environment or the institutional structure underlying many professions, notwithstanding the fact that perhaps nobody may have duties to provide for them, given the problems of possibility, distribution and assignation of roles mentioned above.

But I think that the problem is deeper than this and requires some clarification. In the first place, I agree with authors like Raz, Wellman and Richards that individual rights are grounded on the idea of personal autonomy. This idea includes the capacity which Richards describes in his essay, Chapter 10, as that for second-order, rationally self-critical evaluations and wants and plans, but also covers the external conditions for satisfying the wants and the plans. If we take into account the wide range of individual rights which a liberal conception of society recognizes, they can only be grounded on a general principle which ascribes value to the free choice and materialization of ideals of personal excellence and of plans of life based on them. I do not think that it is possible to construct a liberalism, as proposed lately by Rawls and Ackerman,[32] which is neutral even in relation to the ideal of personal autonomy. The prescription of state neutrality towards personal ideals implies endorsement of the ideal of autonomy of the person and, thus, it cannot be neutral with regard to that ideal. In the work included in this collection, Rawls argues for that neutrality - after distinguishing several senses of the term – and tries to show how it differs from fostering the ideals of autonomy and individuality defended by Kant and Mill; but the implications that these authors draw for state action hardly differ from what Rawls understands by the neutrality implied in his 'political' brand of liberalism. Of course, the liberalism of Kant and Mill also has implications which transcend the political realm, but what matters here is whether there is any difference between the political implications of autonomy and neutrality. Furthermore, when Rawls argues in his latest work[33] for the priority of certain basic liberties he resorts to the basic moral capacity to form, revise and change a conception of the good, which is precisely the capacity in which personal autonomy consists and which a liberal view of society prescribes to promote.

Now, the fact that a liberal conception of rights assumes the value of personal autonomy does not imply, contrary to what Haksar argues,[34] a perfectionist position. Personal autonomy is valued by liberalism as a social ideal, that is as an ideal of intersubjective morality, and not as part of what makes individuals virtuous. Furthermore, even if personal autonomy were also part of what makes good the life of individuals, it would still be compatible with an enormous variety of models of life, and in excluding interference with the choice of those models lies precisely the prescriptive core of autonomy. In the work included here, Rawls distinguishes rightly between personal and political ideals, even when, as we saw, he refuses to include personal autonomy as part of the latter. Besides, he admits that political ideals may include political virtues, which for me is rather doubtful.

However, the difficulties of this distinction between personal and political ideals are displayed in my essay, Chapter 16 of this volume. In it, I argue against modern communitarian critics of liberal rights, like Charles Taylor,[35] Alasdair MacIntyre[36] and Michael Sandel,[37] who maintain that rights are subservient to certain goods which respond to personal ideals that

are embedded in the traditions of a certain society. This kind of view is also adopted by Richard Rorty in his essay, Chapter 15. He avails himself of the Hegelian and Deweyian traditions to overcome Kantian liberalism in favour of a post-modern one which would conceive of morality as the interest of a historically-conditioned community, a morality which would rely on the teachings of shared social facts, instead of abstract principles establishing rights, and would assume a self which is concretely situated.

Even if autonomy were an essential part of a fuller conception of the good, it excludes the enforcement of the rest of that conception and this is the gist of liberal rights. Besides, it is an assumption of our present practice of moral discourse that no tradition or convention is exempt from criticism and, therefore, the goods which allegedly prevail over universal moral rights should be defended against the criteria of moral validity implicit in moral discourse. Those criteria include a conception of the moral person – as a being who is capable of choosing and revising ideals of life, despite the causal flux which affect his/her desires and inclinations, who is continuous over time, and who is separate from other similar beings and from the social context – which lead to the recognition of universal individual rights. Contrary to what Sandel and others seem to suppose,[38] this conception cannot be falsified by pointing out facts of biological, psychological or social reality since, as Rawls says,[39] it is a normative conception. However, some authors, like Okin,[40] argue that the reconstruction of that conception, as done, for instance, precisely by Rawls, is far more historically conditioned than its authors generally acknowledge, which is shown by the systematic ignorance of women's standpoint.

Communitarianism incurs, to my mind, a fundamental contradiction: on the one hand, it alleges the need to resort to social practices; on the other, it inveighs against the assumptions of the social practice of moral discourse. I have alleged elsewhere[41] that the principle of personal autonomy is presupposed in that practice of moral discourse – which accords with Waldron's suggestion that we should search for the principles of the theory of justice in the conditions and presuppositions of the activity of justifying itself – since it derives from the wider principle of moral autonomy which is implied in the aim of moral discourse of achieving consensus on the basis of the free choice of moral principles.[42] The passage from moral autonomy to personal autonomy is allowed by the distinction between principles of intersubjective morality and ideals of personal excellence or conceptions of the good life. Whereas the choice of the first kind of standards could be restricted on the basis of the very principle of autonomy, since there are choices of intersubjective standards which affect negatively the autonomy of other people, the same reason cannot be applied to the choice of personal ideals. This is because, by definition, that choice cannot, in and by itself, affect the autonomy of other people (though there are consequences of the choice which can produce that effect and, thus, violate valid intersubjective principles). Hence, from the self-restraining principle of moral autonomy, implicit in moral discourse, derives the unrestrained principle of personal autonomy which values the free choice of ideals of personal morality.

As personal autonomy is an aggregative value which accrues to the state of affairs of people being able to choose and to materialize plans of life regardless of how this capacity is distributed, it seems that Raz and many other philosophers are right after all, in opposition to Mackie for instance, in pointing out that rights cannot be the fundamental building-blocks of a liberal moral theory; they must be grounded on goods, like personal autonomy, which can be the object of collective goals.

However, I think that the foregoing argument can be countered since personal autonomy provides the content of rights but it cannot by itself generate those rights: they emerge only when the aggregative value of personal autonomy is constrained by the prescription, which I have deemed elsewhere[43] 'the principle of the inviolability of the person', to the effect that the autonomy of an individual may not be restricted for the sole reason that this serves to increase the autonomy of a different person. This principle corresponds, though with some difference,[44] to the second formulation of Kant's categorical imperative and reflects the notion of the separability and independence of persons which is also implicit in our practice of moral discourse when we distinguish between decisions taken by different persons. This principle is analysed by Nagel,[45] when he distinguished the utilitarian, the rights-based and the egalitarian conceptions of equality. According to him, the two last conceptions require a kind of unanimous acceptability which requires us to take separately the point of view of each person affected instead of constructing a single conglomerate viewpoint which absorbs the interests of all the individuals concerned as if they were the interests of one and the same individual. The difference between the rights-based and the egalitarian conception lies, according to Nagel, in whether the alternative actions are evaluated intrinsically or taking into account their consequences. However, to my mind the egalitarian conception is not clearly distinguished, in Nagel's essay, from the other two alternatives: it either confounds itself with a negative variety of utilitarianism which evaluates actions for their contribution to creating misery or unhappiness rather than welfare and felicity, or, given the difficulty of distinguishing, in a non-linguistic way, intrinsic results of the acts from extrinsic consequences, it comes quite close to a rights-based conception (sharing the same need of constantly resorting, as we shall see immediately, to some device which impedes that conflicts of rights, which must be solved in the utilitarian fashion).

The prohibition to sacrifice an individual for the sake of others or of some supra-individual whole excludes holistic and, more specifically, collectivistic stances, which recognize moral basic units which are not strictly reducible to individuals. Though this is an extremely complex philosophical problem, I cannot avoid maintaining that this exclusion of holism and collectivism depends on ontological and moral assumptions about the holders of interests and the nature of these latter; in so far as autonomy relies on subjective preferences, it can only be enjoyed by entities which possess a psyche and its neurobiological substratum. However, it is alleged by some scholars that to understand some relevant rights we must incorporate an irreducible reference to groups to our practical discourse. Owen Fiss maintains for instance that the equal protection clause of the American Constitution must be constructed taking into account not the anti-discrimination principle but one that refers to the need to overcome the disadvantage of certain groups. For him, these groups – like those of blacks or women – are entities which have a distinct existence and identity apart from his members and involve an interdependence between their identity and well-being and that of their members.[46] The ontology and moral status of groups is disputable, but perhaps it is not necessary to defend it in order to assert the possibility that some legal clauses – like the equal protection one – refer to groups as a means to furthering equality between individuals, given the interdependence that Fiss maintains. This interpretation is not available in the case of other defenders of groups-rights, like Ronald Garet,[47] since they explicitly rely on a good which does not accrue to individuals but to collectives.

The principle of the inviolability of the person, which determines the function of individual

rights in establishing barriers against collective goals or claims of others, cannot, however, stand as formulated, since, once we realize that there is no reason to distinguish between action and omission in proscribing conducts which encroach the autonomy of others, almost everything that people or the government may do or omit to do would infringe the principle of the inviolability of the person. I believe that there is only one leeway which permits us to escape the twin threats of holism, which would prescind altogether the principle of inviolability of the person, and of libertarianism, which, as shown in the case of Nozick,[48] uncritically relies on the standards of positive morality which ascribe different causal effects to actions and omissions in relation to their impact on the autonomy of others. That leeway is provided by an egalitarian formulation of the principle of inviolability of the person which assigns a comparative interpretation to the idea of increasing the autonomy of one at the expense of another: the autonomy of no one may be restrained for the sole reason that this increases the autonomy of another to a higher level than the autonomy which is being restricted. This principle so interpreted enjoins, in conjunction with the principle of personal autonomy, to increase the autonomy of people up to the limit at which this contributes to decrease the autonomy of some other at a level which is lower than the former. This implies that there are no evaluative differences between negative and positive liberties, which MacCallum assimilates conceptually in his known essay 'Negative and Positive Freedom'.[49] He maintains there that freedom is always a triadic relation since it uniformly consists in a freedom *of* something (one or several agents), *from* something (positive or negative obstacles), to do, not do, become or not become something.

The interpretation of the principle of inviolability of the person presented in the last paragraph involves a way of combining autonomy, that is freedom, and equality which excludes conflicts between them. Autonomy is the object of distribution whereas equality qualifies a way of effecting that distribution. Freedom is an incomplete value if it is not specified how it should be distributed – that is by whom and under what conditions it should be enjoyed. Equality is a vacuous value if that in which individuals should be equalized is not specified.

However, the possible tensions between liberty and equality may appear in a myriad of ways and should not be easily dismissed. Cohen, in Chapter 17, deals with some other facets of that supposed tension. He reinterprets Marx's assertion to the effect that the position of proletarians in social relations of production force them to sell their labour power. According to Cohen this can be defended if we understand the situation of the proletarians as a case of collective unfreedom, which is defined as follows: 'a group suffers collective unfreedom with respect to type of action A if and only if performance of A by all members of the group is impossible'. Although individual workers can cease to be proletarians and, thus, are not forced to sell their labour power, not all proletarians could do the same. This has been disputed by Brenkert[50] on the grounds that the individual freedom to leave the proletariat that Cohen affirms seems to be spurious. Thus, if there is a crowd of thousands of starving people in front of a prophet with a loaf of bread it is not the case that, because nobody attempts to have it, most were individually free not to starve and, in any case, this is not the sort of liberty which Marx characterizes; namely, the development of each one's capabilities in an unalienated way.

Consented restraints on autonomy are exempted from the proscription to sacrifice it, when this is not directed to expand the lesser autonomy of others, due to a further principle. This I have deemed 'the principle of dignity of the person';[51] it establishes that it is permissible

to ascribe normative consequences to decisions of individuals which are not determined by causal factors having a fairly unequal impact on people. This principle rejects a normative variety of determinism which disqualifies decisions and voluntary actions as proper antecedents of responsibilities and obligations for their being causally determined. This is a normative thesis which cannot be based on the hypothetical truth of determinism alone, without recourse to additional normative premises. These premises are very difficult to envisage, and the opposite to the idea of normative determinism. The principle of the dignity of the person seems to be implicit in the practice of moral discourse itself when we recognize within it the decisions of people to act according to the standards which are consented to in that discussion. This principle allows for a dynamic handling of rights.

The principle of the inviolability of the person distinguishes a liberal conception of rights from a utilitarianism of rights, even when it is subject to all the qualifications proposed by Scanlon. A utilitarianism of rights must allow for the sacrifice of the fundamental rights of a person or a group of persons if this would maximize the promotion of rights, even if the maximization of an equal promotion of rights is required (I think that it may be argued that that maximization is achieved if a society of *a*, *b*, *c*, *d*, and *e* changes from, for instance, the distribution 5, 8, 3, 9, 2 of levels of enjoyment of rights to a distribution such as 1, 8, 8, 8, 8). This weakness also affects the economic analysis of rights – partially criticized by Coleman and Kraus in Chapter 20, notwithstanding that they employ its tools – in so far as it relies on non-distributive values, such as efficiency or welfare.

However, the difference between a rights-based moral conception and a utilitarianism of rights might come to naught in the treatment of conflicts of rights, that is those situations in which what Sen calls 'multilateral interdependences' arise. Conflicts of rights may be overcome by some device or other – like consent and compensation – or they may be solved by giving priority to more fundamental rights. But when it comes to a conflict of rights of equal hierarchy, it seems difficult to avoid an aggregative resolution which takes into account factors like the numbers of people involved. A deontological approach tries to distinguish between the violation of rights due to one's action from some other evil states of affairs which are not one's responsibility. The idea of agent-relative reasons which effects this distinction is proposed, among others, by Amartya Sen who, illuminatingly, distinguishes between different sorts of relativity.[52]

But how to distinguish between what is produced by one's action and the evils that are not provoked by us but that we can avoid? Implicit in many attempts to make this distinction is the above-mentioned difference between actions and omissions or between doing something and letting it happen, which, as Thomson argues, do not carry enough weight.[53] Instead, I think that Gewirth is right in orienting his hopes towards what he calls 'the principle of intervening action', that is, the idea that when the voluntary action of another person intervenes in the causal chain between a harmful result and our action, that impedes the causal ascription of the result to that action and at least attenuates our moral responsibility for not avoiding it. As Hart and Honore say,[54] a voluntary action is at the same time the limit and the goal of the causal search. Though this would require a much more extended discussion, I suspect that this principle derives from the principle of the dignity of the person, since one does not take decisions and voluntary actions of people seriously, not only when one refuses to ascribe to them normative consequences for the reason that they have been caused by some factors, but also when one searches behind those voluntary actions to look for others, further in the

causal chain, leading to the relevant effect, in order to ascribe to them normative consequences for that event. In both cases, voluntary actions are being treated as natural phenomena.

Although these issues present many complications which are the object of extended controversies, I think that there is a case for maintaining that moral rights, many of which are also legal rights, are fundamental components of a theory of social morality which takes seriously the two Kantian precriptions of respecting individuals' ends and considering individuals as ends in themselves.

An account of rights is not complete, however, if it does not deal with the relationship between the recognitions of moral, and hence legal rights, and the working of collective decision-making procedures, in particular those which constitute a democratic government. There are several possibilities for reconstructing this relationship: it might be said that rights always restrain the operation of the decision-making procedure; or it might be argued that the collective will of the people prevails over the recognition of individual rights; or different categories of rights could be distinguished according to whether they condition the working of democracy or are the result of it.

I have defended elsewhere[55] an epistemic view of democracy according to which it has built-in mechanisms (free discussion being one of them) which make of it a more reliable procedure for having access to right solutions of intersubjective morality than any other procedure of decision. This implies, first, to see democracy as a surrogate of the informal procedure of moral discussion which assumes a criterion of validation based on the acceptability of moral principles under conditions of impartiality, rationality and knowledge of the relevant facts and which achieves results that are close to that requirement due to the unanimous consensus between the parties affected which is the only way of ending that discussion. We turn to democracy as majority rule when it is necessary to put an end to the discussion at a certain moment lest the implicit decision be in favour of the status quo and unanimity is not possible to achieve at that required moment. The substitution of the rule of simple majority for unanimity greatly weakens, of course, the reliability of the procedure, but it does not destroy that reliability completely as compared to other procedures: a significant tendency towards impartiality at the individual level is preserved within the democratic procedure thanks to the need to justify our claims to others and the need to try to get the support of as many people as possible to prevent the possible break of the majoritarian coalition. This tendency is compounded at the collective level due to formal structures detected by theorems like that of Condorcet's to the effect that as more people who are individually more likely to be right (i.e. impartial) than wrong support a solution, the more likely it is that the solution is right. This only implies that the democratic procedure of discussion and decision is *in general* more reliable than other procedures – like individual reflection and decision – to reach correct moral intersubjective solutions. In many cases we are sure, quite rightly, that the solution our individual reflection indicates is far better than the result which the majority support. But even in these cases there is reason to observe the result of the democratic procedure, since otherwise our individual reflection would be the final arbiter, contradicting the assumption that it is less reliable than the democratic procedure. If this account has any plausibility, it would show that there is still something to be said for the old idea of the marketplace of ideas – which requires free speech within a democratic procedure – being a way of enhancing the probability of reaching moral truth.

The justification of democracy is, therefore, related to the subject dealt with by

Michelman[56] about the legitimacy of judicial review as a way for protecting basic rights, among them the right to the social minimum that the latter proposes, following Rawls. The doubts that these authors express about that legitimacy – at least in relation to welfare rights in the case of Michelman – seems to be justified under the epistemic view of democracy just summarized. It is hard to argue that a group of judges, whose democratic credentials are quite dim and who are not obliged to respond to the result of free and open discussion among all the people concerned in the results of the principles they apply, are more prone to reach impartial solutions about the scope and conflicts of rights than the organs that are more directly part of the democratic process. Though it is true that rights, as we saw, are barriers to the pursuance of collective goals, even when they represent the aggregate of the interests of the majority of society, this is not the same as saying that they are also barriers to the decisions of the majority. Still those decisions may be, in general, the best way of defining and implementing individual rights. This is quite rightly stressed by Nickel[57] in his criticism of Dworkin's view when he makes clear that not all rights are counter-majoritarian. While it is true that often the majority oppresses minorities, it seems to be more likely that a minority may ignore the rights of other minorities and of the majority.

But this suggestion seems to have two important exceptions. One is when the majority grounds its decision on ideals of personal excellence against the principle of personal autonomy: as the validity of these ideals is not defined in terms of impartiality, the democratic decision has no more title for asserting their correction than individual reflection, and judges should preserve the appropriate space for it in this domain. The second refers to the preconditions for the proper working of the democratic procedure itself and for its possessing epistemic value; these include freedom of speech, political liberties, and a social minimum that guarantees a basic equality in political participation. This cannot be secured by the democratic procedure alone since they vitiate its operation; so it is the mission of judges, as John H. Ely says[58], to be the referees of the proper working of the democratic procedure.

We might distinguish between *a priori* moral rights which are those that are established outside the democratic procedure since they are preconditions for its operation or cannot be determined by it, and *a posteriori* moral rights which are those that should be determined through the democratic procedure. This distinction coincides with that presented above between fundamental moral rights and institutional rights, since the former should be enforced by judges whether or not they have been previously recognized by legislative (democratic) authorities, whereas the latter should be enforced to the extent of their constitutional or legislative democratic recognition (this is the category in which Michelman tends to locate welfare rights in general, though both emphasize that the respective institutional rights are not conventional but mandatory).

I wrote, earlier, that all justificatory legal rights are moral rights and that some classes of moral rights are legal according to the normative concept of law being used and the existence of some prescriptions. A further relationship between both kinds of rights emerges from the view of democracy sketched in this section: legal rights, now in the descriptive and not the justificatory sense which depends on the fact that some norms have been enacted and accepted, may be – when those norms have a democratic origin – epistemic guides towards (*a posteriori*) moral rights. From the fact that a right has been democratically recognized by existing law it may be inferred that a moral right to the protection granted by that law exists.

Therefore, the relationship between legal rights is more intricate than is generally

acknowledged. To summarize – justificatory legal rights are always moral rights; some moral rights are also legal rights, depending on the kind of requirement towards the state implicit in them, the prescriptions authorities emit and the concept of law employed; and descriptive legal rights when democratically established are epistemic guides to infer *a posteriori* moral rights.[59]

Notes

1 Tushnet, M. (1984), 'An Essay on Rights', *Texas Law Review*, **62**, pp. 1363–1403.
2 Friedrich Carl von Savigny maintained that if we considered the law in real life the first thing that manifests itself is the power corresponding to each person, a sphere in which the will of each one reigns, this is what is called a legal right – see (1840), *System des heutigen Roemischen Rechts*, Vol.I. Rudolf von Ihering inveighed against this 'Willenstheorie' arguing that to be subject of law does not suppose to will something but to be able to take advantage of something; according to him, rights are 'legally protected interests, and the role of the will of the subject is only contingent and ancillary since it is only related to the way of protection' – see his *Geist des Roemischen Recht*, third part, first volume, 1865.
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4 Corbin, Arthur L. (1919–20), 'Legal Analysis and Terminology', *Yale Law Journal*, **29**, pp. 163–73; Bentham, J. (1982), 'The Division of Offences', in J.H. Burns and H.L.A. Hart (eds), *An Introduction to the Principles of Morals and Legislation*, pp. 205 *et seq.*, London; Hohfeld, W.N. (1919), *Fundamental Legal Conceptions*, New Haven, (reprinted 1964); for instance, Kelsen, H. (1945), *General Theory of Law and State*, Cambridge, Mass., Chapter VI; Von Wright, G.H. (1963), *Norm and Action*, pp. 119 *et seq.*, London.
5 See, for instance, Raz, J. (1970), *The Concept of a Legal System*, Chapter V, Oxford. See also Nino, C.S. (1985), *La validez del derecho*, Chapter X, Buenos Aires.
6 Nino, C.S. (1980), *Introduccion al analisis del derecho*, Chapter IV, Buenos Aires: Asttrea (Barcelona: Ariel, 1984).
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11 Carrio, G.R. (1986), *Notas sobre derecho y lenguaje*, III, p. 186, Buenos Aires.
12 Alchourron, C. and Bulygin, E. (1980), *Sobre la existencia de las normas juridicas*, Carabobo, Venezuela.
13 Alchourron, C. and Bulygin, E. (1980), note 12 above.
14 Von Wright, G.H., note 4 above, Chapter V, 8, in which he says that only in secondary or analogical promises could there be prescriptions.
15 See, for instance, Kelsen, H. (1960), note 9 above, Chapter III, 29 B.
16 Raz, J. (1970), note 5 above, Chapter VII.
17 Binding, K. (1916), *Die Normen und ihre Ubertretung*, Vol. I, p. 196, Leipzig.
18 Von Wright, G.H. (1963), note 4 above.
19 Alchourron, C. and Bulygin, E. (1983), 'Definiciones y normas', in E. Bulygin, M. Farrell, C.S. Nino and E. Rabossi (eds), *El languaje del derecho-Homenaje a G.C. Carrio*, pp. 38 *et seq.*, Buenos Aires.
20 Ross, A. (1958), *On Law and Justice*, Chapter II, London.
21 Tur, R.H.S. (1976), 'The Notion of Legal Rights: A Test Case for Legal Science', *Juridicial Review*, pp. 177–88.
22 Alchourron, C. and Bulygin, E. (1980), note 12 above.

23 Raz, J. (1970), note 5 above, Chapter VIII, p. 199
24 Wellman, C. (1985), *A Theory of Rights*, Totowa, New Jersey.
25 Alexy, R. (1989), *A Theory of Legal Argumentation*, Oxford.
26 Nino, C.S. (1985), note 5 above, Chapters VIII and IX.
27 Nino, C.S. (1991), note 3 above, Chapter I.
28 Austin, J. (1971), *The Province of Jurisprudence Determined*, Lecture I, London.
29 (1984), 'Can there be a Right-Based Moral Theory?', in J. Waldron, (ed.), *Theories of Rights*, pp. 168 *et seq.*, Oxford.
30 Nino, C.S. (1991), note 3 above, Chapter I.
31 Raz, J. (1970), note 5 above.
32 Rawls, J. (Summer 1985), 'Justice as Fairness: Political not Metaphysical', *Philosophy & Public Affairs*, **4**, no. 3; Ackerman, B. (forthcoming), *Neutralities*.
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37 Sandel, M. (1982), *Liberalism and the Limits of Justice*, Cambridge, Mass.
38 Sandel, M. (1982), note 37 above, Chapter 1.
39 Rawls, J. (forthcoming), *Justice as Fairness: A Guided Tour*.
40 Okin, S.M. (1987), 'Justice and Gender', *Philosophy & Public Affairs*, **16**, (1), pp. 42–73.
41 Nino, C.S. (1991), note 3 above, Chapter V.
42 See J. Waldron's (1989), Introduction to *Theories of Rights*, Oxford: Oxford University Press, p. 20.
43 See Nino, C.S. (1991), note 41 above, Chapter V.
44 The main difference consists in that it is not always the case that when somebody is being used merely as a means her autonomy is thereby restricted (in the work cited I give the example of somebody who makes a machine to work thanks to the pressure that people make when walking normally on the pavement).
45 Thomas Nagel (1978), 'The Justification of Equality', *Crítica*, **X**, No. 28, pp. 3–31.
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47 Garet, R., 'Communality and Existence: The Rights of Groups', *Southern California Law Review*, **56**, pp. 1001–75.
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52 Sen, Amartya (1982), 'Rights and Agency', *Philosophy and Public Affairs*, **II**, pp. 3–39.
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54 Hart, H.L.A. and Honore, A.M. (1959), *Causation in the Law*, p. 39, Oxford.
55 Nino, C.S. (1991), note 3 above, Chapter VII.
56 See Michelman, Frank I. (1972), 'Constitutional Welfare Rights and A Theory of Justice', *University of Pennsylvania Law Review*, **121**, pp. 962–1019.
57 See Nickel, James W. (1977), 'Dworkin on the Nature and Consequences of Rights', *Georgia Law Review*, **3**, pp. 410–30.
58 Ely, J.H. (1980), *Democracy and Distrust*, Cambridge.
59 I am deeply grateful to Carl Wellman for his insightful suggestions and his generous help. Also the general editor of this series, Tom Campbell, has been remarkably supportive. Thanks are also due to Mr. John Irwin, of Dartmouth Publishing Company.

Part I
The Concept of Legal Rights

[1]

DEFINITION AND THEORY IN JURISPRUDENCE *

I

In law as elsewhere, we can know and yet not understand. Shadows often obscure our knowledge which not only vary in intensity but are cast by different obstacles to light. These cannot all be removed by the same methods and till the precise character of our perplexity is determined we cannot tell what tools we shall need.

The perplexities I propose to discuss are voiced in those questions of analytical jurisprudence which are usually characterised as requests for definitions : What is law? What is a State? What is a right? What is possession? I choose this topic because it seems to me that the common mode of definition is ill-adapted to the law and has complicated its exposition; its use has, I think, led at certain points to a divorce between jurisprudence and the study of the law at work, and has helped to create the impression that there are certain fundamental concepts that the lawyer cannot hope to elucidate without entering a forbidding jungle of philosophical argument. I wish to suggest that this is not so; that legal notions however fundamental can be elucidated by methods properly adapted to their special character. Such methods were glimpsed by our predecessors but have only been fully understood and developed in our own day.

Questions such as those I have mentioned "What is a State?" "What is law?" "What is a right?" have great ambiguity. The same form of words may be used to demand a definition or the cause or the purpose or the justification or the origin of a legal or political institution. But if, in the effort to free them from this risk of confusion with other questions, we rephrase these requests for definitions as "What is the meaning of the word 'State'?" "What is the meaning of the word 'right'?," those who ask are apt to feel uneasy as if this had trivialised their question. For what they want cannot be got out of a dictionary and this transformation of their question suggests it can. This uneasiness is the expression of an instinct which deserves respect: it emphasises the fact that those who ask these questions are not asking to be taught how to use these words in the correct way. This they know and yet are still puzzled. Hence it is no answer to this type of question merely to tender examples of what are correctly called rights, laws, or

* An inaugural lecture delivered before the University of Oxford on May 30, 1953.

corporate bodies, and to tell the questioner if he is still puzzled that he is free to abandon the public convention and use words as he pleases.[1] For the puzzle arises from the fact that though the common use of these words is known it is not understood; and it is not understood because compared with most ordinary words these legal words are in different ways anomalous. Sometimes, as with the word "law" itself, one anomaly is that the range of cases to which it is applied has a diversity which baffles the initial attempt to extract any principle behind the application, yet we have the conviction that even here there is some principle and not an arbitrary convention underlying the surface differences; so that whereas it would be patently absurd to ask for elucidation of the principle in accordance with which different men are called Tom, it is not felt absurd to ask why, within municipal law the immense variety of different types of rules are called law, nor why municipal law and international law, in spite of striking differences, are so called.

But in this and other cases, we are puzzled by a different and more troubling anomaly. The first efforts to define words like "corporation" "right" or "duty" reveal that these do not have the straightforward connection with counterparts in the world of fact which most ordinary words have and to which we appeal in our definition of ordinary words. There is nothing which simply "corresponds" to these legal words and when we try to define them we find that the expressions we tender in our definition specifying kinds of persons, things, qualities, events, and processes, material or psychological, are never precisely the equivalent of these legal words though often connected with them in some way. This is most obvious in the case of expressions for corporate bodies and

[1] Professor Glanville Williams in his beneficial article on "International Law and the Controversy concerning the word Law" (*British Year Book of International Law*, 1945, p. 148) advocates this short way with those who ask whether international law is law. But the way is really too short; for the puzzle is not generated always or only by the superstitions about words or essences, or the confusion of "verbal" with factual questions which he attacks. Perplexity here arises from three factors: (i) the well-founded belief that the word "law" when used of municipal and international law is not a mere homonym; (ii) the mistaken belief (false not only of complex legal and political expressions like "law" "State" "nation," but of humbler ones like "a game") that if a word is not a mere homonym then all the instances to which it is applied must possess either a single quality or a single set of qualities in common; (iii) an exaggeration of the difference between municipal and international law due to the failure to see that the "command" of a sovereign is only one particular form of a general feature which is no doubt logically necessary in a legal system, *viz. some* general test or criterion whereby the rules of the system are identified. Of course proper attention to these three factors will only show (by revealing the complexity of the issue and exposing some prejudices) that to call international law law in spite of its differences from municipal law is not arbitrary—just as to call patience a game is not arbitrary in spite of its differences from, say, polo. But there is no conclusive answer to give to those who are very impressed by the differences—in either case.

is commonly put by saying that a corporation is not a series or aggregate of persons. But it is true of other legal words. Though one who has a right usually has some expectation or power the expression " a right " is not synonymous with words like " expectation " or " power " even if we add " based on law " or " guaranteed by law." And so too, though we speak of men having duties to do or abstain from certain actions the word " duty " does not stand for or describe anything as ordinary words do. It has an altogether different function which makes the stock form of definition, " a duty is a . . . ," seem quite inappropriate.

These are genuine difficulties and in part account for something remarkable: that out of these innocent requests for definitions of fundamental legal notions there should have arisen vast and irreconcilable theories so that not merely whole books but whole schools of juristic thought may be characterised by the type of answer they give to questions like " What is a right? " or " What is a corporate body? " This alone, I think, suggests that something is wrong with the approach to definition; can we really not elucidate the meaning of words which every developed legal system handles smoothly and alike without assuming this incubus of theory? And the suspicion that something is amiss is confirmed by certain characteristics that many such theories have. In the first place they fall disquietingly often into a familiar triad.[2] Thus the American Realists striving to give us an answer in terms of plain fact tell us that a right is a term by which we describe the prophecies we make of the probable behaviour of courts or officials[3]; the Scandinavian jurists after dealing the Realist theory blows that might well be thought fatal (if these matters were strictly judged) say that a right is nothing real at all but an ideal or fictitious or imaginary power,[4] and then join with their opponents to denigrate

[2] The general form of this recurrent triad may be summarily described as follows. Theories of one type tell us that a word stands for some unexpected variant of the familiar—a complex fact where we expect something unified and simple, a future fact where we expect something present, a psychological fact where we expect something external; theories of the second type tell us that a word stands for what is in some sense a fiction; theories of a third (now unfashionable) type, tell us the word stands for something different from other things just in that we cannot touch it, hear it, see it, feel it.

[3] W. W. Cook, *The Logical and Legal Basis of the Conflict of Laws*, p. 30: " ' Right ' ' duty ' . . . are not names of objects or entities which have an existence apart from the behaviour of officials but terms by means of which we describe to each other the prophecies we make as to the probable occurrence of a certain sequence of events—the behaviour of officials . . . we must therefore constantly resist the tendency . . . to reify rights . . ."

[4] Karl Olivecrona, *Law as Fact*, p. 90: " We hit the mark when we define a right as a power of some kind but this power does not exist in the real world . . . it is not identical with the actual control . . . exercised by the owner nor with his actual ability to set the legal machinery in motion. It is a fictitious power, an ideal or imaginary power." See also A. Hägerström, *Inquiries into the Nature of Law and Morals*, p. 4: " The insuperable difficulty in finding the

the older type of theory that a right is an "objective reality"—an invisible entity existing apart from the behaviour of men. These theories are in form similar to the three great theories of corporate personality, each of which has dealt deadly blows to the other. There too we have been told by turn that the name of a corporate body like a limited company or an organisation like the State is really just a collective name or abbreviation for some complex but still plain facts about ordinary persons, or alternatively that it is the name of a fictitious person, or that on the contrary it is the name of a real person existing with a real will and life, but not a body of its own. And this same triad of theories has haunted the jurist even when concerned with relatively minor notions. Look for example at Austin's discussion of status[5] and you will find that the choice lies for him between saying that it is a mere collective name for a set of special rights and duties, or that it is an "ideal" or "fictitious" basis for these rights and duties, or that it is an "occult quality" in the person who has the status, distinguishable both from the rights and duties and from the facts engendering them.

Secondly. Though these theories spring from the effort to define notions actually involved in the practice of a legal system they rarely throw light on the precise work they do there. They seem to the lawyer to stand apart with their head at least in the clouds; and hence it is that very often the use of such terms in a legal system is neutral between competing theories. For that use "can be reconciled with any theory, but is authority for none."[6]

Thirdly. In many of these theories there is often an amalgam of issues that should be distinguished. It is of course clear that the assertion that corporate bodies are real persons and the counter-assertion that they are fictions of the law were often not the battle cries of analytical jurists. They were ways of asserting or denying the claims of organised groups to recognition by the State. But such claims have always been confused with the baffling analytical question "What is a corporate body?" so that the classification of such theories as Fiction or Realist or Concessionist is a criss-cross between logical and political criteria. So too the American Realist theories have much to tell us of value about the judicial process and how small a part deduction from predetermined premises may play in it, but the lesson is blurred when it is presented as a matter

facts which correspond to our ideas of rights forces us to suppose that there are no such facts and that we are here concerned with ideas that have nothing to do with reality." On p. 6: "Thus it is shown that the notions we question cannot be reduced to anything in reality. The reason is that they have their roots in traditional ideas of mystical forces or bonds."

5 *Jurisprudence*, 5th ed. (pp. 699–700).

6 P. W. Duff, *Personality in Roman Private Law*, p. 215.

of definition of "law" or "a right"; not only analytical jurisprudence but every sort of jurisprudence suffers by this confusion of aim.

Hence though theory is to be welcomed, the growth of theory on the back of definition is not. Theories so grown, indeed represent valuable efforts to account for many puzzling things in law; and among these is the great anomaly of legal language—our inability to define its crucial words in terms of ordinary factual counterparts.[7] But here I think they largely fail because their method of attack commits them all, in spite of their mutual hostility, to a form of answer that can only distort the distinctive characteristics of legal language.

II

Long ago Bentham issued a warning that legal words demanded a special method of elucidation and he enunciated a principle that is the beginning of wisdom in this matter though it is not the end. He said we must never take these words alone, but consider whole sentences in which they play their characteristic role. We must take not the *word* "right" but the sentence "You have a right," not the *word* "State" but the sentence "He is a member or an official of the State."[8] His warning has largely been disregarded and jurists have continued to hammer away at single words. This may be because he hid the product of his logical insight behind technical terms of his own invention "Archetypation," "Phraseoplerosis," and the rest; it may also be because his further suggestions were not well adapted to the peculiarities of legal language which as part of the works of "Judge & Co." was perhaps distasteful to him. But in fact the language involved in the enunciation and application of rules constitutes a special segment of human discourse with special features which lead to confusion if neglected. Of this type of discourse the law is one very complex

[7] See Olivecrona, *op. cit.*, pp. 88–89. "It is impossible to find any facts that correspond to the idea of a right. The right eludes every attempt to pin it down and place it among the facts of social life. Though connected with the facts . . . the right is in essence something different from all facts."

[8] See *A Fragment on Government*, Chap. V, notes to section vi: § (5) "For expounding the words duty, right, title, and those other terms of the same stamp that abound so much in ethics and jurisprudence either I am much deceived or the only method by which any instruction can be conveyed is that which is here exemplified. An exposition framed after this method I would term paraphrase. § (6) A word may be said to be expounded by paraphrases when not that word alone is translated into other words but some whole sentence of which it forms part is translated into another sentence. § (7) The common method of defining—the method *per genus et differentiam* as logicians call it, will in many cases not at all answer the purpose." *Cf.* also *Works*, Vol. viii, pp. 242–53, cited in C. K. Ogden, *Bentham's Theory of Fictions*, pp. 75–104, and *The Limits of Jurisprudence Defined* (Columbia University Press), p. 317.

example and sometimes to see its features we need to look away from the law to simpler cases which in spite of many differences share these features. The economist or the scientist often uses a simple model with which to understand the complex; and this can be done for the law. So in what follows I shall use as a simple analogy the rules of a game which at many vital points have the same puzzling logical structure as rules of law. And I shall describe four distinctive features which show, I think, the method of elucidation we should apply to the law and why the common mode of definition fails.

1. First, let us take words like " right " or " duty " or the names of corporations not alone but in examples of typical contexts where these words are at work. Consider them when used in statements made on a particular occasion by a judge or an ordinary lawyer. They will be statements such as " A has a right to be paid £10 by B." " A is under a duty to fence off his machinery." " A & Company, Ltd. have a contract with B." It is obvious that the use of these sentences silently assumes a special and very complicated setting, namely the existence of a legal system with all that this implies by way of general obedience, the operation of the sanctions of the system, and the general likelihood that this will continue. But though this complex situation is assumed in the use of these statements of rights or duties they do not *state* that it exists. There is a parallel situation in a game. "He is out " said in the course of a game of cricket has as its proper context the playing of the game with all that *this* implies by way of general compliance by both the players and the officials of the game in the past, present, and future. Yet one who says " He is out " does not *state* that a game is being played or that the players and officials will comply with the rules. " He is out " is an expression used to appeal to rules, to make claims, or give decisions under them; it is not a statement *about* the rules to the effect that they will be enforced or acted on in a given case nor any other kind of statement *about* them. The analysis of statements of rights and duties as predictions ignores this distinction, yet it is just as erroneous to say that " A has a right " is a prediction that a court or official will treat A in a certain way as to say that " He is out " is a prediction that the umpire is likely to order the batsman off the field or the scorer to mark him out. No doubt, when someone has a legal right a corresponding prediction will normally be justified, but this should not lead us to identify two quite different forms of statement.

2. If we take " A has a right to be paid £10 by B " as an example, we can see what the distinctive function of this form of

statement is. For it is clear that as well as presupposing the existence of a legal system, the use of this statement has also a special connection with a particular rule of the system. This would be made explicit if we asked " Why has A this right "? For the appropriate answer could only consist of two things: first, the statement of some rule or rules of law (say those of Contract), under which given certain facts certain legal consequences follow; and secondly, a statement that these facts were here the case. But again it is important to see that one who says that " A has a right " does not *state* the relevant rule of law; and that though, given certain facts, it is correct to say " A has a right " one who says this does not state or describe those facts. He has done something different from either of these two things: he has drawn a conclusion from the relevant but unstated rule, and from the relevant but unstated facts of the case. " A has a right " like " He is out " is therefore the tail-end of a simple legal calculation: it records a result and may be well called a conclusion of law. It is not therefore used to predict the future as the American Realists say; it refers to the present as their opponents claim but unlike ordinary statements does not do this by describing present or continuing facts. This it is—this matter of principle—and not the existence of stray exceptions for lunatics or infants that frustrates the definition of a right in factual terms such as expectations or powers. A paralysed man watching the thief's hand close over his gold watch is properly said to have a right to retain it as against the thief, though he has neither expectation nor power in any ordinary sense of these words. This is possible just because the expression " a right " in this case does not describe or stand for any expectation, or power, or indeed anything else, but has meaning only as part of a sentence the function of which as a whole is to draw a conclusion of law from a specific kind of legal rule.

3. A third peculiarity is this: the assertion " Smith has a right to be paid £10 " said by a judge in deciding the case has a different status from the utterance of it out of court, where it may be used to make a claim, or an admission and in many other ways. The judge's utterance is official, authoritative and, let us assume, final; the other is none of these things, yet in spite of these differences the sentences are of the same sort: they are both conclusions of law. We can compare this difference in spite of similarity with " He is out " said by the umpire in giving his decision and said by a player to make a claim. Now of course the unofficial utterance may have to be withdrawn in the light of a later official utterance, but this is not a sufficient reason for treating the first as a prophecy of the last for plainly not all mistakes are mistaken predictions.

Nor surely need the finality of a judge's decision either be confused with infallibility or tempt us to *define* laws in terms of what courts do, even though there are many laws which the courts must first interpret before they can apply. We can acknowledge that what the scorer says is final; yet we can still abstain from defining the notion of a score as what the scorer says. And we can admit that the umpire may be wrong in his decision though the rules gives us no remedy if he is and though there may be doubtful cases which he has to decide with but little help from the rules.

4. In any system, legal or not, rules may for excellent practical reasons attach identical consequences to any one of a set of very different facts. The rule of cricket attaches the same consequence to the batsman's being bowled, stumped, or caught. And the word "out" is used in giving decisions or making claims under the rule and in other verbal applications of it. It is easy to see here that no one of these different ways of being out is more essentially what the word means than the others, and that there need be nothing common to all these ways of being out other than their falling under the same rule, though there *may* be some similarity or analogy between them.[9] But it is less easy to see this in those important cases where rules treat a *sequence* of different actions or states of affairs in a way which unifies them. In a game a rule may simply attach a single consequence to the successive actions of a set of different men—as when a team is said to have won a game. A more complex rule may prescribe that what is to be done at one point in a sequence shall depend on what was done or occurred earlier: and it may be indifferent to the identity of the persons concerned in the sequence so long as they fall under certain defining

[9] Yet neglect of just these features of the language of rules has complicated the exposition of the concept of possession. Here the word is, of course, ambiguous as between (i) certain legal consequences attached to certain kinds of fact and (ii) those kinds of fact. But when we come to define the word in the second of these uses we are liable to assume that there is something which really or essentially is "possession in fact" independent of any legal system, and that there is something *illogical* in the terminology of a legal system if it does not confine its use of the word "possession" to this (see Paton, *Jurisprudence*, 2nd ed., p. 461). But the only meaning of "possession" which is independent of the rules of a legal system is the vague meaning in common non-legal usage and there is no logical vice in disregarding this. Or again we may assume that there *must* be some single factor common to all the diverse cases which are treated alike by the rules. This will lead us either, as the classical theories do, to select one predominant case as a paradigm and to degrade the rest to the level of "exceptions" or to obscure the real diversity of the facts with expository devices ("constructive" or "fictitious" possession). Preoccupation with the search for some common feature is apt in either case to divert us from the important inquiries which are (1) what for any given legal system are the conditions under which possessory rights are acquired and lost; (2) what general features of the given system and what practical reasons lead to diverse cases being treated alike in this respect. *Cf.* Kocourek: *Jural Relations*, Chap. xx *passim* on "continuing possession" and "legal possession."

conditions. An example of this is when a team permitted by the rules of a tournament to have a varying membership is penalised only in the third round—when the membership has changed—for what was done in the first round. In all such cases a sequence of action or states of affairs is unified simply by falling under certain rules; they *may* be otherwise as different as you please. Here can be seen the essential elements of the language of legal corporations. For in law, the lives of ten men that overlap but do not coincide may fall under separate rules under which they have separate rights and duties and then they are a collection of individuals for the law; but their actions may fall under rules of a different kind which make what is to be done by any one or more of them depend in complex way on what was done or occurred earlier. And then we may speak in appropriately unified ways of the sequence so unified, using a terminology like that of corporation law which will show that it is *this* sort of rule we are applying to the facts. But here the unity of the rule may mislead us when we come to define this terminology. It may cast a shadow: we may look for an identical continuing thing or person or quality *in* the sequence. We may find it—in "corporate spirit." This is real enough; but it is a secret of success not a criterion of identity.

III

These four general characteristics of legal language explain both why definition of words like "right," "duty," and "corporation" is baffled by the absence of some counterpart to "correspond" to these words, and also why the unobvious counterparts which have been so ingeniously contrived—the future facts, the complex facts or the psychological facts—turn out not to be something in terms of which we can define these words although to be connected with them in complex or indirect ways. The fundamental point is that the primary function of these [10] words is not to stand for or describe anything but a distinct function; this makes it vital to attend to Bentham's warning that we should not, as does the traditional method of definition, abstract words like "right" and "duty," "State," or "corporation" from the sentences in which alone their

[10] Lawyers might best understand the distinctive function of such expressions as "He has a right" and others which I discuss here, by comparing them to the *operative* words of a conveyance as distinct from the *descriptive* words of the recitals. The point of similarity is that "He has a right," like "X hereby conveys," is used to *operate with* legal rules and not to state or describe facts. Of course there are great differences: one who says "He has a right" operates with a rule by drawing a conclusion from it whereas one who uses operative words in a conveyance does something to which the rule attaches legal consequences.

full function can be seen, and then demand of them so abstracted their genus and differentia.

Let us see what the use of this traditional method of definition presupposes and what the limits of its efficacy are, and why it may be misleading. It is of course the simplest form of definition, and also a peculiarly satisfying form because it gives us a set of words which can always be substituted for the word defined whenever it is used; it gives us a comprehensible synonym or translation for the word which puzzles us. It is peculiarly appropriate where the words have the straightforward function of standing for some kind of thing, or quality, person, process, or event, for here we are not mystified or puzzled about the general characteristics of our subject-matter, but we ask for a definition simply to locate within this familiar general kind or class some special subordinate kind or class.[11] Thus since we are not puzzled about the general notions of furniture or animal we can take a word like "chair" or "cat" and give the principle of its use by first specifying the general class to which what it is used to describe belongs, and then going on to define the specific differences that mark it off from other species of the same general kind. And of course if we are *not* puzzled about the general notion of a corporate body but only wish to know how one species (say a college) differs from another (say a limited company) we can use this form of definition of single words perfectly well. But just because the method is appropriate at this level of inquiry, it cannot help us when our perplexities are deeper. For if our question arises, as it does with fundamental legal notions because we are puzzled about the general category to which something belongs and how some general type of expression relates to fact, and not merely about the place within that category, then until the puzzle is cleared up this form of definition is at the best unilluminating and at the worst profoundly misleading. It is unilluminating because a mode of definition designed to locate some subordinate species within some familiar category cannot elucidate the characteristics of some anomalous category; and it is misleading because it will suggest that what is in fact an anomalous category is after all some species of the familiar. Hence if applied to legal words like "right," "duty," "State," or "corporation" the common mode of definition suggests that these words like ordinary words stand for or describe some thing, person, quality, process, or

[11] Bentham's reason for rejecting the common method of defining legal words was that "among such abstract terms we soon come to such as have no superior genus. A definition *per genus et differentiam* when applied to these it is manifest can make no advance. . . . As well in short were it to define in this manner a preposition or a conjunction . . . a *through* is a . . . a *because* is a . . . and so go on defining them." *A Fragment on Government*, *ubi sup.*

event; when the difficulty of finding these becomes apparent, different contrivances varying with tastes are used to explain or explain away the anomaly. Some say the difference is that the things for which these legal words stand are real but not sensory, others that they are fictitious entities, others that these words stand for plain fact but of a complex, future, or psychological variety. So this standard mode of definition forces our familiar triad of theories into existence as a confused way of accounting for the anomalous character of legal words.

How then shall we define such words? If definition is the provision of a synonym which will not equally puzzle us these words cannot be defined. But I think there is a method of elucidation of quite general application and which we can call definition, if we wish. Bentham and others practised it, though they did not preach it. But before applying it to the highly complex legal cases, I shall illustrate it from the simple case of a game. Take the notion of a trick in a game of cards. Somebody says " What is a trick? " and you reply " I will explain: when you have a game and among its rules is one providing that when each of our players has played a card then the player who has put down the highest card scores a point, in these circumstances that player is said to have ' taken a trick '." This natural explanation has not taken the form of a definition of the single word " trick ": no synonym has been offered for it. Instead we have taken a sentence in which the word " trick " plays its characteristic role and explained it first by specifying the conditions under which the whole sentence is true, and secondly by showing how it is used in drawing a conclusion from the rules in a particular case. Suppose now that after such an explanation your questioner presses on : " That is all very well, that explains ' taking a trick '; but I still want to know what the word ' trick ' means just by itself. I want a definition of ' trick '; I want something which can be substituted for it whenever it is used." If we yield to this demand for a single word definition we might reply: " The trick is just a collective name for the four cards." But someone may object: " The trick is not just a name for the four cards because these four cards will not always constitute a trick. It must therefore be some entity to which the four cards belong." A third might say: " No, the trick is a fictitious entity which the players pretend exists and to which by fiction which is part of the game they ascribe the cards." But in so simple a case we would not tolerate these theories, fraught as they are with mystery and empty of any guidance as to the use made of the word within the game: we would stand by the original two-fold explanation; for this surely gave us all we needed when it explained the conditions

under which the statement "He has taken a trick" is true and showed us how it was used in drawing a conclusion from the rules in a particular case.

If we turn back to Bentham we shall find that when his explanation of legal notions is illuminating, as it very often is, it conforms to this method though only loosely. Yet curiously what he tells us to do is something different: it is to take a word like "right" or "duty" or "State": to embody it in a sentence such as "you have a right" where it plays a characteristic role and then to find a *translation* of it into what we should call factual [12] terms. This he called the method of paraphrase—giving phrase for phrase not word for word. Now this method is applicable to many cases and has shed much light; but it distorts many legal words like "right" or "duty" whose characteristic role is not played in statements of fact but in conclusions of law. A paraphrase of these in factual terms is not possible and when Bentham proffers such a paraphrase it turns out not to be one at all.

But more often and much to our profit he does not claim to paraphrase: but he makes a different kind of remark, in order to elucidate these words—remarks such as these: "What you have a right to have me made do, is that which I am liable according to law upon a requisition made on your behalf to be punished for not doing" [13] or "To know how to expound a right carry your eye to the act which in the circumstances in question would be a violation of that right; the law creates the right by forbidding that act." [14] These, though defective, are on the right lines. They are not paraphrases but they specify some of the conditions necessary for the truth of a sentence of the form "You have a right." Bentham shows us how these conditions include the existence of a law imposing a duty on some other person; and moreover, that it must be a law which provides that the breach of the duty shall be visited with a sanction if you or someone on your behalf so choose. This has many virtues. By refusing to identify the meaning of the word "right" with any psychological or physical fact it correctly leaves open the question whether on any given occasion a person who has a right has in fact any expectation or power; and so it leaves us free to treat men's expectations or powers as what in general men will have if there is a system of rights, and as part of what

[12] Actually he made the more stringent requirement that the translations should be in the terms calculated to raise images of "substances" or "emotions." This was in accord with Bentham's form of empiricism, but the utility of the method of paraphrases (which is identical with the modern "definition in use") is independent of this requirement.

[13] *A Fragment on Government*, *ubi sup.*

[14] *Introduction to the Principles of Morals and Legislation*, Chap. XVI.

a system of rights is generally intended to secure. Some of the improvements which should be made on Bentham's efforts are obvious. Instead of characterising a right in terms of punishment many would do so in terms of the remedy. But I would prefer to show the special position of one who has a right by mentioning not the remedy but the choice which is open to one who has a right as to whether the corresponding duty shall be performed or not. For it is, I think, characteristic of those laws that confer rights (as distinguished from those that only impose obligations) that the obligation to perform the corresponding duty is made by law to depend on the choice of the individual who is said to have the right or the choice of some person authorised to act on his behalf.

I would, therefore, tender the following as an elucidation of the expression "a legal right": (1) A statement of the form "X has a right" is true if the following conditions are satisfied:

(*a*) There is in existence a legal system.

(*b*) Under a rule or rules of the system some other person Y is, in the events which have happened, obliged to do or abstain from some action.

(*c*) This obligation is made by law dependent on the choice either of X or some other person authorised to act on his behalf so that either Y is bound to do or abstain from some action only if X (or some authorised person) so chooses or alternatively only until X (or such person) chooses otherwise. (2) A statement of the form "X has a right" is used to draw a conclusion of law in a particular case which falls under such rules.[15]

IV

It is said by many that the juristic controversy over the nature of corporate personality is dead. If so we have a corpse and the

[15] This deals only with a right in the first sense (correlative to duty) distinguished by Hohfeld. But the same form of elucidation can be used for the cases of "liberty," "power," and "immunity" and will I think show what is usually left unexplained *viz.*: why these four varieties in spite of differences are referred to as "rights." The unifying element seems to be this: in all four cases the law specifically recognises the *choice* of an individual either negatively by not impeding or obstructing it (liberty and immunity) or affirmatively by giving legal effect to it (claim and power). In the negative cases there is no law to interfere if the individual chooses to do or abstain from some action (liberty) or to retain his legal position unchanged (immunity); in the affirmative cases the law gives legal effect to the choice of an individual that some other person shall do or shall abstain from some action or that the legal position of some other person shall be altered. Of course when we say in any of these four senses that a person has a right we are not referring to any *actual* choice that he has made but either the relevant rules of law are such that *if* he chooses certain consequences follow, or there are no rules to impede his choice *if* he makes it. If there are legal rights which cannot be waived these would need special treatment.

opportunity to learn from its anatomy. Let us imagine an intelligent lawyer innocent of theories of corporate personality because he was educated in a legal Arcadia where rights and duties were ascribed only to individuals and all legal theory is banned. He is then introduced to our own and other systems and learns how in practice rights and duties are ascribed to bodies like the University of Oxford, to the State, to idols, to the *hereditas jacens* and also to the one-man tax-dodging company. He would learn with us that forms of statement were in daily use by which rights were ascribed to Smith & Co. Ltd. in circumstances and with consequences partly similar and partly different from those in which they were ascribed to Smith. He would see that the analogy was often thin, but that, given the circumstances specified in the Companies Acts and the general law, "Smith & Co. Ltd. owes White £10" applied as directly to the facts after its own fashion as "Smith owes White £10." Gradually he would discover that many ordinary words when used of a limited company were used in a special manner. For he would early learn that even if all the members and servants of the company are dead there are yet conditions under which it is true to say that the company still exists; if he was here in 1932 he would have learnt that it can be correctly said of a foreign corporation that though dissolved it still exists; and if he stayed till 1944 he would have learned that given certain circumstances it is true that a company has intended to deceive. On his return to Arcadia he would tell of the extension to corporate bodies of rules worked out for individuals and of the analogies followed and the adjustment of ordinary words involved in this extension. All this he would have to do and could do without mentioning fiction, collective names, abbreviations or brackets, or the *Gesammtperson* and the *Gesammtwille* of Realist theory. Would he not have said all there was to say about the legal personality of corporation? At what point then would the need be felt for a theory? Would it not be when someone asked "When it is true that Smith owes Black £10, here is the name 'Smith' and there is the man Smith, but when Smith & Co. Ltd. owes £10 to Black what is there that corresponds to 'Smith & Co. Ltd.' as the man Smith corresponds to the name 'Smith'? What *is* Smith & Co. Ltd.? What is *it*, which has the right? Surely it can only be a collection of individuals or a real individual or a fictitious individual?" In other words we could make the simple Arcadian feel the theorists' agonies only by inducing him to ask "What is Smith & Co. Ltd.?" and not to admit in answer a description of how, and under what conditions, the names of corporate bodies are used in practice, but

instead to start the search for what it is that the name taken alone describes, for what *it* stands, for what *it* means.[16]

That the presentation of the question in this way has been crucial in the growth of theory could be proved from many famous passages in the literature. Let me take one example. Maitland in his greatness indeed sensed that the choice did not necessarily lie, as it seemed, between the traditional theories and that ultimately some mode of analysis might supply a different answer. I do not understand why he is called a Realist [17] or thought to have accepted the doctrine of Gierke that he expounded, for though he was certain that fiction and collective-name theories "denatured the facts," he left the matter with a final question to which he then saw no answer. But observe the significant form that question took : he imagined a sovereign State and inventing the Latin for Never-never land, called it Nusquamia. Of this he said :

> "Like many other sovereign States, it owes money, and I will suppose that you are one of its creditors. . . .
>
> "Now the question that I want to raise is this : Who is it that really owes you money? Nusquamia? Granted, but can you convert the proposition that Nusquamia owes you money into a series of propositions imposing duties on certain human beings that are now in existence? The task will not be easy. Clearly you do not think that every Nusquamian owes you some aliquot share of the debt. No one thinks in that way. The debt of Venezuela is not owed by Fulano y Zutano and the rest of them. Nor, I think, shall we get much good out of the word 'collectively,' which is the smudgiest word in the English language, for the largest 'collection' of zeros is only zero. I do not wish to say that I have suggested an impossible task, and that the right-and-duty-bearing group must be for the philosopher an ultimate and unanalysable moral unit. . . Only if that task can be performed, I think that in the interests of jurisprudence and of moral philosophy it is eminently worthy of circumspect performance." [18]

Such was Maitland's question : When Nusquamia owes you money who owes you this? How should it be answered? Surely only by

[16] "It is highly improbable that they [Roman lawyers] ever asked or were asked this question" Duff, *op. cit.*, p. 134. But the question is mistaken with regard to the form of answer that it suggests and it is important to see this.

[17] *Cf.* Duff, *op. cit.*, pp. 209 and 216 (n. 8): See for a discussion of the precise point where Maitland diverged from Gierke's *Genossenschafttheorie*. J. A. Mack, "Group-Personality: Footnote to Maitland," *Philosophical Quarterly* (1952), Vol. II, p. 249.

[18] "Moral Personality and Legal Personality," *Collected Papers*, Vol. III, pp. 318–19

ceasing to batter our heads against the single word : Nusquamia. Pressing the question " Who or what when Nusquamia owes you £1,000 is it which owes you this? " is like demanding desperately : " When you lost that game what was it that you lost? " To the question so pressed the only answer is to repeat " a game," as to the other the only answer is to repeat " Nusquamia." This, of course, tells us precisely nothing but is at least neither mystifying nor false. To elucidate it we must obey Bentham's first injunction : we must take the whole statement " Nusquamia owes you £1,000 " and describe its use perhaps as follows :

1. Here in the territory of Nusquamia there is a legal system in force; under the laws of this system certain persons on complying with certain conditions are authorised for certain purposes to receive sums of money and to do other actions analogous to those required to make a contract of loan between private individuals.

2. When such persons do such acts certain consequences, analogous to those attached to the similar actions of private individuals, follow, including the liability of persons defined by law to repay the sums of money out of funds defined by law.

3. The expression " Nusquamia owes you £1,000 " does not state the existence of these rules nor of these circumstances, but is true in a particular case when they exist, and is used in drawing a conclusion of law from these rules in a particular case.

How much detail should be given depends on the degree to which the questioner is puzzled. If all that he is puzzled by is his inability to say who or what Nusquamia is and the inadequacies of theories to explain this, he may be content with what has been done. But of course he may be puzzled by the notion of one and the same legal system existing throughout the lives of different men in terms of which this elucidation of " Nusquamia " has been offered.[19] If so, this in its turn must be elucidated as it can be in the same manner.

There is of course nothing in this method to prevent its application to the ephemeral technical one-man company which Realists regarded as a difficulty for their theory.[20] To explain what a limited company is we must refer to the relevant legal rules, which determine the conditions under which a characteristic sentence like " Smith & Co. owes White £10 " is true. Then we must show how the name of a limited company functions as part of a conclusion of

[19] That is, we must elucidate the expression " the same legal system " by showing what are conditions sufficient for the truth of statements on the form. " The same legal system is in force in England now as in 1900." The fundamental question here is the elucidation of the expression " the same rule."

[20] See Wolff, " On the Nature of Legal Persons," 54 *Law Quarterly Review*, 494 at p. 504; Duff, *op. cit.*, p. 218.

law which is used to apply both special company rules and also rules such as those of contract which were originally worked out for individuals. It will, of course, be necessary to stress that under the special conditions defined by the special rules, other rules are applied to the conduct of individuals in a manner radically different from though still analogous to that in which such rules apply to individuals apart from such special conditions. This we could express by restating the familiar principle of our company law "A company is a distinct entity from its members" as: "The name of a limited company is used in conclusions of law which apply legal rules in special circumstances in a manner distinct from though analogous to those in which such rules are applied to individuals apart from such circumstances." This restatement would show that we have to do not with anomalous or fictitious entities, but with a new and extended though analogous use of legal rules and of the expressions involved in them.

V

If we look now at the type of theory so attractive to common sense which asserts that statements referring to corporations are "abbreviations" and so can be reduced or translated into statements referring only to individuals, we can see now in precisely what way they failed. Their mistake was that of seeking a paraphrase or translation into other terms of statements referring to corporations instead of specifying the conditions under which such statements are true and the manner in which they are used. But in assessing these common-sense theories it is important to notice one very general feature of the language involved in the application of legal rules which the attempt to paraphrase always obscures. If we take a very simple legal statement like "Smith has made a contract with Y" we must distinguish the meaning of this conclusion of law, from two things: from (1) a statement of the facts required for its truth, *e.g.*, that the parties have signed a written agreement, and also from (2) the statement of the legal consequences of it being true, *e.g.*, that Y is bound to do certain things under the agreement. There is here at first sight something puzzling; it seems as if there is something intermediate between the facts, which make the conclusion of law true, and the legal consequences. But if we refer to the simple case of a game we can see what this is. When "He is out" is said of a batsman (whether by a player, or by the umpire) this neither makes the factual statement that the ball has struck the wicket nor states that he is bound to leave the wicket: it is an utterance the function of which is to draw a conclusion

from a specific rule under which in circumstances such as these, consequences of this sort arise, and we should obviously neglect something vital in its meaning if, in the attempt to give a paraphrase, we said it meant the facts alone or the consequences alone or even the combination of these two. The combined statement "The ball has struck the wicket and he must leave the wicket" fails to give the whole meaning of "He is out" because it does not reproduce the distinctive manner in which the original statement is used to draw a conclusion from a specific but unstated rule under which such a consequence follows on such conditions. And no paraphrase can both elucidate the original and reproduce this feature.

I dwell on this point because it is here that the common-sense theories of corporate personality fail.[21] The theory that statements referring to corporations are disguised abbreviations for statements about the rights and duties of individuals was usually expounded with such crudity as not to deserve consideration. It is easy to see that a statement about the rights of a limited company is not equivalent to the statement that its members have those same rights. A conveyance by Smith & Co. Ltd. to the sole shareholder Smith is of course not a conveyance by Smith to Smith. But a few theorists, among them Hohfeld, have stated this type of theory with a requisite degree of subtlety. Hohfeld saw that to say that Smith & Co. Ltd. has a contract with Y was, of course, not to say the same thing about the members of the company : he thought it was to say something different and very complicated about the way in which the capacities, rights, powers, privileges, and liabilities of the natural persons concerned in the company had been affected. Though more formidable in this guise, the theory fails because, although it gives us the legal consequences upon the individuals of the original statement, it does not give us the force and meaning of that statement itself. The alleged paraphrase is less than the original statement "Smith & Co. Ltd. has a contract with Y" because it gives no hint of what the original statement is used to do, namely, to draw a conclusion of law from special rules relating to companies and from rules extended by analogy from the case of individuals. So the paraphrase, complex and ingenious as it is, gives us too little; but it also gives us too much. It dissipates the unity of the simple statement "Smith & Co. has

[21] It is also the explanation of the sense of a *tertium quid* between the "facts" and the "legal consequences" which troubles the analysis of many legal notions, *e.g.*, status. The status of a slave is not (*pace* Austin) just a collective name for his special rights and duties: there is a sense in which these are the "consequences" of his status; it is the sense in which the obligation to leave the wicket is a consequence of being "out."

a contract with Y" and substitutes a statement of the myriad legal rights, duties, powers, etc., of numerous individuals of whom we never have thought nor could have thought in making the original statement.[22] Hence it is that those who are attracted to this common-sense form of analysis feel cheated when they look at it more closely. And they *are* cheated; only they should not in despair clutch at the Realist or Fiction theories. For the elements which they miss in the translation, the analogy with individuals, the unity of the original statement, and its direct application to fact cannot be given them in these theories nor in any translation of the original; it can only be given in a detailed description of the conditions under which a statement of this form is true and of the distinctive manner in which it is used to draw a conclusion from specific rules in a particular case.

I have of course dealt only with the *legal* personality of corporations. I have argued that if we characterise adequately the distinctive manner in which expressions for corporate bodies are used in a legal system then there is no residual question of the form "What is a corporation?" There only *seems* to be one if we insist on a form of definition or elucidation which is inappropriate. Theories of the traditional form can only give a distorted account of the meaning of expressions for corporate bodies because they all, in spite of their mutual hostility, make the common assumption that these expressions must stand for or describe something, and then give separate and incompatible accounts of its peculiarity as a complex or recondite or a fictitious entity; whereas the peculiarity lies not here but in the distinctive characteristics of expressions used in the enunciation and application of rules. But of course it is not the legal personality but the "moral" personality of organised groups that perplexes most: these exist apart from legal rules (one confusing sense of "not fiction" is just to assert this fact) and no collective-name or abbreviation theory seems to be

[22] See Hohfeld, *Fundamental Legal Conceptions*, pp. 198–200, 220 *et seq.* Though Hohfeld writes at times as if his complex statements of rights, duties, capacities, etc., were synonymous with the original statement about companies, ["we mean nothing more than what can be explained by describing the capacities etc. . . . of the natural persons concerned."] I think he also saw that statements concerning companies cannot be "reduced" to statements concerning individuals but are as he says "sui generis" (p. 198) and that this is why fictionist, realist, and collective-name theories all distort the concept of a corporate body. What he does not see is that in using these special forms of expressions we are not (my italics) "*describing* . . . the peculiar process by which the burdens and benefits of the corporate members are worked out" (p. 199) but drawing a conclusion of law from special rules. What is ignored here is the distinction (see p. 42, *ante*), between the statement *about* a legal rule and a statement which *applies* a legal rule by drawing a conclusion from it. To ignore this obscures the analysis of the notion of a corporate body as much as that of a right.

adequate; so we are tempted to ask, "What *is* a Church, a Nation, a School?" "What is any association or organised group?" But here too we should substitute for this ever-baffling form of question [23] the following: "Under what conditions do we refer to numbers and sequences of men as aggregates of individuals and under what conditions do we adopt instead unifying phrases extended by analogy from individuals?" If we ask this and investigate the conditions of use of characteristic sentences ("The Nation suffered for 50 years," "The University expressed its gratitude," "The crowd was angry") we shall cease to talk about group-personality (and indeed individual personality) as if it were a single quality or set of qualities. For we shall find that there are many varieties of widely different conditions (psychological and others) under which we talk in this unifying personal way. Some of these conditions will be shown to be significant for legal or political purposes; others will not. It was surely one of the sentimentalities of *Genossenschafttheorie* that unity just as unity was made to appear significant or worthy of respect, as compared with the vulgar plurality of persons strolling in the street. After all mere unity is not very much, though it is far more various than it appears to be.

VI

If we put aside the question "What is a corporation?" and ask instead "Under what types of conditions does the law ascribe liabilities to corporations?" this is likely to clarify the actual working of a legal system and bring out the precise issues at stake when judges, who are supposed not to legislate, make some new extension to corporate bodies of rules worked out for individuals. Take for example the recent extension to corporations of liability for crimes involving knowledge and intention, or some other mental element [24] which are such that a natural person would not be criminally responsible if his servant with the requisite knowledge and intention committed the *actus reus* in the course of his employment. There are two ways, one illuminating and the other misleading, of representing the issues at stake here: two ways, that is, of interpreting the word "can" in the question "can a limited

[23] Baffling, that is, so long as we are puzzled about fundamentals though not if we are concerned only with some particular species of organised group and its differences from others. See p. 46, *ante*.

[24] *D. P. P.* v. *Kent and Sussex Contractors Ltd.* [1944] K.B. 146: ("with intent to deceive made use of a document which was false in a material particular" and "made a statement which they knew to be false in a material particular"). *Moore* v. *Bresler, Ltd.* [1944] K.B. 551 ("with intent to deceive made use of a document false in a material particular").

company commit a crime involving knowledge and intention?" The illuminating way would be to exhibit the obstacle to such an extension as consisting in the type of analogy that has been followed in fitting corporate bodies into the general structure of our law. It is, of course, predominantly the analogy with the case of an individual held liable for what his servant does in the course of employment. It is by use of this analogy that the liabilities of corporations were extended from contract to ordinary torts and then to torts involving malice: and the whole vocabulary of the law of principle and agent has been adapted to the case of the limited companies. But for crimes of the type under consideration this analogy is useless and the fundamental question is: Is this the only analogy available to the courts? Is the law closed on this matter, or are there other criteria for the application to companies of rules originally applied to individuals? In fact the judges have felt that they were not restricted in this way and of course it has often been pointed out that it is possible in English law to find authority for imputing to a company the actions and mental states of those who are substantially carrying on its work. How far this alternative source of analogy can or should be utilised is of course a debatable legal issue, but the important thing is to see that this legal issue, and not some logical issue, is the character of the question. Here then is the force of the word "can" in "can a company be liable for a crime involving intention to deceive?" [25] By contrast the confusing way of stating the issue is to bring in definitions of what a company is and to deduce from them answers to the question in hand. "A company is a mere abstraction, a fiction, a metaphysical entity." "A company has no mind and therefore cannot intend." These statements confuse the issue because they look like eternal truths about the nature of corporations given us by definitions: so it is made to appear that all legal statements about corporations *must* square with these if they are not to be logically inconsistent. It seems therefore that there is something over and above the analogies which are actually used in the legal system for the application to corporations of rules worked out for individuals and that this limits or controls that application. And of course a Fiction theory taken seriously can impose irrelevant barriers just as much as a Realist theory; for just as a Realist theory appears to tell us that a company "cannot" be bound by an agreement empowering another company to direct its business and appoint its personnel because this would be "to

[25] And surely it is in this way also that the still debated question "can a company be liable for an *ultra vires* tort" should be considered.

degrade to the position of a tool " a person with a real will,[26] so a Fiction theory appears to say that a company " cannot " be guilty of certain crimes because it has no mind.

Indeed the *suggestio falsi* in the use of the notion of " fiction " in the exposition of this branch of the law merits our consideration. Its peculiar vice is to conceal that when words used normally of individuals are applied to companies as well as the analogy involved, there is also involved a radical difference in the mode in which such expressions are now used and so a shift in meaning. Even in the simplest case of all when we say " X is a servant of Y & Company " the facts which justify the use of the words " X is a servant " are not *just* the same as the facts which support " Smith is a servant of Brown." Hence any ordinary words or phrases when conjoined with the names of corporations take on a special legal use, for the words are now correlated with the facts, not solely by the rules of ordinary English but also by the rules of English law much as when we extend words like " take " or " lose " by using them of tricks in a game they become correlated with facts by the rules of that game. Now if we talk here of " fiction " we cannot do justice to this radical difference in use of ordinary expressions when conjoined with the names of corporations; we can only distort it. For when, for example, we say of a company that it resides in England even though its members and servants were killed last night by a bomb, the meaning of these words is to be found only by examining the legal rules which prescribe in what conditions such a statement is correct. But if we talk of " fiction " we suggest that we are using words in their ordinary sense and are merely pretending that something exists to which they apply. In novels—real fiction—we *do* preserve the ordinary meanings of words and pretend that there are persons of whom they are true in their ordinary sense. This is just what we do *not* do when we talk of corporations in law. Yet one of the most curious pieces of logic that ever threatened to obstruct the path of legal development owes, I think, its origin to the confusion of such a shift in meaning with fiction.[27] It was once said that a corporation has no real will but a fictitious will imputed by law, and that since such a will so imputed could effect only lawful ends, we cannot, if we are logically consistent, say that it could commit a crime, or even perhaps a tort. Of course this use of the fiction theory does conjure up an allegorical picture:

[26] See Wolff, *op. cit.*, 54 *Law Quarterly Review* at p. 501, citing a decision of the German Supreme Court.

[27] On account of the standing possibility of this confusion I would abandon the use of the word " fiction " in the exposition of this branch of the law though Dr. Wolff (*op. cit.*, p. 505) was prepared to retain it " as a formula."

Law breathing into the nostrils of a Limited Company a Will Fictitious but like that of its Creator Good. But the picture is more misleading than even an allegory should be, because it conceals the fact that the word " will " shifts its meaning when we use it of a company : the sense in which a company has a will is not that it wants to do legal or illegal actions but that certain expressions used to describe the voluntary actions of individuals may be used of it under conditions prescribed by legal rules. And from the bare fact that the law does prescribe such conditions for a wide range of expressions (which is all that imputing a will to a company can mean) it cannot be deduced that these conditions do not include the commission of a criminal or tortious act. Analogy with a living person and shift of meaning are therefore of the essence of the mode of legal statement which refers to corporate bodies. But these are just what they are. Analogy is not identity, so though we can now (as lawyers) say that a company has intended to deceive this has no theoretical consequences; and shift in meaning is not fiction, so the need for logical consistency with an irrelevant notion of a law-created pure Will need not have been added to the difficulties of judges who, in a case law system, have to decide how far the analogies latent in the law permit them to extend to corporations rules worked out for individuals when justice seems to demand it.

This post-mortem has lasted long. I will add only this. It would of course be the merest provincialism to think of the history of jurisprudence in this matter of definition as a record of errors—even of illuminating errors. It is on the contrary full of invaluable hints as to what should be done to cater for the idiosyncrasies of legal language and the elucidation of its special concepts. Besides the precepts and practice of Bentham there is the practice of Austin at his best; there is Bryce's pregnant observation [28] that fundamental legal notions could perhaps not be defined, only described, and much in Pollock and Maitland [29] to show how the interplay of remedy with right has generated a special use of words. There is much, too, of value in Kocourek and Kelsen. Would it, I wonder, be folly to see in the Digest title *De acquirenda vel de amittenda possessione* with its evasion of the fruitless question : " What is possession ? " an instinctive recognition of the cardinal principle

[28] *Studies in History and Jurisprudence*, Vol. II, p. 181. "He [Austin] did not perceive how deep some of the difficulties of legal theory lie nor that there are some conceptions which it is safer to describe than to attempt to define." But *cf.* Austin, *Jurisprudence*, 5th ed., Vol. II, p. 1076 "In truth some of these terms will not admit of definition in the formal or regular manner . . . And as to the rest to define them in that manner is utterly useless."

[29] *History of English Law*, Vol. II, pp. 31 *et seq.*

that legal words can only be elucidated by considering the conditions under which statements in which they have their characteristic use are true? But though the subject of legal definition has this history, it is only since the beneficial turn of philosophical attention towards language that the general features have emerged of that whole style of human thought and discourse which is concerned with rules and their application to conduct. I at least could not see how much of this was visible in the works of our predecessors until I was taught how to look by my contemporaries.

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THE CONCEPT OF LEGAL LIBERTY

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The concept of legal liberty may be called the *pons asinorum* of analytical jurisprudence; but unlike Euclid's fifth theorem it is a bridge at which not only the beginner but some grave and learned men have been known to stumble. Even among the professional exponents of jurisprudence there is no full agreement upon the answers to what would appear at first sight to be elementary questions.

I. The Definition of Legal Liberty

A liberty, as that word will be used in the following discussion, means any occasion on which an act or omission is not a breach of duty. When I get up in the morning, dress, take breakfast, and so on, I am exercising liberties, because I do not commit legal wrongs. Since the commission of legal wrongs is relatively infrequent, almost every act is the exercise of a liberty.

An example of a liberty appearing in legal works is the defense of privilege in defamation; also the (more or less) general defenses in tort, such as consent, necessity, private defense, and statutory authority. When a person has a substantive defense in law to an action or prosecution, that is to say a legal defense on the merits, he has a liberty, *i.e.*, the conduct of which complaint is made is not a breach of duty. This is not necessarily true of a merely procedural or adjectival defense. The defense under statutes of limitation, for example, generally does not deny the duty, but alleges that the duty has become unenforceable through lapse of time. Several other unenforceable duties are known to the law. Except in the case of these unenforceable duties or other procedural objections it is true to say that a successful objection in point of law to a claim involves the assertion of a liberty.[1]

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1. The "trust of imperfect obligation" or "honorary trust" is in fact a liberty conferred upon the trustees to waste the trust property in a certain way; the tombstone or the animal is not (as is sometimes supposed) the beneficiary. The only beneficiary, because the only person with a right, is the next-of-kin or residuary legatee who can claim if the property is

Most legal liberties are not to be found stated in law books, because there is generally no point in making these negative statements. It will not surprise the reader to know that there is no entry of "breakfast, liberty to eat," in the index to *Corpus Juris*. If the law lays down no duty, it is generally indicated in legal works by making no reference to the subject. When a liberty is stated, it is generally by way of expressing the limits of a legal duty. Thus freedom of speech, which is a liberty, represents the limits of the duty not to utter defamation, blasphemy, obscenity, and sedition. Even so, we should not bother to proclaim liberty of speech unless this were regarded as a special value, to be jealously guarded. We are particularly likely to express a liberty when the law was formerly otherwise, or when the law of foreign countries is otherwise, or when some people want to make our law otherwise. Take as an example the liberty of the press: this is in part a memory of the fact that at one time there were in England press licensing laws, which made it an offense to print without previous license. If no one had ever challenged the liberty of the press, by imposing a certain duty not to print, we should hardly pause to think of it as a freedom. Similarly the so-called right of combination, which is really the liberty of workmen to combine in trade unions, derives its special meaning in England from the historic struggle to repeal the combination laws.

It follows from what has been said that the question, sometimes mooted, whether liberties are conferred by law, is one of words. If law is conceived as a system of rights and duties, liberties lie outside it; they are an "extra-legal phenomenon," representing what is left of possible conduct after deducting the part regulated by rules of duty. However, it is often convenient to think and speak of liberties as being included in the law. The law, in this sense, includes rules denying duties as well as rules affirming duties. Considerable portions of law books are taken up with the denial of duties, that is to say the affirmation of liberties.

Liberties may be "given" either by general rules of law (representing in reality the limits of legal duty) or by act of party; in the latter event a particular person has by law the power to dispense with the duty that would otherwise exist. Exercising this power, he confers a liberty. Liberties so given by act of party are generally termed licenses. A clear example is the revocable license to enter land. At the moment I am under a duty not to enter your land, but if you give me a gratuitous license to enter, my duty will be replaced by a liberty to enter. It is sometimes said to be a "right" to enter; but since this supposed right may be revoked by the landowner at

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not wasted in the specified manner. Hence a so-called trust of imperfect obligation is in truth a fully enforceable trust for the next-of-kin, subject to a condition precedent which confers on the trustee the liberty stated. It is not a case of unenforceable duty.

any time, it is much better called a liberty. Even an irrevocable license is a liberty, though, being irrevocable, it is coupled with the licensee's right against the landowner, during the term of the license, not to be interfered with in its enjoyment.

Whenever a liberty is given for the first time, it involves the abrogation of a previous duty to do the opposite. For example, the abrogation of a duty not to enter land creates a liberty to enter it. These two possibilities (duty to act in a certain way, liberty to act in the opposite way) are mutually exclusive, being contradictory in meaning.

The illustration of the landowner's license may serve to introduce another point. Suppose that, after you have given me the license to enter your land, I make a contract with you that I will enter your land for a specified purpose, say to repair the fence. Now, under my contract, I am under a duty to enter, a contractual duty. What has become of my liberty to enter? Clearly it is still there. Even since the making of the contract, it is true to say that my general duty not to enter the land of others remains abrogated in respect of your land, and consequently it is true to say that I have a liberty to enter. This liberty is not inconsistent with my duty to enter. A liberty and duty *of the same content* may exist together. The statement that I am at liberty to enter means that I commit no tort or crime or other legal wrong in entering. The statement that I am under a duty to enter means that I shall commit a wrong if I do not enter.

II. The Choice of the Word "Liberty"

In the present discussion, the concept of absence of duty is being expressed by "liberty" (the term used by Austin and Salmond) instead of Hohfeld's "privilege." This departure from Hohfeld is made with reluctance, because the need for an agreed technical language is so great that it counterbalances any minor difficulties that may be urged against the choice of this or that particular word. Morover, Hohfeld's terminology has been quite generally accepted in American legal writing, and has been used in the *Restatement of the Law of Torts*. For many years, when teaching Jurisprudence in the University of London, I used Hohfeld's term, abandoning it only when I had become convinced that it created an excessive amount of difficulty. The term "privilege" carries the strong popular and etymological meaning of a special favor given to the individual or a narrow class (*privilegium*, a private law), and the tendency is for this to fight down the general meaning that Hohfeld chose to assign to it. I found that, however clearly I tried to explain to students that "privilege" in jurisprudence was to mean merely what Salmond called a liberty, some seemed to be unable to hold this ex-

planation in the mind. Hence I was constantly faced with the objection to particular illustrations: "That is not a privilege, because everybody has it."

Hohfeld's meaning of "privilege" not only runs counter to the popular use, but it departs from the technical legal use. As Spencer Bower observed, except in defamation "the term [privilege] is uniformly employed to connote two ideas: (1) the notion of something in excess of the ordinary law, (2) something which is conferred by grant, statute, or usage on a particular person, corporation, place, class or profession."[2] Even in defamation the defense of privilege implies some restriction by person or circumstance; the defense open to the whole world is called not privilege but fair comment upon a matter of public interest. Fair comment is the exercise of a liberty, but is not in ordinary legal language a privilege. Sociological writers keep a similar distinction alive when they speak of the privileged as opposed to the deprived classes; sometimes one hears the somewhat ridiculous phrase "the under-privileged classes." Even the *Restatement* does not wholly adopt Hohfeld, because it denies the term "privilege" to the situation at common law where the defendant need not pay damages for negligence because of the plaintiff's contributory negligence;[3] according to Hohfeld's definition such conduct would be privileged, because it would not be a breach of duty.

There are other objections to the term privilege, of a minor character. In some contexts it is a eulogistic word, and this is apt to interfere with a strictly scientific use. In other contexts it means something different from liberty. Thus the privilege of a legislature to compel the attendance of witnesses is a power, while the privilege of its members to be free from arrest is an immunity; and diplomatic privilege is an immunity. Occasionally the term "privileged" is applied in law to things, *e.g.*, the privilege of goods from distress and of documents from production in court, whereas the liberty-privilege is exclusively an attribute of legal persons.

Now the word "liberty" is free from the principal defect of "privilege": it is ordinarily used both for liberties common to all (*e.g.*, liberty of speech) and for special privileges. As an example of the latter, a landowner, in permitting another to enter his land, may quite naturally say: "You are at liberty to use the path." It is true that the term once had a very narrow meaning in English law: Blackstone said that "franchise and liberty are used as synonymous terms: and their definition is a royal privilege, or branch of the king's prerogative, subsisting in the hands of the subject."[4]

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2. Bower, Actionable Defamation 315 (2d ed. 1923), and see his long discussion generally. See also Miller, Data of Jurisprudence 103-08 (1903); 5 Viner, Abridgement (Supp. 1905), S.V. Privilege.

3. Restatement, Torts § 10, comment *a* (1934).

4. 2 Blackstone, Commentaries *37; *cf.* Miller, *op. cit. supra* note 2, at 96-100, 102; Wharton, Law Lexicon (14th ed. 1938), S.V. Liberty.

But liberty now generally has a wider meaning, and sometimes it even includes a power (as in the phrase "liberty of contract"). For the purpose of analytical jurisprudence a liberty and power are, of course, distinguished from each other. Another disadvantage of the word "liberty" is that it is used in a variety of meanings differing from the meaning it bears in jurisprudence. Political philosophers use it to mean liberty of choice, liberty to choose the good, political liberty, economic liberty, etc. None of these represents the meaning of liberty when this word is placed in the table of jural relations.

The unreliable nature of our present legal dictionary may be illustrated by an English case[5] turning on the words in section 62 of the Law of Property Act, 1925: "liberties, privileges, easements, rights and advantages." Luxmoore, L. J., said:

> A 'liberty' must, I think, be something which results from a permission given to, or something enjoyed under sufferance by, a particular person or body of persons, as distinguished from something enjoyed by sufferance by all and sundry, while a 'privilege' describes some advantage to an individual or group of individuals, a right enjoyed by a few as opposed to a right enjoyed by all. 'Easement' and 'right' are obviously words not appropriate to universal enjoyment nor is the word 'advantage', for it necessarily connotes the enjoyment of something which is denied to others.

As general definitions these remarks are open to doubt. To seize upon the most obvious error, "right" is clearly a word appropriate to universal as well as to particular enjoyment (*e.g.*, the public right not to have a highway obstructed). Similarly, constitutional liberties are enjoyed by all. The definitions of Luxmoore, L. J., may have been correct within the context of the particular section he was discussing, but it seems unsatisfactory that we have no technical term which connotes beyond a peradventure an absence of duty whether universal or particular.

As said before, liberties are in some contexts expressed by the word "license." Thus we speak of the plea of "leave and license" in torts to property, and of a license as contrasted with a lease. Sometimes a license (that is to say, exemption from duty) may be given by an official acting in accordance with legal rules: examples are dog, radio, and operators' or driving licenses, which render legal acts that would otherwise be illegal. On the subject of licenses to use land, Vaughan, C. J., said in 1673: "A dispensation or licence properly passeth no interest, nor alters or transfers property in anything, but only makes an action lawful, which without it had been unlawful."[6] The latter part of this sentence expresses a legal liberty. But

5. Le Strange v. Pettefar, 161 L.T.R. 300 (Ch. 1939).

6. Winter Garden Theatre, Ltd. v. Millennium Production, Ltd., [1948] A.C. 173, 193; see also Miller, *op. cit. supra* note 2, at 102-03. Although Vaughan C.J.'s dictum is still verbally maintained by the courts, one opinion holds that the law has developed in such a way that licenses for value are in reality interests.

the term license is normally confined to a permission given by a human being in accordance with the law; it is not applied to permissions given directly by the law. Nor is it applied to all permissions by a human being; as has just been noted, a lease is not a license, and neither is an easement. Finally, in political philosophy license means an immoral use of liberty.

Yet another word is "freedom." This is not much used by lawyers except in connection with the constitutional freedoms and the freedom of a municipality.

"Immunity" is sometimes used: thus the infant's immunity in contract is in reality a liberty not to pay what would otherwise be his debts. "Authority" is another word, though in some contexts this means power. Other expressions are "lawful," "justified," "justifiable," "excuse," "excusable," "defense," "exemption," "protection," "protected"; but these have their own troubles. Perhaps the most unreliable as terms of art are "lawful" and its opposite, "unlawful." In *Lemy v. Watson*[7] it was held that a trade description was not lawfully applied before 1887 within the meaning of the English Merchandise Marks Act of that year, when it was misleading to the public, even though its use was not, before the act, a criminal offense. The decision may perhaps be explained by saying that the misleading application was a breach of contract. Sometimes other courts have gone further and distinguished between what is legal and what is lawful; legal is what is in conformity with the law; lawful connotes also a requirement of morality. Thus a conspiracy to do something immoral may be regarded as a conspiracy to do an unlawful act; or, at one time, a killing in the course of an immoral act was apparently regarded as a killing in the course of an unlawful act, and so as manslaughter. The usage is most unfortunate, particularly in criminal law; and there are signs that it is disappearing.[8] Finally, "lawful" sometimes means the valid exercise of a legal power.[9]

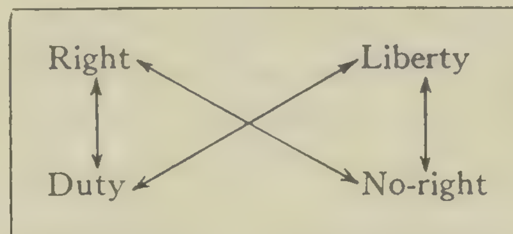
Owing to the lack of legal expressions of clearly general import, a draftsman is forced to make use of a large variety of words if he wishes to express a wide conception; and he must then content himself with hoping that a particular contingency which he wishes to cover will not be held to be excluded from each of his particular words. For example, by the English Medical Act of 1860 "the granting of new charters to the said corporations respectively by and in the altered names and styles respectively, as provided in the Medical Act, shall not, in respect of such alteration of name or style merely, alter or affect in any way the *rights*, *powers*, *authorities*, *qualifications*, *liberties*, *exemptions*, *immunities*, *duties*, *and obligations*, granted, conferred,

7. [1915] 3 K.B. 731.
8. The Queen v. Clarence, 22 Q.B.D. 23, 36, 40 (1888); WILLIAMS, CRIMINAL LAW: THE GENERAL PART § 8 (1953).
9. *In re* Croxon, [1904] 1 Ch. 252, 257.

or imposed to or upon, or continued and preserved to the said corporations respectively."[10] If the wide meanings of "powers" and "liberties" now current in jurisprudential literature were accepted by the judges, there would have been no need to include in this list the words "authorities," "qualifications," and "exemptions"; and "obligations" could have been omitted as covered by the word "duties."

III. Legal Liberties to Act and Not to Act

There was one point upon which Hohfeld was in error, or at least guilty of incomplete statement. It will be remembered that Hohfeld constructed a table in which privilege (or, as I am calling it, liberty) was made the opposite of duty and the correlative of no-right. The scheme may be exhibited as follows:



Here the vertical arrows couple the correlatives, so that a right in *A* against *B* implies a duty in *B* towards *A* and vice versa. The diagonal arrows couple what Hohfeld called opposites but which can better be called contradictories, because taken together they exhaust the relevant field (universe of discourse). For example, a no-right means the absence of a right. Either *A* has a right in a particular respect or he has no right (a no-right); there is no third possibility.

There is, however, an error in the table, namely in the unqualified word "liberty." Liberty is not, as such, the correlative of no-right, or the contradictory of duty. To make the table correct, one must write instead of "liberty" the words "liberty not." For example, the correlative of your no-right that I should pay you $5 is my liberty *not* to pay you $5. The contradictory of my duty to pay you $5 is again my liberty *not* to pay you $5.

To explain this in more detail, it is necessary to consider the kinds of rights and duties. These may be either positive or negative, in the sense that a duty may oblige either to acts or to forbearances. My right against my debtor that he shall pay me the debt is a right of positive content; my right that he shall not assault me is a right of negative content.

The negative in the last example touches on the content of the right

10. 23 & 24 Vict., c. 66, § 3.

(that he shall not assault me), and is to be distinguished from a negative predicated of the right itself, *i.e.*, a statement that a given right does not exist. The sentence: "I have not a right that X shall pay me $5" is an example of a denial of a right of positive content. The sentence: "A child has not a right that his father shall not chastise him" is a denial of a right of negative content. Putting the last sentence another way, one could say: "A father is not under a duty not to chastise his child." This is a denial of a duty of negative content. It is a denial of any legal prohibition of chastisement. Observe that the two negatives perform different logical functions. The first denies the duty, while the second states that the duty denied is one of negative content, a duty to refrain from doing. This difference of function means that the negatives cannot be cancelled out. In the instance given, the sentence obviously does not mean the same as: "A father is under a duty to chastise his child." The latter affirms a duty of positive content, and, unlike the former, is an incorrect statement of the law.

Nor (one may add) does the former sentence mean: "A father has a right (in the strict sense) to chastise his child." This is because the child owes no duty to be chastised. He would not break a duty if he were not chastised.

The next step is the vital one in the argument. We will take the sentence: "A father is not under a duty not to chastise his child," and by verbal magic change it into another sentence that in outward form appears quite different. This sentence is: "A father has a liberty to chastise his child." The two sentences have precisely the same meaning. Yet in the second two negatives have disappeared, namely, the negative serving to deny the duty and the negative expressing the fact that the duty denied is one of forbearance. In short, whereas the second sentence seems to assert something concerning the father, it is in meaning merely a denial—a denial of a legal duty of negative content.

It will be found that the same analysis holds for every other sentence asserting a liberty to do something. Such an assertion is in reality a *denial* of duty *not* to do the thing in question.

This is perhaps a unique phenomenon in our language. Several other words conceal a single negative behind an apparent positive, *e.g.*, "black," "cold," "heathen," "alien," "layman." "Liberty" goes one better; it manages to conceal two negatives which are logically independent of each other. (The same is, of course, true of words of similar meaning like "freedom" and "privilege.")

We may manufacture a compound noun "no-duty," meaning an absence of duty. No-duty is the contradictory of duty. Using this expression, a liberty to do something becomes a no-duty not to do it. This gives a number of different ways of expressing the same thought, *e.g.*:

"A father has a liberty to chastise his child."

"A father has not a duty not to chastise his child."

"A father has no duty not to chastise his child."

"A father has a no-duty not to chastise his child."

The only need for the noun "no-duty" is this, that lawyers commonly speak of a liberty (using various words to express the concept, not necessarily the word "liberty"), and it is sometimes clearer to be able to translate this into the language of rights and duties. Therefore it is sometimes convenient to say that a liberty is a no-duty not to do something. One can always avoid using both the term liberty and the term no-duty by saying simply that there is not a duty not to do the act, *i.e.*, by denying a duty to refrain from it.

The foregoing discussion was concerned with a liberty to do something. Now it is possible also to have a liberty not to do something. For example, I have a liberty not to pay my tailor any money, because it happens that at the moment I do not owe him any. This liberty not to pay means that I am not under a duty to pay, *i.e.*, that I have a no-duty to pay. We thus reach the conclusion that a "liberty not" means a no-duty, while a liberty means a "no-duty not."

What is the correlative of liberty not or no-duty? Since rights are correlative to duties, a denial of duty necessarily involves a denial of correlative right. Thus, the correlative of the negative concept no-duty (liberty not) is no-right, or the contradictory of a right. This is illustrated in the following sentences, all of which are equivalent in meaning to the corresponding ones previously given.

"My tailor has not a right that I shall pay him."

"My tailor has no right that I shall pay him."

"My tailor has a no-right that I shall pay him."

"The child has not a right not to be chastised."

"The child has no right not to be chastised."

"The child has a no-right not to be chastised."

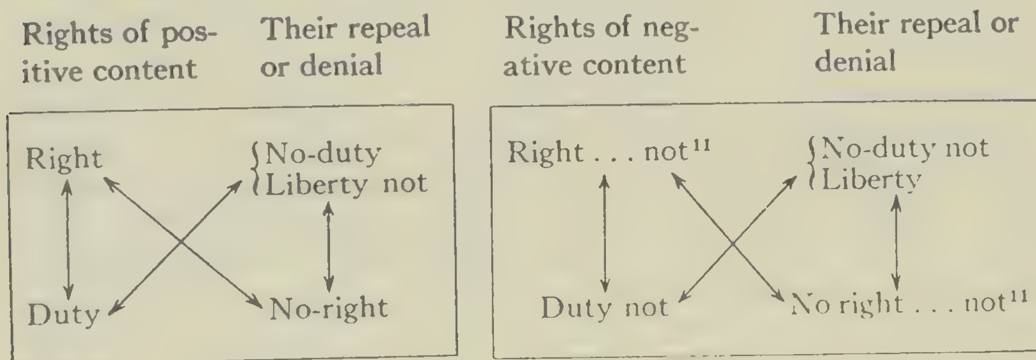
Here, again, the noun "no-right" is not necessary. It is simpler and more usual to say that a man has not a right than that he has a no-right. However, those who insist on finding a correlative for the expression "liberty" (to do

something) can be satisfied by being told that the correlative is a no-right in the other person that the thing shall not be done.

Just as the correlative of a no-duty (liberty not) is a no-right, so the contradictory of a no-duty is obviously a duty. This is where Hohfeld went wrong. He said that the correlative of a no-right is a privilege, and the contradictory (or, in his language, opposite) of a privilege is a duty. I have shown that to make these statements correct the word "privilege" must be written as "privilege not."

If it is desired to take the concept of privilege or liberty as a starting point, this is equivalent to no-duty not, and its correlative is no-right . . . not, while its contradictory is duty not.

The discussion so far may be summed up by setting out two conversion tables, in amplification and correction of Hohfeld's, explaining what happens when a right or duty is repealed or denied. Reading downwards the concepts are correlative. Reading diagonally towards the right, the tables state what happens when a right or duty is repealed or denied. In other words, the concepts connected by diagonal arrows are legal contradictories; each is a denial of the truth of the other.



Within each square the left-hand column may be taken to indicate an assertion of the present legal position, and the right-hand column to indicate what would happen if the law were altered or its existence denied. Or, the right-hand column within each square can be read as the assertion, and the left-hand column as its alteration or denial.

To give some further illustrations: I am under a duty to pay my taxes. If the tax statutes were repealed, I should have a liberty not (a no-duty) to pay taxes. Again, if *A* has a right that *B* shall not trespass on his land (right . . . not), *B* is under a duty not to trespass (duty-not); it is not true

11. The conduct to which a right obliges is the conduct of the person under the duty. There is never a right in the strict sense that the owner of the right shall do or not do something. A "right . . . not" (right of negative content) is a right *that the other shall* not do something, and so with a "no-right . . . not." The dots in the table are intended to signify the missing words "that the person under the (real or alleged) duty shall."

that *B* has a liberty to trespass (denial of liberty); it is not true that *A* has no right that *B* shall not trespass (denial of no-right . . . not).

The term no-right, which was invented by Hohfeld, has been derided by some writers, who observe that it is a purely negative expression. You might as well talk of a no-dog, it is said, as of a no-right; and again it has been remarked that a no-right may be an elephant. Oddly, these critics do not find anything laughable in the term "liberty"; yet it is an even more negative expression than no-right, for a liberty is a no-duty not.[12] Whether no-right and no-duty prove to be sufficiently convenient terms to establish themselves in the language remains to be seen; it is not a final objection that they are of quaint appearance.

IV. Legal Liberty Need Not Involve Choice

As remarked at the beginning, liberty in the sense in which that word is here used is not inconsistent with duty, for there may be a duty and a liberty of the same content. The real inconsistency is between duty and liberty not (*i.e.*, no-duty). To repeat an example already given, the repeal of the tax laws could not give me a liberty to pay taxes, for I already have that liberty; it would give me a liberty not to pay.

This is a difference between the definition of legal liberty and that of philosophical liberty. A philosopher would say that if the law regulates every action of the citizen, prescribing in detail what it is his duty to do from morning to night, there is no liberty left. Liberty, for the philosopher, implies choice of conduct, and liberty merely to do one's duty (as, to pay taxes) is a poor kind of joke. The philosopher's use of the term is important and useful, but it is not the one generally needed by the lawyer. Once legal liberty is defined as the absence of a duty to act otherwise, it follows that there can be a liberty to perform a legal duty.

Those who remain unconvinced by this argument should reflect that any difficulty they feel is caused merely by our appropriation of the word "liberty." Replace this word by Hohfeld's "privilege," and the difficulty would hardly arise. It is the word "liberty" that, through its philosophical associations, raises in the mind the notion of choice. Now this, from the present point of view, is an irrelevant factor. The concept under investigation, whatever we may choose to call it, is the contradictory of duty and the correlative of no-right. Logically, the question of choice has nothing to do with this concept. If we decide to express the concept by the word

12. *Cf.* Whately, Logic 137 (rev. ed. 1869): "Many negative terms which are such *in sense only* have led to confusion of thought from their real character being imperfectly perceived. E.G. 'Liberty,' which is a purely negative term, denoting merely 'absence of restraint,' is sometimes confounded with 'Power.' "

"liberty" (or, rather, "liberty not"), this can only be on the distinct understanding that there may be liberty to perform a duty. From this point of view, it must be confessed, Hohfeld's "privilege" is superior to "liberty": it does not import the irrelevant philosophy of choice.

This objection does not seem to be fatal to the use of the word "liberty" in the table of jural relations, because in many legal contexts the word does not necessarily imply choice. For example: suppose that a convict's sentence has expired, and the governor of the prison says to him: "You are at liberty to leave." This means that the convict will not be prevented from leaving, and that he will not commit the crime of escape in leaving. It is a perfectly natural use of language: none the less so because the convict is actually under a duty to quit the prison, his period of free board having come to an end. The statement "You are at liberty to leave" does not imply the statement "You are at liberty to stay." It is true that in many contexts of ordinary life the speaker and hearer may understand from the word "liberty" that a choice is intended. This is true even of legal documents: for example, the word "liberty" in the United States Constitution implies an ambit of philosophical freedom.[13] But in legal discussions it is best to state precisely that there is a choice (*i.e.*, that liberty and liberty not coexist), if that is meant and if it is important to express it, and to read the sentence, "You are at liberty to leave," as meaning neither more nor less than it says.

As a further illustration of this, there is a doubt whether in present law a citizen is under a duty to arrest one who commits a felony in his presence; but he certainly has a liberty and power to do so at common law. Even if there is a duty to arrest, it is meaningful to say that there is a liberty to arrest, for this means that arresting is not a tort to the person arrested.

In England, the Larceny Act of 1861 provides that a person to whom any property shall be offered to be sold, pawned, or delivered, if he has reasonable cause to suspect an offense under the act with respect to such property, "is authorised, and, if in his power, required," to apprehend the party offering.[14] The word "authorised" creates a liberty and power to arrest; the word "required" creates a duty to arrest. There is no contradiction between the two concepts.

Where the law imposes a public duty, there is an immediate inference that a liberty exists to give effect to the duty, in accordance with the maxim that "what the law requires it also justifies." In other words, "must" includes "may," for otherwise the subject of the law would be placed in the embarrassing position of having to break one or the other of conflicting duties. Even an unenforceable duty may create a liberty. Thus the Act

13. See Shattuck, *Meaning of the Term "Liberty"*, 4 HARV. L. REV. 365 (1891).
14. 24 & 25 VICT., c. 96, § 103.

of Uniformity,[16] which is still technically in force in England, imposes a duty to attend divine service; but the only punishment named is "the censures of the Church," which in effect makes the duty an unenforceable one from the legal point of view. Nevertheless the duty has some legal importance, for the duty of parishioners to attend their church is taken to create a "right" in them to enter the church.[16] This "right" is a liberty which cannot be revoked except for disorderly conduct; and its meaning is that the parishioners do not commit trespass in entering the church, and have a right not to be prevented from entering the church except for due cause.

The only instance in Anglo-American law where a public "must" does not include a public "may" is in relation to trusts for indefinite public non-charitable purposes. The effect of some authorities seems to be that if the testator has said that his trustees "may" devote property to such purposes, then they may; but if he says they must, then they may not. The latter rule has been the subject of criticism.[17] Of course it does not create conflicting duties, for the "must" is void and the only duty is to apply the property for the benefit of those otherwise entitled.

In private law, owing to the concept of duties in personam, a "must" (*i.e.*, duty) in respect of one person need not necessarily involve a "may" (liberty) in respect of another. In rare instances, the performance of a duty towards *A* is not a liberty towards *B* but is a breach of duty towards *B*. Suppose that *X* sells the same watch twice, the second purchaser not knowing of the first sale. Here *X* is under inconsistent legal duties—to deliver to the first purchaser, and to deliver to the second. Since he cannot perform both duties, he must be liable in damages to one purchaser. His performance of the one duty, being a breach of the other, is not the exercise of a liberty. To speak more precisely, his performance of his duty to one purchaser is a liberty towards that purchaser, but is not a liberty towards the other purchaser. Liberties, like duties, can exist in personam.

The lack of opposition between liberty and duty has had the peculiar consequence that in some cases a statute saying that someone may do something, or that it shall be lawful to do something, has been construed as creating not merely a liberty but a duty to do it.[18] Prima facie, however,

15. 5 & 6 Edw. 6, c. 1, § 1 (1552).

16. Cole v. Police Constable 443A, [1937] 1 K.B. 316, 330 (1936). Notice may be taken here that the word "correlative" is sometimes confused with "corollary." A correlative, properly, is one of two things having a reciprocal relation such that one of them necessarily implies, or is complementary to, the other: *e.g.*, husband-wife; parent-child; right-duty. A corollary is an immediate deduction from a given proposition, generally so obvious as not to require separate proof. When, in *Cole*'s case, *id.* at 323, counsel argued that the "right" of parishioners to attend church is correlative to their duty to do so, he should have said "the corollary of."

17. *E.g.*, Scott, *Trusts for Charitable and Benevolent Purposes*, 58 Harv. L. Rev. 548, 563 (1945).

18. Yorkshire Copper Works Ltd. v. Registrar of Trade Marks, [1954] 1 Weekly L.R.

these expressions create liberties only.[19] It is submitted that only the clearest inference from other parts of the statute should be sufficient to give a mandatory meaning to words permissive in ordinary use.

It would be possible to escape from linguistic difficulties if we could invent a completely new technical term to occupy the place in the table of legal relations. The best and clearest term would be "no-duty," so that instead of saying that *X* has a liberty to do something we should say that *X* has a no-duty not to do it. However, one can hardly hope to persuade the legal profession to use such an invented language. Thus it seems that the word "liberty," notwithstanding the ambiguities to which it is subject, is the best existing term for denoting the jurisprudential concept.

V. Liberty and Right

Quite often a liberty is called a right, *e.g.*, the right of self-defense, the right of combination, rights of way. The "claim of right" in larceny is a claim of liberty. This use of the word "right" is found even in statutes. It should, however, be avoided wherever strictness of language is required. "Right" conjures up the idea of something that can be insisted on, whereas a liberty is purely a negative expression.[20] A right exists where there is a positive law on the subject; a liberty where there is no law against it. A right is correlative to a duty in another, while a liberty is not.

It might have been thought that the last proposition had been proved beyond doubt by the labors of the classical writers on jurisprudence; yet it is still persistently denied in some quarters. There are those who still assert that a liberty corresponds to duties, or at least is surrounded and supported by duties, or is given legal protection.[21] For example, the proposition that I have a liberty to walk along the street is not (it is said) a mere negative statement, because the liberty is correlative to the duty of everyone not to stop me from walking.

The short answer to this is that the duty not to stop me from walking is merely the ordinary duty not to assault me, and this is correlative to

554, 560 (H.L.); Rex v. Worcestershire Justices, 55 T.L.R. 657 (K.B. 1939); De Keyser v. British Ry. Traffic & Elec. Co., [1936] 1 K.B. 224; Julius v. Lord Bishop, 5 App. Cas. 214, 222-23 (1880); see 3 Burrows, Words and Phrases 169, 342 (1944); Maxwell, Interpretation of Statutes 244 (10th ed. 1943); Odgers, Construction of Deeds and Statutes 270, 281 (3d ed. 1952).

19. *Cf. In re* Baker, 44 Ch. D. 262, 270 (C.A. 1890); East Suffolk Rivers Catchment Bd. v. Kent, [1941] A.C. 74 (1940); Comment, 14 Can. B. Rev. 160, 161 (1936).

20. Of course, a right frequently co-exists with a liberty; *e.g.*, my right against my debtor that he shall pay me co exists with my liberty to receive payment. However, the exercise of a right against *A* may be a breach of duty to *B*. And it would not be illogical for the law to recognize a primary right as founding a sanctioning right even in some circumstances where the primary right would be illegal. See Williams, *The Legal Effect of Illegal Contracts*, 8 Camb. L.J. 151 (1942).

21. It is not common to come across these views in print. *But see* Buckland, Some Reflections on Jurisprudence 94-96 (1945).

my right not to be assaulted. The latter right is something different from my liberty to walk along the street, which is merely an expression of the fact that there is no law against my walking.[22]

Those who wish to find a "right" (in the strict sense) to walk along the street sometimes say that it is correlative to the duty of others not to obstruct the highway so that I cannot pass along it. This obstruction would be a public nuisance, but the rule is that no member of the public can sue for damages sustained from a public nuisance unless particular damage is suffered, over and above that suffered by the rest of the public. Thus your duty not to obstruct my passage along the highway is, properly speaking, a duty owed to the state; the only duty you owe me in this respect is a duty not to cause me particular damage by obstructing the highway, which is correlative to my right not to receive particular damage. This is obviously different from my liberty to walk, which requires no reference to damage.

The argument that rights and liberties are the same is usually based on the proposition that every one has a right not to be interfered with in the exercise of his liberties. This, however, is a fallacy. There are in fact two different propositions involved, viz.:

"I have a liberty to do this"; and

"I have a right not to be interfered with in doing this."

Even if in a particular context the second proposition is true as a matter of law, the two propositions mean different things. The first means that I do not commit a tort or other legal wrong by doing so-and-so. The second means that you commit a tort or other legal wrong by interfering with my doing so-and-so. These are different statements.

But the truth is that the second proposition does not invariably coincide with the first as a matter of law. It often does, because of the width of the law of tort, particularly in such torts as assault and false imprisonment. Yet circumstances arise in which there can be a liberty to do something without a right not to be interfered with in doing it. These are the well-known instances of *damnum absque injuria*.

(1) It has already been shown that this is partly true of the public liberty of passage along the highway. (2) You and I are walking together when we see a gold watch lying in front of us. I have a liberty to run forward and pick it up. (Also a power by so doing to obtain a title good against all save the true owner.) But you may run faster than I and pick it

22. It can be said that you have no liberty to stop me walking. This means that you have no excuse if sued in tort for assault. It is an assertion that my general tort-right not to be assaulted applies to these particular facts. The sentence does not mean the same as the sentence, "I have a liberty to walk down the street."

up first; this will *de facto* be an interference with me in the exercise of my liberty, but will not be a tort or other legal wrong to me. My liberty is a bare liberty unsupported by a right in this particular respect. This was essentially the situation in *Mayor v. Pickles*:[23] the corporation of Bradford had a liberty to receive the percolating water but no right against other landowners to receive it. (3) After much inquiry I have discovered a good cook who is willing to take employment with me. I have a liberty and power to employ her, but you commit no tort by offering better wages and so displacing me. (4) One who has a license to use land has a liberty, but according to the traditional position of the common law has no right against third parties not to be interfered with.[24] (5) I have a liberty to erect a house on the edge of my land (provided that I obtain any requisite governmental permission); but my neighbor has a liberty to dig a quarry on the edge of his land and so cause a subsidence of my house, thus rendering it impossible for me to build effectively. (The only exceptions are where I have an easement of support, or where the quarry would cause a subsidence of my land even if it were unweighted by buildings; in these two instances I should have a right of action.)

One of the clearest examples of a liberty unprotected by corresponding duties is the liberty of speech. It may be asserted that I possess this liberty; yet no one is under a duty to assist me in my speech, to listen to me, or (since I am neither a judge nor a parson) to preserve silence while I am speaking. The only relevant duty that can be discovered is the duty not to gag me; but this, of course, is only part of the ordinary duty to refrain from assault. It has no specific connection with liberty of speech. A person who is not gagged may still fail to make others pay attention to him; he has no right to be heard. Were there such a right, every one who did not hear the speaker would break his duty. In truth the liberty of speech is, as Dicey showed, the residuum after subtracting all the particular duties to refrain from sedition, slander, etc.

From this discussion there emerges a principle of some importance in dealing with these fundamental legal concepts. This is that, in arguing from a concept to its correlative, the content of the concept must not be changed. It is not permissible to deduce from the proposition that *A* is under a duty not to gag *B* the proposition that *B* has a right to speak freely. Wherever there is the possibility of fallacy, the content of the right should

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23. [1895] A.C. 587.

24. Some decisions, however, give a wider measure of protection, either by allowing an action for the tort of interference with contract—see G.W.K. Ltd. v. Dunlop Rubber Co., 42 T.L.R. 376 (K.B. 1926), *appeal dismissed*, 42 T.L.R. 593 (C.A. 1926); PROSSER, TORTS § 106 (2d ed. 1955)—or by regarding the license as a "clog or fetter" on the title of the licensor.

be stated in the same language as the content of the correlative duty, and vice versa. If the verbal formula be changed, this may give rise to the suspicion that the content of the concept has been changed, and consequently that there is a flaw in the reasoning.

To test whether an alleged "right" is a right in the strict sense, ask whether it has a legal duty correlative to it, and keep to the same formula when stating the duty. Thus it is fallacious to argue that the "right" of a licensee to go upon land is correlative to a duty on the occupier not to set traps. Similarly the "right of way" (as, by way of easement) is not a right, because there is no duty of way. A person entitled to a right of way has not a right to walk, because the other is under no duty that he shall walk. If the dominant owner decides to stay at home and not walk, this would be no tort to the servient owner. The "right of way" is a liberty of way combined with the ordinary right not to be assaulted when exercising it and a right not to have the way obstructed.

There is another method of showing that "right of way" is a misnomer. No one ever has a right to do something; he only has a right that some one else shall do (or refrain from doing) something. In other words, every right in the strict sense relates to the conduct of another, while a liberty and a power relate to the conduct of the holder of the liberty or power. A statement that a person has a right to do something generally means that he has a right in the strict sense not to be interfered with in doing it.

It may be thought that the phrase "right of way" is not a favorable illustration of the argument, for it is, after all, a convenient and relatively harmless abbreviation of "right not to be prevented from passing." In so far as the first phrase means the second, it is a true right. A liberty of way under an easement is so closely coupled with a right that it is convenient to speak of the complex as a right of way. If a person were given a revocable license of way, that is to say a bare liberty of passing, we should hardly call it a right of way. This shows that "right of way" is a contracted expression connoting a protected enjoyment, and involving a right proper.[25] While accepting the convenience of this language, it is still necessary to insist as a matter of analysis that the right and the liberty are distinct.

The use of the word "right" in an extended sense to include liberties is inveterate and probably beyond recall; but there should at least be an awareness of the ambiguity. For right in the sense of liberty, Terry suggested the phrase "permissive right"; for right as correlative to duty he suggested "correspondent" or "protected right."

25. Even a bare license cannot be revoked except upon reasonable notice, so that until the expiration of the reasonable notice the licensee is protected by a right not to be interfered with in derogation of the license. See Minister of Health v. Bellotti, [1944] K.B. 298 (C.A.).

VI. Some Examples of Fallacies

To give point to the argument, it is necessary to show how confusion of terms has in the past led to false reasoning.

The error has sometimes been made in conspiracy cases, and in those relating to restraint of trade. Thus Lord Parker said,

> At common law every member of the community is entitled to carry on any trade or business he chooses and in such a manner as he thinks most desirable in his own interests, and inasmuch as every right connotes an obligation no one can lawfully interfere with another in the free exercise of his trade or business unless there exists some just cause or excuse for such interference.[26]

Here the first proposition is readily accepted, though in its ordinary meaning it refers only to a liberty; Lord Parker takes advantage of the ambiguity of the word "entitled" to assume that it is also a right in the strict sense, for he proceeds to find a correlative obligation, *i.e.*, duty. Thus a tort of interfering with trade materializes out of the thin air of a logical fallacy. Other judges have pointed out the *non sequitur*.[27] Of course, the recognition of the tort may be socially desirable notwithstanding the illogicality of the argument used to establish it. Since judges do not readily admit to making law, a fallacy is often the only acceptable mode of establishing a new rule. But when the decision on the point of policy remains unavowed, one has no assurance that the relevant considerations have been weighed.

I have heard the reply made to this criticism that the liberty to trade necessarily involves a right not to be interfered with in trading, for otherwise what use is it? The answer to this is that the liberty to trade is of precisely the same "use" as any other liberty; it states a protection from legal proceedings for breach of duty. This may be shown by taking a regulated profession. I have no liberty to practice as a medical practitioner, because I am not qualified. Dr. Smith has a liberty to practice, because he is on the medical register. His liberty to practice means that he commits no offense in practicing. It does not in itself mean that he can sue others who in some way interfere with his practice. Whether he can sue others depends upon his rights, not upon his liberties.

The next clinical specimen is taken from an argument advanced by a

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26. Attorney General v. Adelaide S.S. Co., [1913] A.C. 781, 793 (P.C.); *cf.* Sorrell v. Smith, [1925] A.C. 700, 727-28; Quinn v. Leathem, [1901] A.C. 495, 534 (discussed in Hohfeld, Fundamental Legal Conceptions 42 (1934)); Allen v. Flood, [1898] A.C. 1, 14, 33 (1897) (from which it appears that this particular fallacy goes back to a book published by Erle).

27. Per Lord Dunedin in Sorrell v. Smith, *supra* note 26, at 727-28; Allen v. Flood, *supra* note 26, at 29, 151.

great master of the common law. In an article in the *Law Quarterly Review*,[28] Pollock examined the legal effect where *A* purports orally to give *B* a chattel, but does not deliver it. For example, *A* says, "I hereby give you this watch," but although *B* is waiting expectantly, nothing else happens. Pollock suggested that the words of present gift, though they do not pass the ownership of the chattel (for it is only delivery or a deed that can pass legal ownership by way of gift), nevertheless operate as a revocable license (and, indeed, a power) to take it. *B*, the imperfect donee, may therefore take the watch if he sees it lying about, and if he does so the delivery will become perfect and he will obtain ownership. But suppose that, before he can take it, it is stolen by a stranger. Can *B* sue the thief for conversion? Pollock suggested that he can, and the way in which he arrived at that conclusion was as follows: Anyone who has an immediate right to possession can bring trover, and *B* (in Pollock's view) has an immediate right to possession, because it would be lawful for him to take possession if he could.

Here again we have a covert transformation of terms. Pollock's proposition that an imperfect donee can sue a stranger in trover is not proved by the argument that precedes it. For the right to recover damages in trover is founded on possession or on an immediate right (in the strict sense) to receive possession of the chattel—not upon an immediate liberty to take possession of the chattel. Conversion, like every other tort, is a legal wrong, a breach of duty towards the plaintiff. It is a violation of the plaintiff's right in the strict sense, not a violation of the plaintiff's liberty; in fact there is no such thing in analytical jurisprudence as a violation or breach of liberty. Pollock's argument is plausible only because of the ambiguity of the word "right." In fact the argument, or one very like it, was rejected by the English Court of Appeal in a recent case.[29]

The ambiguous use of the word "right" caused the plaintiff in *Chaffers v. Goldsmid*,[30] to waste his money in fruitless litigation. It is frequently said by writers on the English constitution that there is a right in the subject to petition Parliament for the redress of grievances. What this means is that it is not a contempt of Parliament to do so; that there is a regular parliamentary procedure for receiving petitions; that petitions have absolute privilege in libel;[31] and perhaps that they have privilege in the law of sedition. The plaintiff, however, assumed not unnaturally that there was a right in the strict sense, and he accordingly sued his Member for damages for refusing to present a petition, and for a mandamus. The action failed. This case shows how important it is to have a precise legal terminology. If English

28. Pollock, *Gifts of Chattels Without Delivery*, 6 L.Q. Rev. 446 (1890).
29. Jarvis v. Williams, [1955] 1 Weekly L.R. 71 (C.A. 1954).
30. [1894] 1 Q.B. 186 (1893).
31. Lake v. King, 1 Wms. Saund. 131, 85 Eng. Rep. 137 (K.B. 1667).

law were codified, it would be undesirable to provide that a man has a right not to be assaulted and a right to petition Parliament, for the two rules have quite different effects and need different language for their proper expression.

The curious uncertainty of usage now prevailing is further illustrated by the following passage from a judgment of Evershed, M. R., in the English Court of Appeal, relating to a permission to use land.

> If the nature of the privilege given is a mere licence unsupported by consideration, it cannot strictly be stated that any 'right' to occupy had been conferred at all. No doubt, until it was revoked, the occupant, the licencee, could not be said to be a trespasser, but he could not claim and enforce in the courts any right to continue in occupation, still less exclusive occupation, of the property. But it might be that there could be a tenancy at will without consideration. In so far as there was a tenancy, that would appear to involve an exclusive right of occupation.[32]

Here the suggestion in the concluding sentence seems at first sight to contradict the earlier reasoning. The first part of the passage implies that a person has not a right to occupy if he cannot enforce in the courts a right to continue in occupation. Now a tenant at will (referred to in the concluding sentence) cannot enforce against his landlord any right to be allowed to continue in occupation; consequently he has not, against his landlord, a "right of occupation." However, the tenant at will has a right at common law against strangers not to be disturbed in his enjoyment of the land. On the other hand the gratuitous licensee, referred to in the earlier reasoning, was thought, when this judgment was pronounced, not to have a right against strangers. Hence it may be that the learned Master of the Rolls intended to refer to this distinction of right against strangers, but the judgment is not clear.[33]

VII. Liberty Not as Affected by the Characteristics of Duty

Since liberty not is a denial of duty, it takes its meaning from the duty that is denied.

(1) Some duties are to refrain from wilful wrongdoing, or negligence; others are strict. Liberties exhibit corresponding distinctions. Damage inflicted by negligent driving is a breach of duty; but damage inflicted by driving without negligence (inevitable accident) is done in pursuance of liberty.

(2) Some duties are imposed by the criminal law, others by the civil law. It might be convenient to speak correspondingly of criminal liberties

32. Goldsack v. Shore, [1950] 1 K.B. 708, 714 (C.A.).

33. Possibly even this distinction has disappeared with the new protection given by the courts to the licensee; but the extent of this protection is disputed, and it is not certain that the decisions apply to a gratuitous licensee.

and civil liberties; but the former expression is unusual, and the latter has the specialized meaning of constitutional liberties (including even constitutional criminal liberties).

By the Canadian constitution, the provinces have legislative power in respect of "property and civil rights in the Province." In *Toronto Electricity Comm'rs v. Snider*,[34] the Privy Council held that a Dominion statute interfered with civil rights when it suspended liberty to lock-out or strike during a reference to a board. Now the statute did not make the lock-out or strike a tort or breach of contract but only made it a crime; hence it did not affect non-criminal liberties but only criminal liberties. Nevertheless it affected civil rights within the meaning of the constitution.

(3) Some duties are in personam; hence, as said before, it is possible for a "liberty not" to exist against *A* but not against *B*.

VIII. The Non-Emotive Character of Legal Liberty

The fact that conduct is a liberty does not necessarily imply any sort of approval of it by the law. *Non omne quod licet honestum est.*[35] It used to be thought that the aim of the criminal law was to suppress moral wrongdoing, but the growth of the deterrent theory of punishment and the realization that there are limits to effective legal action have modified this view. Thus the maxim of the enlightened legislator is: *Non omne quod inhonestum est prohiberi debet.* Yet even at the present day, proposals to restrict the law of abortion, incest, and sodomy on utilitarian grounds are sometimes met with the objection that "the law cannot countenance that sort of thing." The notion that the repeal of a prohibitory statute involves approving or condoning the conduct in question is extraordinarily persistent and is a serious obstacle to legislative change.

The strong emotive character of "privilege" is one reason why it is unsuitable for use as a general synonym for liberty. Thus in one case Channell, J., expressed the opinion that it was inaccurate to speak of the privilege of a judge to be malicious, because such conduct would be wrong of him.[36]

The law may concede a liberty and yet strike at it indirectly, for example, by the law of public policy in contract. Lord Wright said that "a legal liberty may form the basis of blackmail"[37]—not because the exercise of the liberty is legally or morally wrong, but because it is wrong to make certain forbearances a means of extorting money.

Different grades of liberty are also found in other contexts. In the law

34. [1925] A.C. 396, 403.
35. Paul, D. 50. 17. 144.
36. Bottomley v. Brougham, [1908] 1 K.B. 584, 586.
37. Thorne v. Motor Trade Ass'n, [1937] A.C. 797, 822.

relating to by-laws (and, probably, other forms of delegated legislation) a distinction is drawn between what may be called a protected liberty and a bare liberty. A protected liberty exists when a statute expressly enacts that it shall be lawful to do so-and-so, or uses words that are construed as having the same effect; a bare liberty exists when the statute book merely refrains from forbidding the conduct in question. In the former case, a by-law forbidding the conduct is invalid for repugnancy; in the latter it is not.[38] A similar distinction prevails in the law of contract. The English rent acts are construed as conferring upon a landlord a protected liberty to charge his statutory tenant the standard rent, and a term in the previous contract that the rent shall be less than the standard rent is repugnant to this liberty, even though it is not repugnant to the liberty (also possessed by the landlord) of charging less than the standard rent if he likes.[39] Yet another variant of the protected liberty may be found in connection with self-defense. Some liberties are accompanied by a duty upon other persons to submit to the exercise of the liberty, while other liberties are not so accompanied. The liberty of a jailer to imprison the convict is a protected liberty in the sense that the convict is under a duty to submit and is not allowed to commit a battery in order to escape. In contrast, suppose that a lunatic, not knowing what he is doing, attacks a man; even if the lunatic is not liable in tort or crime, so that his attack is legally the exercise of a liberty, the person attacked has the usual liberty of self-defense.

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38. Powell v. May, [1946] K.B. 330; *cf.* London M. & S. Ry. v. Greaver, [1937] 1 K.B. 367 (1936); Gentel v. Rapps, [1902] 1 K.B. 160, 166 (1901); Thomas v. Sutters, [1900] Ch. 10 (C.A.); White v. Morley, [1899] 2 Q.B. 34.

39. Dean v. Bruce, [1952] 1 K.B. 11 (C.A. 1951).

[3]

FOURTH SYMPOSIUM

The Correlativity of Rights and Duties[1]

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It is commonly held that rights "correlate" with duties.[2] By this is usually meant at least that rights imply duties (even if not all duties imply rights) and also that claims of individual rights need not be recognized unless backed by proof that corresponding obligations obtain. Such a doctrine of correlativity also forms part of the view that rights must be understood or analyzed in terms of duty or obligation.[3]

I shall examine this doctrine, beginning with a clear case of "correlativity," turning then to cases that diverge from it significantly. I argue that it is at best misleading to say that rights generally "correlate" with duties.[4] For the implications between them

[1] To be presented in an A.P.A. symposium on Rights and Duties, May, 1970. Commentators will be D. Braybrooke and M. Singer.

[2] See for example Bentham, *Works*, III, p. 159 and many recent writers including S. I. Benn and R. S. Peters, *Social Principles and the Democratic State*, pp. 101f; R. B. Brandt, *Ethical Theory*: 433-441; E. F. Carritt, *Ethical and Political Thinking*, p. 77; R. Grice, *The Grounds of Moral Judgment*: 37f; J. Hospers, *Human Conduct*, p. 386; W. D. Lamont, *The Principles of Moral Judgment*: 80-95; W. D. Ross, *The Right and the Good*: 48-56.

[3] The differences between having a duty and being under an obligation are, I think, peripheral to this discussion and can be ignored. I assume throughout that moral and legal rights are analogous.

[4] Compare G. Williams, "The Concept of a Legal Liberty," *Columbia Law Review*, LVI (1956): 1129-1150. For the groundbreaking work on rights by jurists, one should start with W. N. Hohfeld, *Fundamental Legal Conceptions*.

vary substantially with the kind of right in question; it is not clear that all rights imply duties; and even if they do, to emphasize the common elements is to obscure important differences among the "correlations."

I

The following should exemplify the correlation of rights with duties. Suppose that Bernard owes Alvin ten dollars: we then have equal reason to ascribe a right to Alvin and a corresponding obligation to Bernard. Bernard's obligation is to pay Alvin ten dollars; but his obligation is also *to Alvin*—or, as we say, it is "owed" to Alvin in particular.[5] Alvin has a corresponding right, to be paid ten dollars by Bernard, which is held "against" him specifically.

Alvin's right and Bernard's obligation do not merely coexist: their *co*existence is necessary, not contingent. Neither the right nor the obligation could arise without the other, and if one is discharged, waived, cancelled, voided, forfeited or otherwise extinguished the other must be extinguished as well. For the "ground" of the obligation—the undischarged debt—is the "title" of the right.

This right and obligation entail one another. A statement ascribing one warrants fully an inference to the other, without appeal to contingent facts or substantive principles. It is not that facts or principles have no bearing on the case: assertions of the right or obligation may presuppose principles deriving them from certain kinds of fact. But, if we are *given* either the right or the obligation we can infer the existence of the other.

Moreover, such implications are, as we might say, *specific* and the correlations *determinate*. A full statement of the right or the obligation implies a full specification of the other. It is not that Alvin's right implies merely that there is some coexisting obligation, but that Alvin's having this particular right implies that Bernard is under an obligation, to Alvin, to pay him ten dollars (and vice versa).

These tight correlations are quite common. They occur not only when debts (in the ordinary sense) are owed but also when certain other relations exist between two or more individuals—as a

[5] See H. L. A. Hart, "Are There Any Natural Rights?", *Philosophical Review*, LXIV (1955): 179-181, and J. Feinberg, "Duties, Rights, and Claims," *American Philosophical Quarterly*, III (1966): 137-144.

consequence, for example, of promises and contracts, wrongful injuries that require reparation, relationships such as parent to child and teacher to student. In such cases it seems natural to speak not only of *A*'s having certain rights but of his having them "against" *B* in particular and likewise of *B*'s reciprocally "owing" an obligation to *A*.

There is, then, a familiar class of cases which can sensibly be talked about in terms of the "correlations" of rights and duties, and it is tempting to suppose that whenever "rights"and "duties" or "obligations" can be ascribed the pattern will recur. But while there are various implications between rights and duties, the pattern just sketched does not arise whenever rights and duties obtain. Before comparing our first kind of case to others, however, let us consider it more closely.

The doctrine of correlativity sometimes assumes a particularly strong form, when it is held that rights and duties do not merely imply one another but do so because they are *conceptual* correlatives. This idea is that "there can be no right without a corresponding duty, or duty without a corresponding right, any more than there can be a husband without a wife, or a father without a child."[6] The suggestion is most plausible, however, when restricted to cases like our original one, where rights are held "against" and duties "owed" specific individuals. The relation here is like that between "right" and "left." Just as statements of the form "*A* is to the right of *B*" and "*B* is to the left of *A*" entail one another in virtue of the correlative meanings of "to the right of" and "to the left of," so a statement of the form "*A* has a right against *B*" implies and is implied by a statement of the form "*B* has a duty (or, is under an obligation) to *A*" in virtue of the correlative meanings of "has a right against" and "has a duty (is under an obligation) to."

But this cannot be all there is to it, for the propositional functions, so stated, are incomplete. Rights and duties not only connect ordered pairs (or sets) of persons; they also have contents. By "contents" I mean, *what* it is that *A* has a right to and *what* it is that *B* has a duty or obligation to do. These must also have a definite relation if we are to be able to infer the right or the obligation from the other directly, and *a fortiori* if rights and duties are to be regarded, even in this limited class of cases, as conceptual correlatives. For just as Alvin's right against Bernard does not

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[6] *Salmond on Jurisprudence* (11th edn., by G. Williams), p. 264.

correlate with Dana's obligation to Charles, so Alvin's right to be paid ten dollars by Bernard does not correlate with Bernard's obligation to apologize to Alvin. There can be independent relations of rights and duties between the same two persons.

If *A*'s right and *B*'s obligation entail one another as we are supposing, there should be a formal rule connecting their contents. Examples suggest such a rule: *A*'s right to be obeyed by *B* links with *B*'s duty to obey *A*, just as Alvin's right to be paid by Bernard goes with Bernard's obligation to pay Alvin. The rule is that the expression of the content of the right is related to the expression of the content of the obligation as the passive is related to the active voice.[7] Were this the rule we could reasonably say that the right and the obligation have the same content, for they would both concern (in just verbally different ways) some required behavior of *B*'s with respect to *A*. This would support the thesis of conceptual correlativity and explain why it is so clear not only that such rights imply corresponding obligations but also what those obligations are and upon whom they are incumbent.

There are complications I cannot deal with here. I have sketched a notion of "conceptual correlativity" restricted to rights held "against" and duties or obligations "owed" to specific persons. These do not exhaust the classes of rights and obligations: such restrictions need explaining and justifying. The notion is also restricted to "passive" rights and "active" obligations; and one might wonder whether some "active" rights do not also correlate with obligations. I shall not try to answer this, but I shall argue that some "active" rights (rights *to do* things) do not fit the pattern delineated.

Before going on, finally, I wish to protect my limited claims against possible objections to my characterization of Alvin's right and thus to the formal rule and the restricted thesis of conceptual correlativity. Some may think it more felicitous to say that Alvin has a right to *expect* or *demand* payment than a right to be paid. But "expect" is too weak: one might have a right to expect money even if none is owed; and if there is a debt, the right is not just to expect payment but (one is tempted to say) to the money itself. This goes too far, of course, for the right is not to any specific bit of cash but only to payment of a certain amount—my way of describing it. "Demand" seems too strong: one does not have a right to *demand*

[7] Compare M. Radin, "A Restatement of Hohfeld," *Harvard Law Review*, LI (1938), p. 1150.

payment unless one's debtor fails or at least threatens not to pay—in other words, does not respect one's right to be paid. Another possible referent of "right to demand payment" is the "right" one has to refuse to forgive a debt—which complements the "right" one has to forgive it, both of which seem but constituents of the complex right to be paid. These objections thus seem to fail.

Nevertheless, it might be thought that a "right to be paid ten dollars by Bernard" could not be the one that correlates with Bernard's obligation to pay Alvin, for anyone might have the right so described whether or not Bernard owes him anything. But this is mistaken: Alvin's right can be described as a right held "against Bernard"—which indicates that Alvin has a legitimate claim he may press or waive as he chooses. The right of a noncreditor, by contrast, cannot be qualified as a right "against Bernard," for it rests on no such special claim relation (and it is more naturally described as a right to *receive* or *accept* money anyway).

Consequently, I see no reason to redescribe the right, and I shall assume that such rights and obligations are but two sides of the same coin.

II

In the sort of case with which we began, therefore, to say that someone has a right seems just another way of saying that someone else is under a certain type of obligation. Let us compare that with a new example. Suppose that Alvin is atop a soap box speaking to a crowd against United States military involvement in Vietnam. His act is perfectly lawful, but he is assaulted by some private citizens, driven from the box and silenced. Their behavior is unlawful and constitutes unwarranted and prohibited interference with the exercise of his legal rights. In saying this we may refer to his general right of free speech or to a specific right to stand there addressing the crowd. In either case the right might be construed as a right *to do* something. How is that to be understood?

A common view is that such a right consists of an area of free choice protected by prohibitions against interference. For example, to say that Alvin has a legal right to do *X* is, on this view, to say that (1) it is not unlawful for Alvin to do *X* (or, perhaps, to refrain from doing it) and (2) it is unlawful for others to interfere with Alvin's doing *X*. But this needs adjusting if we seek a schema that could be applied to moral rights as well. We

cannot simply substitute "immoral" for "unlawful" in (1) because we should allow in morals (what we may not need to allow in law) that there are rights it can be wrong to exercise. We might say that there is a nonvacuous presumption which must be rebutted before it can be shown that Alvin's doing *X* is wrong. But our argument does not require us to pursue this.

Can such rights be assimilated to those with which we began? I think not. I shall note some counter-indications and then develop one particular difficulty. To be assimilated, it must be the case that the assertion of Alvin's right to stand on the soap box addressing the crowd is equivalent to the assertion of correlative obligations incumbent on others. There is at once a difficulty I shall mention and waive. It is not clear that the relevant prohibitions (against assault, and so on) are properly characterized as "duties" or "obligations";[8] but unless they are there is no chance of construing such rights on the pattern of our first example. It is also unclear that assertions of these "obligations" exhaust the content of the right; for such "active" rights seem to say in part that the behavior in question is at least *prima facie* permissible or unobjectionable; while Alvin's right to be paid says no such a thing about his own behavior. Also, one who emphasizes the "free choice" element of "active" rights might think it comparable to the "free choice" enjoyed by Alvin; but the latter is the private "power" or "capacity" he has to change his relation to Bernard—by forgiving the debt, waiving his right and cancelling Bernard's obligation or refusing to do so. Nothing corresponds to this in the sort of "active" right we are considering.

What I wish to scrutinize more closely, however, is the view that the prohibitions on others' behavior constitute not only an obligation but also one that stands to "active" rights just as Bernard's obligation to pay Alvin correlates with Alvin's right. Before proceeding, a digression to underscore my general thesis that rights relate in different ways to obligations.

Alvin's Constitutional right of free speech cannot be construed as an area of free choice protected by others' obligations. This right is conferred by the First Amendment, which deprives Congress and other governmental agencies of the authority (the legislative "power" or "capacity") to enact laws requiring or prohibiting speech of certain kinds (among other things). If the Supreme

[8] See Hart, *op. cit.*, 178 and 181, and also his "Legal and Moral Obligation," in *Essays in Moral Philosophy* (ed. by Melden).

Court reviews such a law it finds it null and void, with no legal effect.

Now it is easy to confuse this right with an area of free choice protected by prohibitions against interference, for the latter can be inferred from the former and standing conditions. If Congress cannot restrict one's speech then it is not unlawful for one to speak or remain silent; and since one is *generally* protected against interference (as I shall argue) others also have "obligations not to interfere." But such Constitutional rights are *not the same* as these protected areas of choice since we could lose the former and retain the latter. To see this, imagine the First Amendment repealed: then Congress would acquire the "power" to enact legally binding laws restricting speech now unrestrictable. But Congress could have this power without exercising it, and thus it could happen that speech was no more restricted than it is right now and that one's speaking and remaining silent were equally lawful and protected against interference even though we could no longer truly say that we have Constitutional rights of free speech.

These Constitutional rights exemplify what some jurists call "immunities,"[9] for to assert them is to say that protected areas of speech *cannot be taken away*. Alvin's Constitutional right has a conceptual correlative: but it is not an obligation; it is a legislative "disability," the assertion of which says that Congress is not empowered to enact certain laws.

It may still be tempting to search for "correlative" obligations here; but the candidates are implausible. The Constitutional right of free speech is independent of, for example, the obligation not to assault that was breached by those who silenced Alvin. Nor does it correlate with obligations incumbent on Congress. There may be some point in speaking of a Congressional "obligation" not to (try to) exceed one's legislative powers or, more specifically, not to restrict speech guaranteed free by the First Amendment. But this "obligation" would be a queer one, for the members of Congress are not subject to civil or criminal action against them if they "breach" it by enacting unconstitutional laws. If they do this their actions could be described as "illegal" or "unlawful" only in the sense of "invalid": it is not that they would *break* the law in so acting, but rather that they would *fail to make* valid and binding law.

[9] On "immunities," "disabilities" and "powers," see Hohfeld, *op. cit.*, or the helpful summary in *Salmond on Jurisprudence*, ch. 10.

"Immunities" are probably not thought of by philosophers who proclaim the general correlativity of rights and duties. But that slogan is presumably applied to Alvin's right to address the crowd, to which we now return.

The men assaulting Alvin acted unlawfully and may be said to have breached a legal obligation. They might have done the same in other ways; by threatening, coercing, forcibly restraining or abducting him, for example. These are at least the *usual* ways of interfering with the exercise of someone's rights, and consequently the prohibitions upon such forms of behavior (either in law or morals) might be thought to constitute an aggregate "obligation not to interfere" which correlates with Alvin's right. But this is not plausible, since others' having *these* obligations does not entail that Alvin has any particular right to do anything. If so, they cannot correlate with Alvin's right according to the pattern discerned before. I shall explain.

It sometimes seems to be assumed that Alvin is not protected by prohibitions on our behavior unless he has a right to do what he is doing, which makes it seem as if Alvin's right (when he has one) and the prohibitions are more closely connected than they actually are. But this assumption is false. Most of the things that we are prohibited from doing to or with respect to Alvin when he is acting within his rights we are also prohibited (by law and morals) from doing when he has no right to act as he does. If Alvin's soap box talk had been illegal and he had acted without a legal right, those who assaulted him would still have acted illegally themselves. Similarly, if it could be shown that Alvin had no moral right to make that speech it would not follow that we would have been morally entitled to interfere. I have no right to kill Alvin in order to prevent his stealing candy from a baby; I have no right to gag him to prevent his lying; I have no right to torture him to dissuade him from breaking a promise. This is not to say that Alvin's acting outside his rights has no bearing on the way we may treat him—only that it does not entitle us to treat him as we please. In some cases we are allowed to interfere; in order to defend ourselves, for example; but these seem to be special exceptions to the ordinary sweeping prohibitions against killing and assault. In other words, from the fact that others are prohibited from acting in ways that constitute interference with *A*'s doing *X* it does *not* follow that *A* has a right to do *X*. So the ordinary legal and moral prohibitions which serve to protect someone in the exercise of his

rights do not logically correlate with those rights since others are, in general, under such obligations even when one does not have a right to act as he does.

Before considering some rebuttals, we should deal with the possible inference in the other direction—from "active" rights to protecting obligations—for this alleged entailment is all that is sometimes meant by the equivocal term "correlativity." It must be borne in mind, however, that if the inference works in this direction *alone*, there is a significant disanalogy between such "active" rights and Alvin's right to be paid.

From the fact that Alvin has a right to do *X* does it follow that others are prohibited (in law or morals) from interfering with his doing *X*? It should be obvious now why one may be tempted to say yes—and also why at least some of the grounds for saying yes are insufficient. Since others are prohibited in general from (e.g.) assaulting, threatening, coercing and forcibly restraining Alvin, they are prohibited from doing such things when they constitute interference with the exercise of his rights. And thus counterexamples to the alleged entailment between such "active" rights and these "obligations not to interfere" will be impossible. It may *seem* as if these obligations follow from, are "part" of or "correlate" with Alvin's right. But once we see that these obligations apply generally, whether or not Alvin acts within his rights, and that this is what makes it seem as if they follow from Alvin's right, we should no longer be tempted to say that they do follow.

Let this be granted. I shall consider two ways in which a partisan of general correlativity might try to save that doctrine. He might claim that, besides the ordinary obligations mentioned, there are also extraordinary or special obligations that strictly correlate with "active" rights. For the ways in which one might interfere with Alvin's speaking are not, perhaps, exhausted by the class of things the ordinary prohibitions cover; and some of this surplus might be prohibited as well. Certain forms of verbal abuse might be prohibited when used against a public speaker, for example, but not otherwise. If so, the obligation imposed would correlate with Alvin's right to speak publicly.

But this is not a promising line of defense, for it is a contingent matter in the law, at least, whether any such special obligations are imposed; and so the existence of such obligations would not be *implied* by (though they would imply) the right to speak publicly. One might deny this if he were willing to say something

like (a) that any relevant change in the law (however minor) changes the sense of the statement that Alvin "has a right to speak publicly," or (b) that any such change destroys one right and creates another in its place, though the two would be described identically. But I see no reason to construe the case in such a way except to defend at all costs a general doctrine of correlativity. Furthermore, unless we suppose that the analysis of moral and legal rights diverges at this point, any such special obligations in morals are not implied by moral "active" rights either.

Another line of defense is given by the claim that there is a *general* obligation not to interfere with another person, an obligation not exhausted by the ordinary prohibitions. For one is rarely justified (in morals at least) in interfering with another's doing what he has a right to do. But this suggestion too is covered by our previous remarks. On the one hand, the existence of a general legal obligation not to interfere is a contingent matter (it may protect some forms of behavior and not others). And on the other hand, I think it also true that one is rarely justified on moral grounds in interfering with another *whether or not* he has a right to do what he is doing—unless one is defending oneself or preventing substantial harm to others.

III

Am I claiming, then, that it is not generally true that rights "correlate" with duties or obligations—even in the minimal sense of implying them? Well, yes and no. Our Constitutional right of free speech does not correlate with duties in anything like the way that Alvin's right correlates with Bernard's obligation. But given certain assumptions there may be ways of deriving statements about some obligation or other from the assertion of such a right. It would be most misleading, however, to call the implication a case of "correlativity" if that term is also used to characterize the very tight, determinate relations between rights and duties exemplified by our first example. I am not even prepared to grant that run-of-the-mill "active" rights directly imply specific obligations not to interfere. It seems correct and natural to say, for example, that a motorist has a right to make a right turn on a red light in California which he does not have in New York State, in virtue of the differences between the traffic laws of those two states, whereby making a right turn on a red light is prohibited unless explicitly

authorized in New York, whereas it is permitted, and indeed required when traffic allows, in California. This example may help debunk several dogmas about rights.

First, what implications does the assertion of this right have about others' obligations? The right does not impose on other motorists an obligation to stay out of one's lane, for example; if there is such an obligation (e.g., not to block traffic) its existence seems independent. It seems more plausible to say that this right imposes obligations on law-enforcement officials not to interfere with one's making a right turn (when allowed by the conditions of the right). But we know that a policeman may stop a car for various reasons even though the driver is not violating any regulations; so *what sort of* interference *is* excluded by this right? and *by whom* specifically? A policeman may admittedly be under an obligation not to stop or disturb a private citizen without cause—but can we say that *that* obligation is "correlative" with my right to make a right turn on a red light in California?

Second, some might maintain that rights imply "correlative" duties because the point of claiming or asserting a right often is to deter, discourage, prevent, protest or stop unwarranted interference. But there are other ways of accounting for this phenomenon. Moreover, assertions about rights can have other points. Our traffic law example could be used to remind, contrast or instruct, and would not likely be used to protest unwarranted interference.

Last, it is generally supposed that an "active" right essentially involves an element of choice in the sense that one cannot have a right to do something without having the right to refrain. But this assumption seems falsified by our example. Choice is ruled out, as it often is, because the behavior is not only allowed but required. Ours is not an isolated example: one can think of many possible cases. It seems no contradiction to imagine, say, that one has the right to vote but is also required by law to vote. It may sometimes be (for various reasons) misleading to speak of a right to do something when one also has an obligation to do it; but even if misleading it can be true; and, indeed, when challenged one can sometimes support one's claim of a right to do something by showing that one has a positive obligation to do it.[10]

[10] Earlier versions of this paper were read at Stanford, Cornell, Michigan, and Rutgers universities, where I received many helpful comments and suggestions.

[4]

Discussion

UPHOLDING LEGAL RIGHTS

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Law and order are essential to the preservation of any society and to the well-being of every citizen, but in the United States today there is a crisis of lawlessness and disorder. Every newspaper and television set daily report criminal acts ranging from mugging to murder, from robbery to rape. Our overworked police, overtaxed courts, and overcrowded jails cannot contain the criminal or hold down the rising crime rate. The personal and property rights of the American citizen are everywhere in danger.

I speak of this danger from personal experience and much feeling, for I live in Parkview, a neighborhood in Saint Louis dividing the inner city from the outer suburbs. If I walk the inner city at night, my life and limb, not to mention my wallet and watch, are in danger. Even within Parkview, I dare not let my children play outside at night. We cannot leave our home unoccupied for more than a day or two for fear of burglary or vandalism. Something is sadly wrong in our society when a respectable citizen and paragon of virtue, like myself, cannot enjoy his basic legal rights.

What is wrong? Why aren't my legal rights being protected? The very question answers itself. They are not being *protected.* Practical politicians tell us that the problem of lawlessness and disorder arises simply because the law of our land is not being adequately enforced. The solution is obvious—stricter enforcement. Legal philosophers provide a theoretical justification for this simple diagnosis. A legal right consists in, or can be defined in terms of, a legal duty of one or more other persons to the possessor of that right.[1] And a legal duty is a real obligation, is really obliging or binding, only because the commands of law are backed up by legal punishment for disobedience.[2] Hence, if any legal right is in danger, the logical solution is to increase the sanction behind the legal duty and ensure that this sanction is known by every potential criminal and inflicted on every actual criminal. We in Parkview have attended to the wisdom of

1. John Austin first analyzed a legal right in terms of a relative duty, a duty to some determinate person or persons. More recently, Wesley Hohfeld and Joel Feinberg have defended similar analyses.

2. The classical sources for this position are Thomas Hobbes, Jeremy Bentham, and John Austin. Although the pure command theory of law is rare in contemporary jurisprudence, this Hobbesian conception remains in any legal philosophy that emphasizes the essential dependence of legal obligation upon the imposition of sanctions.

practical politicians and legal philosophers and have taken their advice. Our neighborhood association has hired private policemen to supplement the regular police force of our city. As a responsible citizen, I have put up a floodlight to illuminate my backyard and the public walkway adjacent to it, and I continue to pay for the electricity it consumes. We have followed the advice of politicians and philosophers, but our problem is not solved. Criminals from the black ghetto and delinquents from the white suburbs continue to invade our neighborhood. The personal and property rights of myself, my family, and my neighbors remain in jeopardy. Why? Have we and our officials not done enough to enforce our legal rights? I suggest that more strict enforcement is an ineffective solution because the problem of upholding legal rights is not as simple as politicians and philosophers have led us to believe. They have vastly oversimplified both the nature of legal rights and the motives of those who uphold or downpull the law.

I

Take, for example, my legal right to personal security, my right not to be personally attacked, physically injured, or killed. Can my right be reduced to the legal duty of second parties (other individuals against whom the right holds) not to attack me, injure me physically, or kill me? We recognize that my legal right is not this simple when we reflect on the various ways in which it can be upheld or fail to be upheld. To be sure, it can be upheld by second parties doing their legal duty and refraining from attacking me; it can be violated when any second party violates his legal duty by attacking my person. But it can *also* be upheld or fail to be upheld in many *other* ways. I can uphold my legal right by resisting attack: the law gives me permission to defend myself from illegal attack with all necessary, but no unnecessary, force. I fail to uphold my legal right to personal security if I submit meekly, without resistance or protest, to an invasion of my right. Third parties (individuals other than the possessor of the right or second parties who act to threaten or violate the right) can uphold my right to personal security if they come to my aid and overpower my attacker, or even if they summon police assistance quickly; the law allows this intervention by third parties, and in some cases it imposes a legal duty upon them to intervene. My right to personal security can be upheld by a policeman who overcomes my attacker, who pursues him into the night to arrest him, or who patiently investigates my case until the criminal is apprehended. The policeman fails to uphold my legal right if he is slow to come to my assistance, unwilling to risk hot pursuit, or unconcerned to follow up my complaint fully. The public prosecutor may uphold or fail to uphold my right by pressing charges or neglecting to do so should the attacker be apprehended and prima facie evidence of guilt produced. The judge, and in some cases the jury, can uphold or fail to uphold my right to personal security by rendering judgment or failing to render judgment against my attacker should the indictment against him be proved in court. I could go on, and those more knowledgeable in the law than I could fill out (and occasionally correct) the details, but I wish to pause to draw a lesson from this example.

As philosophers, we subscribe to a misleading theory if we reduce a legal right, like my right to personal security, to a legal duty upon others to perform or refrain from performing some specified action, such as attacking me. Typically a legal right is

a complex cluster of legal liberties, claims, powers, and immunities involving the first party who possesses the right, second parties against whom the right holds, third parties who might intervene either to aid the possessor of the right or the violator, and various officials whose diverse activities make up the legal system under which first, second, and third parties have their respective legal liberties, claims, powers, and immunities and whose official activities are in turn regulated by the legal system itself. Any philosophy of law that would illuminate the problem of upholding legal rights must recognize this complex structure of a right, for only then can it show clearly and explain intelligibly how it is that there are many persons who are legally in a position to uphold or fail to uphold any specified right. Any adequate analysis of a legal right must distinguish the several roles of the individual citizens living under the law (the roles of first, second, and third parties) and of the officials (policemen, prosecutors, judges, jurymen, legislators, and administrators) whose activities transform what Llewellyn called a "paper right" into a real and functioning legal right.

This theoretical lesson can be driven home by a consideration of another example, the legal right to vote. The Fifteenth Amendment, adopted in 1870, declares that "the right of citizens of the United States to vote shall not be denied or abridged . . . on account of race." Today, more than a century later, black citizens are still struggling to secure this civil right. Why this long denial of a clear constitutional right? Who has failed to uphold the right to vote? In many states, legislators disenfranchised blacks wholesale by enacting statutes containing discriminatory qualifications, such as the grandfather clause, for voting. State officials have frequently refused to allow blacks to vote on the basis of tests, such as literacy or understanding the Constitution, they would not and did not apply as stringently against white voters. After such statutes and tests were declared unconstitutional by the Supreme Court, the Democratic party introduced the "white primary" in many southern states. Blacks who have persisted in registering to vote or insisted upon exercising their franchise have been subject to retaliation, such as the loss of their jobs, damage to their homes, or physical violence to their persons, by white citizens unwilling to lose their monopoly of political power. In the North, where such obvious oppression has been almost unknown, the black vote has often been denied any real political significance by requiring extended residence before one may register to vote or by gerrymandering districts either to scatter black votes so that they would be lost among the safe white majorities or to concentrate all the black votes in a single district in order to leave all the other districts safely white. Most of us, of course, have never infringed or denied the right to vote of any black citizen. But how hard have we striven to uphold the legal right to vote, a right written into our Constitution, the highest law of our land? How often have we participated in voter registration campaigns, and how hard have we worked politically for civil rights legislation to protect the right to vote? It is clear that the failure to uphold this legal right cannot be blamed upon the disreputable criminals in our society or upon spoiled youths too advantaged to appreciate our precious constitutional heritage. It is primarily public officials whose actions constitute the realities of our legal system and private citizens respected in their communities who have denied and infringed the legal right to vote of black citizens. And it is the inaction and merely token action of the majority of citizens that have failed to uphold this right to vote. Many persons, some private citizens and

other public officials, who occupy various roles in the complex structure of a legal right are in a position to uphold or fail to uphold that legal right, each in his own way.

Some legal philosophers will try to resist my conclusion that a legal right is a complex structure of legal liberties, claims, powers, and immunities. From the fact that upholding a legal right is a very complex business, it does not necessarily follow that what is upheld is similarly complex. Granted that the law protecting legal rights is very complex, they will insist that the legal right itself is simply a legal claim of the possessor against one or more second parties.

The plausibility of this reduction of a legal right to a legal claim derives, I believe, from an ambiguity in the meaning of "a claim." This expression may refer either to something which is claimed or to the act of claiming something, but these two references embody very different fundamental legal conceptions. That which I claim as a creditor is the performance by my debtor of his *legal duty* to repay me; my act of claiming repayment is an act of exercising my *legal power* to sue in the courts. Any legal philosopher who accepts the Hohfeldian distinction between legal claims–duties and legal powers–liabilities and who holds that a legal right consists in a simple legal relation must resolve this ambiguity one way or the other. Wesley Hohfeld insisted that my legal right to repayment in the strict sense is simply the correlative of my debtor's legal duty to repay me.[3] Hans Kelsen chose the other option and held that in the strictest sense my legal right to be repaid consists in my legal power to put in motion the legal sanction should my debtor fail to repay me.[4] Joel Feinberg tries to have it both ways; for after accepting the Hohfeldian analysis of a legal right in terms of the duty claimed, he then provides his own analysis of a legal claim in terms of the act of claiming.[5] Thus in the end he dimly recognizes that a legal right is a complex legal structure.

It is my contention that a legal right cannot be reduced to any one of the fundamental legal relations Hohfeld distinguished and defined. To say that I have a legal right to repayment, for example, is to say that it is legally up to me whether or not I am repaid. Legal rights are an important part of the legal system because the desires, decisions, and actions of different individuals so often conflict; I may want to be repaid when my debtor decides not to do so. The function of a legal right is to resolve such conflicts by giving legal priority to the desires and decisions of one party over those of the other. A legal right is the allocation of a sphere of freedom and control to the possessor of the right in order that it may be up to him which decisions are effective within that defined sphere. Now it is hardly up to me whether I am repaid if my debtor may refrain from repaying me if he wishes; the core of my legal right to repayment is my legal claim to repayment, that is, the legal duty of my debtor to repay me. But this legal claim does not exhaust the content of my legal right, for in itself this legal duty is not sufficient to allocate control over repayment to me. I can legally control performance of this duty only if the law also gives me the legal power to

3. Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions* (New Haven, Conn., 1919), p. 38.

4. Hans Kelsen, *General Theory of Law and State*, trans. Anders Wedberg (New York, 1961), pp. 81–83.

5. Joel Feinberg, *Social Philosophy* (Englewood Cliffs, N.J., 1973), pp. 56–59, 64–67.

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enforce repayment in some manner and the power to waive repayment as well. Moreover, all these legal relations would be empty if the law did not also give me the legal liberty to accept repayment when offered by my debtor. Finally, it is hardly up to me whether or not I get repaid if I am not legally immune to having the debt rendered null and void by my debtor's act of snapping his fingers three times in front of my nose. My argument does not hinge on proving that all the Hohfeldian legal relations I have mentioned are and must be included in my legal right to repayment; probably any of them, with the exception of the claim to repayment, could be replaced by other comparable elements. My argument is the negative one that no isolated legal relation is sufficient to constitute a legal right. It may be that in some limiting and degenerate sense an isolated legal claim, liberty, power, or immunity may be called a legal right. But in the full and most meaningful sense, it is only some combination or cluster of legal relations that constitutes a genuine legal right. We cannot begin to understand the problem of upholding legal rights as long as we conceive of a right simply as a single legal relation between one person who has that right and one or more other persons who have a corresponding legal duty.

II

Nor can we begin to understand what makes any person playing any of the various roles in a legal right willing or unwilling to uphold that right until we stop thinking of the law as a system of rules entirely or primarily enforced by sanctions. Just as some legal philosophers have oversimplified the nature of a legal right, so others have oversimplified the motives that make a legal right effective.[6] A legal right is secure, they argue, only as long as the person upon whom it imposes the corresponding legal obligation is effectively bound to do his duty. A legal duty or obligation is by definition something that *obliges* or *binds* the citizen to obey the law. But what does or could bind the citizen, who is not literally bound with chains, when he is inclined to disobey the law? Obviously, it is the threat of sanctions imposed by the courts for disobedience. Take away these sanctions, the legal realists argue, and a statute becomes an empty form of words, or at best a pious moral ideal; it is no longer a law in force (note the language) in the legal system. Hence, the essential motive creating real legal rights and the duties they imply is fear arising in the citizen from the threat of punishment for disobedience of the law. The practical corollary is that the way to uphold legal rights, should they be threatened, is to increase the penalties for every violation of law and to ensure that such penalties are imposed by strengthening our police force and enlarging our penal institutions.

Even if we reduce a legal right to a single legal duty and consider only the second

6. I do not imagine that any legal philosopher explicitly denies that a variety of motives may cause one to uphold or fail to uphold the law, but most of these motives tend to get ignored when one formulates a theory of the nature of law or of legal obligation. Thus, Hobbes, Bentham, and Austin all defend a command theory of law in which the command of the sovereign obliges or binds because of the sanctions threatened for disobedience. Philosophers like Holmes and Kelsen, who distinguish sharply between the law and morality, also regard the sanction as definitive of law. Even Alf Ross, who rejects all forms of the command theory, explains the bindingness of law in terms of only two motives—fear of punishment and respect for moral authority.

party's motivation to fulfill his legal obligation, this account is inadequate. Why do I regularly perform my legal duty of paying my debt to the savings and loan association that holds a mortgage on my home? If I do not forget the date, I send in my mortgage payment the first of each month from sheer habit, without deliberation. When I am tempted to spend my money in more exciting ways, my desire to maintain my credit in the community and to avoid disagreeable correspondence with the bank are sufficient motives to cause me to do my legal duty. Only in extremity, when I am extraordinarily hard pressed for cash or credit, does my fear of legal sanctions, of court action to foreclose my mortgage, deter me from violating the bank's legal right to be paid the amount due on the due date. Why do those persons I pass on the street refrain from attacking my person to inflict grievous bodily injury or to steal my wallet? Most of the people I meet each day are strangers who need no motive at all to *oblige* them to respect my legal rights to security of person and property because they have no operative motive to beat me up or steal from me; they do not hate me, and they have enough money to satisfy their more insistent needs. Many of the people I meet each day are friends or neighbors who have a concern for my welfare, not necessarily strong or deep, but sufficient to overcome the even slighter temptation to attack me that might arise from momentary anger or desires frustrated by a temporary lack of ready cash. It is the exceptional person who is seriously moved to attack me, and even here fear of legal sanctions is not the only motive upholding the law. If he has been well brought up, his sense of duty, his conscience, may restrain his lawless impulses. If he is a respectable citizen, or at least a respected one, he may be more concerned about the loss of reputation and the condemnation of his community than about formal legal sanctions. Even if he is an irresponsible juvenile or a callous criminal, he may be afraid that I will defend my person or my pocketbook. I do not wish to insinuate that legal sanctions are unnecessary to secure legal rights or that more effective enforcement of the law is not part of the solution to the problem of law and order in our society. I do insist that enforcement is a very small part of the solution because it ignores every motive for obedience to law other than fear of sanctions, and it leaves untouched every motive for disobedience to the law. Most citizens perform their legal duties from a variety of motives in which the fear of legal punishment plays little or no part. Only when an individual has some strong motive to disobey the law does the threat of effective enforcement become necessary to uphold a legal right. Even then if the *balance* of motivation, and hence the course of action, is to be effectively controlled, it is not enough to increase the fear by improving the enforcement; this fear needs to be supported by a strengthening of the other motives that bind one to obey the law and by a weakening of those motives (like hunger, hostility, or greed) that drive one to violate legal rights. This much is true even when we restrict our attention to the motives that make second parties willing to fulfill their legal duties to first parties who possess legal rights.

When we expand our vision and recognize that a legal right is more than a claim to a corresponding legal duty, then we must see that sole reliance upon the motive of fear of punishment is theoretically absurd and practically naive. A legal right typically includes legal liberties, powers, and immunities as well as legal claims of the first party, the person who has the right. It involves liberties, and sometimes powers and duties, of third parties to aid the possessor of the right and to refrain from helping second parties

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who threaten to violate his right. It also involves a host of legal liberties, powers, and duties of various officials playing diverse roles in the legal system that creates, protects, and enforces the legal right. When we look beyond the one individual who might break the law by attacking my person or refusing to allow a black citizen to vote to the many private citizens and public officials whose efforts are required to uphold my legal right to personal security and the black's legal right to vote, we see that the threat of sanctions is almost beside the point. What motivates a legislator or citizen to work for legislation designed to protect a threatened civil right is never fear of being taken to court and convicted of breaking the law if one refrains from such political activity. What motivates a judge to decide for a plaintiff claiming his legal right against one who would deny or infringe it is not the fear of legal sanction should he render the opposite verdict. What moves the possessor of a legal right to demand that his right be respected and to resist every invasion of his right is only tangentially connected with the effectiveness of its legal enforcement. What makes third parties willing to intervene on the side of those whose legal rights are threatened is almost never the worry that they will be threatened with court action if they remain neutral. The overemphasis on the practical importance of enforcing the law springs in part from neglecting the many different persons who must be willing to uphold the law.

It also springs from underestimating the degree of willingness required. As long as one considers only the second party who might attack my person or refuse to allow a black citizen to vote, it appears sufficient to force him to do his legal duty, however reluctantly. And if it turns out that third parties have legal duties to aid the possessor of a right and officials have legal duties to protect and enforce that right, then presumably these additional persons can be coerced into doing their duties, too. But those who must uphold a legal right must do more than their respective duties: they must exercise their legal liberties and powers. The possessor of a right is legally permitted, but not legally obligated, to claim his right and to resist, within defined limits, its infringement. Third parties may, but usually need not, exercise their liberty to intervene and, occasionally, their power to arrest when a second party is violating a legal right. If a legal right is to be secure, officials in the legal system must exercise their legal powers of acting in the law to protect and enforce the legal right. And citizens need to work politically to cause these officials to exercise their powers of legislating, rendering verdicts, and enforcing the law on behalf of and not against the possessor of the legal right. All of this action requires much more than reluctant obedience to law; it requires an active participation in and dedication to the law. If the fear of sanctions is often inadequate to motivate second parties to perform their legal duties, it is almost irrelevant to the motivation necessary to cause first and third parties, not to mention the officials in the legal system, to exercise their legal liberties and powers. Only a wide range of motives will be sufficient to ensure that all those in a position to uphold any specified legal right are fully willing to do so.

III

I have argued that there are many different persons, both private citizens and public officials, who must be willing to uphold any given right if that right is to be secure. I have also argued that there are many different motives that make a person willing or unwilling (dedicated, amenable, reluctant, or opposed) to play his role in

upholding a legal right. What practical implications do these theoretical conclusions have for the problem of maintaining law and order in our society?

First, the problem of law and order, as articulated by many of our political leaders, is misconceived. They conceive of the problem from the perspective I expressed in the introduction to this paper. As a resident of Parkview, an upper-middle-class residential area, I see the problem of law and order as that of preventing crimes of violence to my person and property committed by desperate urban criminals or by spoiled suburban delinquents. But my perspective and that of my political representatives triply misrepresents the problem of lawlessness in our society.

The crimes that fascinate and worry me, a relatively advantaged and protected member of our society, are violations of my right to personal security and of my property rights; and it seems to me that the criminals that threaten my rights come primarily from alien groups, from the urban masses and the spoiled generation. The residents of the urban ghettos can understand my concern for my rights to security of person and property, for they are much more vulnerable to crimes like assaults and burglaries than I. But they are also frequent victims of police harassment and landlord extortion as I am not. Again, the frequency, range, and social importance of white-collar crime in our society is something of which I am largely unaware. Finally, in these days of Watergate hearings and trials, responsible citizens can hardly remain unconcerned by the degree to which lawlessness has permeated our basic legal and political institutions. Spokesmen for law and order too often ignore or underestimate the wide range of criminal acts and the variety of criminals in our society.

Again, they mistakenly equate lawlessness with crime. To be sure, criminal acts are violations of the law, but they are not the only illegal acts. The criminal law is only one portion of the law of our land; the law also contains at least the law of torts, the law of contracts, administrative law, constitutional law, and procedural law. Since the rules of any of these bodies of law can be and are violated in ways that violate important legal rights, the problem of law and order is far broader than the problem of preventing crime.

Not only is the problem broader than is often recognized, it is also far less negative. As long as one is concerned with criminal acts alone, the problem appears to be that of preventing crime: but as soon as one thinks of the problem in terms of legal rights, one recognizes that what really matters is the positive task of upholding or maintaining the legal rights of all the citizens of our society. This is not to deny that there is a problem of preventing crime, but it is to place that limited problem in its broader and proper setting. The point and purpose of preventing crimes is to protect and secure the legal rights that would be violated by such acts of assault, robbery, harassment, or fraud. And upholding a legal right requires that many persons play their diverse roles in that legal right. Conceived of in terms of legal rights, the problem of law and order is not the narrow and negative problem of preventing crimes of violence to person and property, it is the broad and positive problem of upholding all of the rights incorporated into our legal system.

Second, stricter enforcement of the criminal law is a totally inadequate solution to the problem of law and order. More policemen, larger prisons, and harsher sentences for convicted criminals will do very little to uphold legal rights. This is not to deny that

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the law desperately needs to be enforced, but it is to suggest that improved enforcement is not identical with stricter enforcement. We probably do need more policemen, but even more we need more intelligent and better trained policemen, who will be more effective in detecting and preventing crime and less likely to violate legal rights in the process. Granted the importance of convicting the criminal, we should reform our courts to provide speedier trials and public defenders so that the rights of society and of the accused may both be protected. It is a social calamity when judges so often can impose only a suspended sentence because there is no room in any penal institution for another violator of the law, but it is even more of a menace to society to commit offenders to penal institutions that turn out hardened criminals rather than reformed citizens. We need improved, not just stricter, enforcement of the law; and we need to enforce all of the law. The laws against perjury by public officials and harassment by policemen are as much in need of enforcement as the laws against robbery and burglary. Enforcement of the several civil rights acts is just as much, and as little, a solution to the problem of law and order as enforcement of the several laws against crimes of violence. Enforcement of the law is necessary, but it needs broader and better enforcement, not just a narrow and harsh enforcement.

Even the broadest and best enforcement, however, is insufficient to uphold legal rights. At best, enforcement provides one motive, fear of legal sanctions, to cause one to perform one's legal duty. But it does nothing at all to reduce or eliminate the many motives that operate to cause people to violate their legal duties. More important, it is almost entirely irrelevant to the various legal liberties and powers that are built into legal rights. Since legal rights contain elements that are not legal duties at all, it does not even make any sense to conceive of the solution to the problem of upholding legal rights entirely in terms of enforcing such duties.

Third, any adequate solution to the problem of law and order in our society must motivate a variety of persons to play their diverse roles in upholding legal rights. Let me give a few samples of the kinds of measures that might be taken to support the motivation needed to uphold legal rights. Why are urban criminals and ghetto youths so often unwilling to obey the law? One reason, among many, is that they see no hope of achieving their long-range goals or even meeting their immediate needs through action within the law. They believe, probably correctly, that the social system is such that no amount of striving within the system will enable them to obtain an adequate education, remunerative work, or a decent standard of living. If they are to be willing to refrain from violating the legal rights of others, our society must provide them with a vastly expanded opportunity to obtain nourishing food, necessary health care, decent housing, quality education, and rewarding jobs.

Why are legal officials (policemen, welfare workers, and even judges) who deal with the disadvantaged in our society so often unwilling to respect their rights? One reason is that they share the racial, social, and moral prejudices that infect our society. They believe explicitly, or inarticulately feel, that blacks are inferior, that the poor are too lazy to work, and that anyone who deviates from the accepted norm is both morally wicked and socially dangerous. If these legal officials are to be willing to respect fully the legal rights of all those with whom they deal, we must have an education program, in school and out, that will remove or weaken such prejudices and will enable each

person in our society to understand people of different races and classes and that will build attitudes of mutual trust and concern. Racially and socially integrated schools are a first step in this program, but integration may do as much to increase as to remove prejudice unless it is accompanied with a revised curriculum and a reformed teacher-training program.

Why are our leaders, those with political and economic power in our society, unwilling to lead us in the continuing struggle to secure the legal rights of *all* citizens? Why do some of our leaders even use the law as an instrument to curtail and deny the legal rights of the disadvantaged? One reason is that they believe, probably incorrectly, that achieving complete equality of rights would require too great a sacrifice of their own self-interest and of the interests of those citizens whose support keeps them in power. To respect fully the legal rights of the disadvantaged, they reason, would mean to alter the status quo in such a way that the privileged in our society would lose much of their economic, political, and social advantage; to reduce in any significant measure the disparity between rich and poor, powerful and weak, privileged and deprived, surely cannot be to the advantage of the former. I challenge this reasoning and suggest that it is possible to enlist the powerful motive of self-interest on the side of the legal rights of the weak in our society. The suburbs cannot long flourish while the urban centers decay; it is the prosperous who must pay the tremendous price of the welfare programs that accomplish little beyond maintaining the poor beneath the poverty level; it is the solid citizen who will finance a vastly expanded police force and court system and complex of penal institutions without buying real security for his own legal rights; it is those who have monopolized the desirable jobs for themselves who must pay out of their income taxes the incalculable costs of maintaining and restraining those who are unemployed because of job discrimination or unemployable because of inferior education. One condition that must be present for our leaders to be willing to pay the price of a realistic program to enable the disadvantaged in our society to enjoy fully their legal and human rights is for our leaders to be shown, not by the sort of philosophical rhetoric I am using but by detailed objective economic analyses, the even greater price they and their supporters pay for the legal injustices and social inequities in our system.

Why are the citizens in our society unwilling to intervene when the rights of others are violated? Why do individuals stand idly by when they happen to witness some other individual being physically attacked or robbed or cheated? Why do groups of citizens not engage more vigorously in political action to help those classes in our society whose rights are repeatedly denied? Our political leaders have justly complained that there is a lack of respect for the law in our society, but they have unjustly ascribed this moral defect to the disadvantaged criminal and the overprivileged youth. Above all it is the respectable citizen who is lacking in respect for the law. He does not feel any strong obligation to intervene individually and politically on behalf of any and every fellow citizen whose legal rights are denied or infringed, nor does he prize the law so highly that he actively upholds threatened legal rights in ways that go beyond the call of moral duty. A genuine and proper respect for the law cannot be created and sustained by mere indoctrination, much less by harsh enforcement of legal duties. Respect for legal rights can be fostered by an increased knowledge of the nature of the rights incorporated into our legal system and from a fuller understanding of the personal and

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social value of these rights. This calls for a program of public education, not legal punishment.

I do not propose these measures as a complete program or an adequate solution to the problem of law and order in our society. I mention them as illustrating the need to modify social conditions and the members of our society in many ways in order to change the motivation of the various groups of people who are in a position to uphold legal rights.

Fourth, when a given legal right is not being upheld, it is sometimes possible to restructure the right in a way that renders it more secure. Each legal right involves the roles of first, second, and third parties and is a real, as opposed to a "paper," right only as it functions in the activities of the various officials who make up the legal system. Now if some of these persons are failing to uphold the legal right, it may be possible to add or subtract or change the legal relations that make up the right in order to switch the persons whose activities are required to make the right effective. The Fifteenth Amendment explicitly gives every black citizen the right to vote. This legal right is a complex of legal relations including at least the legal liberty to register as a voter and to cast one's ballot, the legal claim against other individuals (both private citizens and public officials) to refrain from interfering with one's activities of thus registering and voting, the legal power to go to court and obtain injunctions to prevent others from so interfering, and a legal immunity to any statutes or court decisions that arbitrarily deprive one of the franchise. History showed, however, that the legal power of the black citizen to protect his right to vote through the courts was insufficient and ineffective. Therefore, the Voting Rights Act of 1965 restructured his right to vote by giving the attorney general the legal power to institute proceedings in the courts on behalf of any black citizen or citizens whose right to vote has been violated or infringed. This is only a sample of the way in which the complex structure of a legal right can be modified in order that it may be more effectively upheld.

IV

As a resident of Parkview, I find my right to personal security and my property rights in danger. My first impulse is to see the problem as many public officials formulate it, as the problem of preventing crimes against persons and property, and to imagine that the solution is simply stricter enforcement. But philosophical reflection upon why it is that my legal rights are not being protected led me to two theoretical conclusions. A legal right is a complex structure of legal relations such that many different persons are in a position to uphold or fail to uphold that right, and there are many different motives that make any person willing or unwilling to play his part in upholding a given legal right. These theoretical conclusions in turn have four practical implications for the conduct of public affairs. The problem of law and order is not simply the problem of preventing crimes against life, limb, and property. Stricter enforcement of the criminal law is a totally inadequate solution to the problem. Any adequate solution must motivate a variety of persons to play their diverse roles in upholding legal rights. And it is sometimes possible to restructure a legal right in such a way that a crucial role will be shifted from a person who is unwilling or unable to uphold the right to some other person or persons who can and will render that right

secure. As a philosopher of law I am most interested in the theory of legal rights I have advanced in this paper, but as a citizen I am pleased by the way in which reflection upon a practical problem can lead to theoretical insights that in turn lead back to practical applications.

Part II
Legal Rights Related to Morality

[5]

Children's Rights: A Test-Case for Theories of Right

BY NEIL MACCORMICK, EDINBURGH

I am not confident that I could give, far less justify, a comprehensive list of the rights which children have, but I feel no unease in saying that they do have rights. I don't have a theory of children's rights, but I do at least have a theory of rights which can make sense of saying that children have them. Just because the concept of 'children's rights' is difficult to square with some theories of what it is for anyone to have a right, children's rights are a good test case for theories of rights in general. First things first. Let us be clear that it makes sense to ascribe rights to children at all before we go on to work out substantive theories as to the rights they should be accorded. The former is what will be made clear in this paper.

In broad and general terms there are two competing theories as to the nature of rights[1]: the theory which says that having a right of some kind is to do with the legal or moral recognition of some individual's choice as being preeminent over the will of others as to a given subject matter in a given relationship; and the other theory which says that having a right is having one's interests protected in certain ways by the imposition of (legal or moral) normative constraints on the acts and activities of other people with respect to the object of one's interests. Between various manifestations of the will theory and the interest theory there has been a long running, but inconclusive, series of test matches. Today we have a test case, in the light of which I shall show, to my own entire satisfaction, the untenability of all forms of will theory, in place of which I shall suggest as an alternative a theory more along the lines of traditional interest theories.

Let me start from what seems to me a simple and barely contestable assertion: at least from birth, every child has a right to be nurtured, cared for, and, if possible, loved, until such time as he or she is capable of caring for himself or herself. When I say that, I intend to speak in the first instance of a moral right. I should regard it as a plain case of moral blindness if anyone failed to recognise that every child has that right. Certainly, it has not been a universally recognised legal right

[1] See, e.g., G. W. Paton, *A Text-book of Jurisprudence*, 4th ed., Oxford 1972, ed. by G. W. Paton and D. P. Derham, at pp. 285–290, for a review of this opposition of theories.

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— think of the law of Republican Rome — but to my way of thinking that only means that some or perhaps many legal systems have been morally deficient, which is scarcely a startling observation. (As it happens, our legal systems do at present grant the right in question, so for us, now, it is a legal as well as a moral right.)

There are, however, morally acute and clear-sighted people who would deny not the substantive moral tenet involved in ascribing that right to all children, but the appropriateness of expressing the moral tenet through the linguistic device of the noun 'a right'. 'Say, if you will, that morality demands, or the law demands, that all children be nurtured, cared for, and, if possible, loved, but do not say they have a right to such treatment, for so to use the term right is to obfuscate.'

That objection is grounded in the will theory of rights. It could be expanded, along lines laid down by H. L. A. HART[2], in some such terms as follow: Rights (understand 'claim-rights', 'rights of recipience')[3] presuppose duties as their correlative. Duties exist when there exist legal or social rules of a particular kind, in virtue of which individuals in certain circumstances are required to act or abstain from acting in certain ways. For any individual whose circumstances are those specified in such a rule, it is true to say that he has a duty to act or abstain from acting as specified.

Of the rules which impose duties, some provide that the performance by a duty bearer of the required act (or abstention) is to be conditional on some other person's choice, either in the sense that it is to be performed only if and when he so requests, or in the sense that that other person can waive the requirement, and, if he does, the act (or abstention) need not be performed. When A's being required to do his duty is

[2] See H. L. A. Hart, "Definition and Theory in Jurisprudence", *L.Q.R.* 70 (1954), p. 37, esp. at p. 49; "Are there Any Natural Rights", repr. in *Political Philosophy*, ed. A. M. Quinton, Oxford 1968, esp. at p. 58, where it is said that to ascribe rights to babies or animals is perhaps to "make an idle use of the expression 'a right'"; "Bentham on Legal Rights", in *Oxford Essays in Jurisprudence (2nd series)*, ed. A. W. B. Simpson, Oxford 1973. For another recent example of an essentially similar argument, see W. J. Kamba, "Legal Theory and Hohfeld's Analysis of a Legal Right", *Juridical Review*, 1974, pp. 249–262.

[3] On terminology, see W. N. Hohfeld, *Fundamental Legal Conceptions*, New Haven 1919, third reprint 1964; for the expression "rights of recipience" see D. D. Raphael, *Problems of Political Philosophy*, London 1970, pp. 68–71.

in either sense left in B's discretion, B may properly be said to have a right against A, a right that A act or abstain in the manner contemplated in the rule. On this view, a legal or moral right is equivalent to a legal or moral power of waiver or enforcement of duties; at any rate, rights exist only when people have such normative power over duties of others. (Although this analysis applies only to 'claim-rights' in the HOHFELD scheme, the theory suggests that what is common to all types of right is that they make the choice, or the will, of the right holder paramount in a given relationship.)

If that view is accepted as yielding a satisfactory recommendation as to the usage of the noun 'a right', then it must indeed be inept to ascribe to children the right to care, nurture and love. A baby cannot in fact, cannot in morals, and cannot in law relieve his or her parents[4] of their duty towards him or her in those matters.

But adherents of the 'will theory' have a standard tactic for avoiding the awkward example of children. They say that it is sufficient if either B or some other person C acting on B's behalf has the relevant powers over A's duty in respect of B.

For the case we are considering, the tactic is unemployable. Standardly, in the case of children, the party who can in legal (or indeed in social) matters act on a child's behalf is his or her parent or guardian. But it is at least possible to imagine a legal system in which a parent's duty to care for and nurture his or her own child is neither subject to the parent's issuing a self-directed request on the child's behalf nor indeed to any possibility of waiver by the parent as the child's representative. That is so whether or not the law accords to the parent powers of waiver or enforcement over duties owed to the child by third parties. What is more, speaking morally, there seems to be no reason whatever to suppose that the child or anyone acting on the child's behalf should be permitted or empowered to waive the parental duty or in any sense to acquiesce in its non-performance.

It might be said that the contemporary British legal systems do give just that power to certain public officials, in that procedures exist where-

[4] Here, and elsewhere, I assume for the sake of simplicity, that the duty towards children is a duty primarily owed by the 'natural parents'. But, as is pointed out later, the opinion that children have the right in question does not necessarily entail the opinion that it is the *parents* who bear the correlative duty. Throughout, for the sake of simplicity, I ignore questions of adoption, legitimacy, etc.

by in appropriate circumstances children may be removed from their parents' care and transferred to the care of other persons in pursuance of a judicial order. Short of that, too, welfare officers acting in the interests of children have power in various ways to 'keep up to the mark' parents whose performance of their parental duties is in some degree deficient.

One who rejects the 'will theory', as I do, can say, as I say, that such legal provisions are desirable because they protect and further the rights of children. To regard such powers as constitutive of rights (as the will theory does), is to foreclose the possibility of justifying them on the ground that they do protect rights which might otherwise be insecure, and thus in my submission to confuse the substantive right with ancillary remedial provisions. It is unduly anglo-centric to erect the brocard *ubi remedium ibi ius* into an analytic truth.

In any event, that example of those legal provisions would not serve to save the theory that powers of waiver or enforcement of duties are essentially constitutive of 'rights', even if it were proferred in its defence. When a child is taken by law out of the tutelage of its parents and put into the care of some other person, the measure is not conceived as being a waiver of the parent's duty – the parent may indeed be penalised for the acts of neglect which justify the order. The point is that in the interests of the child, fulfilment of the functions of care and nurture especially in infancy is so fundamentally important that someone else is appointed to undertake their fulfilment as a duty on the ground that the parent is temporarily or permanently unable or unwilling to do so. It is a case of substituted performance of a duty which is so important in the child's interest that penal or compensatory remedies for its breach are inadequate. Substituted performance is no waiver. The function is not one of 'letting off' the parent, rather it is one of protecting the child. In consequence, the transfer of care is not deemed to release the parent from the duty in the sense of exempting him or her from the possibility of penalties for its breach.

As for enforcement provisions which fall short of transferring care of the child, these lack the discretionary character essential to the 'will theory'; it is not the case that the child or someone deemed to be acting on the child's behalf has an option of enforcing the duty of care and nurture, which option may or may not be exercised according to arbitrary choice. If the child needs greater care than is being provided, there is not discretion to be exercised; that greater care must be provided.

Of course, there is discretion in judging any question of 'need', but it is discretion of a kind not contemplated by the will theory.

We are put, as lawyers say, to our election. Either we abstain from ascribing to children a right to care and nurture, or we abandon the will theory. For my part, I have no inhibitions about abandoning the latter. It causes me no conceptual shock or mental cramp to say that children have that right. What is more, I will aver that it is *because* children have that right that it is good that legal provisions should be made in the first instance to encourage and assist parents to fulfil their duty to care and nurture, and secondarily to provide for its performance by alternative foster parents when natural parents are disqualified by death, incapacity, or wilful and persistent neglect. *Ubi ius, ibi remedium.* So far from its being the case that the remedial provision is constitutive of the right, the fact is rather that recognition of the right justifies the imposition of the remedial provision.

Is this merely a trivial issue of linguistic preferences? Only in part, and that a small part. I think that it is morally important that we should recognise the moral importance and the significance of moral rights, and legally useful to have a clear conception of legal right which recognises the straightforwardly analogical relationship between legal and moral rights. (That they are analogical in form does not, of course, mean that they are identical in content.) In so saying, I do of course court BENTHAM's posthumous condemnation, if not, in his case, subhumous rotation. In his view, the locution 'a moral right' was either a devious way of talking about what ought to be done, an obscure way of asserting that the law ought to confer certain rights, or just plain nonsense[5].

I counter-claim that there is a significant difference between asserting that every child ought to be cared for, nurtured and, if possible, loved, and asserting that every child has a right to care, nurture and love. One way of showing the difference is to show that there are statements which could intelligibly be advanced as justifications of the former proposition but which could not be intelligibly be advanced in justification of the latter. For example, along the lines of SWIFT's *Modest Proposal*, one could suggest as a reason why children ought to be cared for, nurtured, and loved, that that would be the best way of getting them

[5] See, e.g., *Bentham's Works*, ed. Bowring, 1843, vol. II, pp. 501 f., vol. III, pp. 221 f.

to grow into plump and contented creatures fit to enhance the national diet. Or again, one could argue that a healthy society requires healthy and well nurtured children who will grow into contented and well adjusted adults who will contribute to the G.N.P. and not be a charge on the welfare facilities or the prison service. (KEITH JOSEPH has recently adumbrated the latter argument, if I understood him rightly.)

Of course only one of these is a moral, or indeed a serious, argument. Buth neither is an argument which could be used directly to justify the proposition that children have a right to care, nurture and love. Why not? Because both advance reasons for giving children care, nurture and affection solely on the ground that their well-being is a fit means to an ulterior end. I do not say that there can be no moral argument that certain beings ought to be treated in a certain way in order to achieve some end other than their well being. I do say that such arguments are necessarily inept in justifying the ascription to them of a right to that treatment. Consider the oddity of saying that turkeys have a right to be well fed in order to be fat for the Christmas table, or of saying that children have a right to care and nurture lest they become a charge on the taxpayer. It may not have escaped notice that the same oddity would attach to saying that children have a right to be cared for because that is a way of maximising general utility. So it may be no wonder that BENTHAM was so dismissive of the notion of moral rights. But it would be a wonder if he were believed.

To argue, on the other hand, that each and every child is a being whose needs and capacities command our respect, so that denial to any child of the wherewithal to meet his or her needs and to develop his or her capacities would be wrong in itself (at least in so far as it is physically possible to provide the wherewithal), and would be wrong regardless of the ulterior disadvantages or advantages to anyone else — so to argue, would be to put a case which is intelligible as a justification of the opinion that children have such rights. To generalise: the ascription of a right to some class of beings seems to require the following presuppositions: for the class in question (in our case, children) there is some act or omission (in our case, the acts and omissions involved in care, nurture and love) performance of which in the case of each and every member of the class will satisfy, protect, or advance some need, interest or desire of each such individual; and secondly: satisfaction of that need, interest or desire is of such importance that it would be wrong to deny it to any such individual regardless of ulterior advantages in so

doing. Of course, the second of these conditions is intrinsically contentious, and argument might rage inconclusively over the question whether denial of some form of treatment to every member of a given class would be wrong. But to observe that is to observe only what is obvious, that in relation to their substance, rights belong to the class of essentially contested concepts.

Even that generalised formulation is perhaps too specific, just because it unnecessarily begs substantive moral questions in tying an elucidation of the notion of 'having rights' solely to 'want-regarding' categories such as needs, interests and desires. This is the characteristic failing of the 'interest theory'. It is uncontroversial that satisfaction of needs, interests and desires is a part of 'the good' for individuals, but it is controversial whether it is exhaustive of and constitutive of the good. A formal account of rights can and should be neutral on that substantive moral question. So I shall generalise further and say this: to ascribe to all members of a class C a right to treatment T is to presuppose that T is, in all normal circumstances, a good for every member of C, and that T is a good of such importance that it would be wrong to deny it to or withhold it from any member of C. That as for moral rights: as for legal rights I should say this: when a right to T is conferred by law on all members of C, the law is envisaged as advancing the interests of each and every member of C on the supposition that T is a good for every member of C, and the law has the effect of making it legally wrongful to withhold T from any member of C.

What has been said may suggest that one cannot believe in the category 'moral rights' unless one accepts in some form the principle that sentient beings ought to be respected as ends in themselves. If that is so, I do not regret it. I am inclined to the view that a belief in respect for persons is indeed an essential precondition of a belief in moral rights. And I am also inclined to the view that respect for persons is both a fundamental and an ultimate moral principle[6].

Be that as it may, the above reflections have, I hope, indicated why the proposition that all children ought to be cared for, nurtured and loved is far from identical with the proposition that every child has a

[6] As it stands, this passage is open to the charge of begging at least one question; but I put it forward very tentatively, and would call in aid David Raphael's very persuasive Presidential Address to the Aristotelian Society (D. D. Raphael, "The Standard of Morals", *Proceedings of the Aristotelian Society*, vol. XCVI (1974–75), p. 1).

right to be treated so. It is indeed possible, and now possible to see why it is possible, to advance the latter proposition as a specific kind of justification for the former, but not (without more) *vice versa*. It is also trivially true that children's having that moral right can be advanced as a reason why they ought to be accorded the parallel legal right. That the one proposition can genuinely be adduced as a reason for adhering to the other, however, in itself indicates that BENTHAM was wrong in thinking them identical (or, rather, in thinking that the former was reducible to the latter so far as it made sense at all).

What I have said so far seems to entail at least the possibility that rights are or could be logically prior to duties. That may seem very shocking, but it is true. AUSTIN and HOHFELD might be scandalised, but I can appeal to law to mitigate the scandal, by showing that the law sometimes confers rights which are logically prior to duties. An interesting instance of such a right statutorily conferred upon children is to be found in section 2(1)(a) of the Succession (Scotland) Act 1964: "Subject to the following provisions of this Part of this Act, (*a*) where an intestate is survived by children, they shall have right to the whole of the intestate estate."

By virtue of that, whenever any person domiciled in Scotland dies having left no valid will, there automatically vests in his children (if any) a right to the whole of that part of his estate statutorily denominated 'the intestate estate'. At the moment of its vesting, the right is not a 'real right' involving ownership of the estate or any part of it. It is a right to receive, in due course, a proportionate share in the assets remaining in the executor's hands after satisfaction of prior claims. But note that at the moment at which the right vests there is as yet no executor to bear the correlative duty. The executor must be judicially confirmed or appointed in due course, and what is more, if the estate is solvent those who have beneficial rights in it are normally preferred to other parties in the appointment of an executor dative. So any child who is of sufficient age may, in virtue of the right conferred by the Act, have a resultant if defeasible right to be appointed as executor. His appointment as such will in turn result in his acquiring the duties of executor, including the duty of distributing the intestate estate to those (including himself) who have the right thereto in virtue of section 2.

The intelligibility of that statutory provision indicates that the vesting of rights may be both temporally and logically prior to the vesting of duties correlative thereto. Since that is intelligible, it cannot be an

objection to the argument herein advanced that it contemplates the possibility of rights being logically prior to duties. On the other hand, it may be noted that the statute could not be intelligible if the will theory were correct.

It certainly does not seem to me in any way objectionable to say that it is *because* children have a right to care and nurture that parents have the duty to care for them. There might be other and different grounds (e.g. saving taxpayers' money) for imposing such a duty on parents or on whomsoever it may be imposed; but recognition of children's rights is one distinctive reason for doing so. I find it a much more peculiar view to suppose that parents' having the duty is a logical prerequisite of children's having the right; *a fortiori* if it is added that someone has to have discretion over its performance.

Surely there is much more sense in the opinion that it is because children have the right, and because their parents stand in a particular natural relationship to their own children, that it is the parents upon whom in the first instance the duty of care and nurture is incumbent. But only in the first instance; in default of parents (death, incapacity, fecklessness), the children's right remains and other means must be sought to fulfil it. That in modern societies the responsibility is deemed a state responsibility indicates only one possible solution to the problem.

There may be other cases in which we are much more certain that children have a right to something than we are certain about what is the right, or the best way of giving effect to it. That every child has a right to be educated to the limits of his or her abilities seems to me clear. But whose is the duty and the rightful power to provide it and to rule as to what constitutes a satisfactory education seems to me much less clear. The parents? The local authority? The central government? A church? The child? There can be heated dispute over the rival claims of all these, and more besides, even among those who are in no doubt about every child's right to have a proper education, indeed especially among those.

In the foregoing pages I have suggested that children's rights provide a test-case for rival theories about rights in general, and that the 'will theory' fails the test. What I have offered in the alternative is, in effect, a variant of the 'interest theory' advanced in various forms by such

writers as IHERING[7], AUSTIN[8] and BENTHAM[9] (whose rejection of the concept 'a moral right' should not blind us to the value or the generalisability of his theory of legal rights). As I have said, to ascribe to all members of a class C a right to treatment T is to presuppose that T is in all normal circumstances a good for every member of C, and that T is a good which it would be wrong to withhold from any member of C. Certainly recognition of a right involves the imposition of duties on other persons than the right-holder, but what duties, and upon whom, is a matter which in any case needs careful definition in order best to secure the right. When the legislature confers a right *eo nomine*, as in the Succession (Scotland) Act discussed above, it is in effect left to the courts to effect a structure of duties and remedies sufficient to secure the right in question.

Although it appears, for the reasons stated here, that the will theory cannot be accepted as yielding a satisfactory analysis of legal or moral rights, the central point which the theory stresses is one which should not be denied. It is certainly true that apart from such cases as those of children or the mentally incapacitated, the holder of a legal right is normally permitted and empowered in law to choose whether or not on any given occasion he should avail himself of his right by insisting on performance by another party of the relevant duty. What is more, in the case of 'private rights', breach of a correlative duty ordinarily gives rise to a 'remedial' right which in turn the right holder has an option to exercise or not as he sees fit. The remedial right is enforced by exercising as against the wrongdoer the power of initiating legal proceedings. For quite obvious reasons, out of the whole class of legal rights, it is this subclass of private rights supported by private remedial rights and private powers of initiating proceedings which is of central concern in the practice of the law.

But while conceding the truth, and the practical importance, of these points, I would strongly contend that powers of waiver or enforcement are essentially ancillary to, not constitutive of, rights (whether primary rights or remedial rights). That contention, when coupled with that

[7] See R. von Ihering, *Geist des römischen Rechts*, III, p. 332.
[8] See J. Austin, *Lectures on Jurisprudence*, c. XVII.
[9] See H. L. A. Hart, "Bentham on Legal Rights", *op. cit.* supra n. 2., and references therein. For a contemporary defence of a version of 'interest theory' see also G. Marshall, "Rights, Options, and Entitlements", in: Simpson (ed.), *op. cit.* supra n. 2, pp. 228–241.

concession, is acceptable only if good reason can be shown, in terms of the theory here advanced, why it should be normal that rights (as here explained) carry with them the power of waiver or enforcement, and a free option as to its exercise.

To recur to my earlier elucidation of a legal right, and to improve a little on it, let this be said: a law which is conceived as conferring on members of Class C a right to treatment T, is envisaged as advancing the interests of each and every member of C on the supposition that T is (normally) a good for each and every member of C. (Save in the case of legislation expressly conferring 'rights' *eo nomine*, it may be disputable whether a law is so conceived and should be so construed.) On that footing, there would be good reason to leave it to any right holder to choose whether other parties need or need not on any given occasion respect his primary right, and whether to enforce or not to enforce remedial rights in the case of breach of the primary right, only if there is some good reason to leave it to the choice of individuals whether to have or not have what is, or is from the legislator's point of view believed to be, good for them.

Is there then any good reason why individuals should be permitted to choose whether or not to have what they, or others, think is good for them? From a certain standpoint in political philosophy, that of liberalism as classically expressed, for example, by JOHN STUART MILL in his *Essay on Liberty*, the answer is 'Yes'. To be a liberal is indeed to believe *inter alia* that nobody should ever be forced to pursue his own good, however that may be defined; but exceptions are allowed for, notably children and the mentally incapacitated. One ground which can be asserted as supporting both the principle and the exception is that people can be presumed to be the best judges of what is for their own good or in their own interest, but that presumption does not hold in certain defined cases, for example young children and mentally incapacitated people. To put it another way: save in such exceptional cases, freedom of action is a good which ought to be accorded to every person except in the case of actions harmful to others. (Notice that on the present theory, that would lead on to saying that people have a right to freedom; a right which would be barely intelligible if we accepted a *definition* of 'right' in terms of the will theory.)

It is now obvious that if anyone accepts the theory advanced in this paper as to the nature of rights, and also accepts (as I do) the liberal principle just adumbrated, he must further accept that in all normal

cases rights ought to carry with them powers of waiver or enforcement. That the legal system does in fact normally confer just that power of waiver or enforcement on right holders should accordingly be taken as implying no more than the unsurprising truth that the liberal principle is deeply embedded in our law, if less so now than in the later nineteenth century. It would be equally unsurprising that questions about private rights should be regarded as being of practical importance only in legal systems imbued to some extent with liberal principles. I conclude that the theory here advanced can fully accomodate the valid insights of the will theory in the context of a liberal legal system.

On the other hand, the will theory fails as an explanation of rights because it cannot account for such important rights as the children's rights discussed in this essay. The presumption that people are the best judges of what is good for them and of whether to have it or not is not and should not be extended to children, certainly not to young children. Neither in law nor in what I take to be sound morality can children's rights be regarded as carrying the option of waiver or enforcement by themselves or on their behalf. Children are not always or even usually the best judges of what is good for them, so much so that even the rights which are most important to their long-term well being, such as the right to discipline or to a safe environment, they regularly perceive as being the reverse of rights or advantages. It does not follow that adults act well if they permit their children to waive those rights, or if they enforce them only at their children's insistence.

I am at once glad and regretful to discover that it is possible for me to acknowledge that my children have rights, without being thereby committed to the outrageous permissiveness to which my natural indolence inclines me[10].

[10] Subject to all proper disclaimers of their responsibility for my obstinacy in error, I have warmly to thank several colleagues for criticism of, and advice on, drafts of this paper: D. D. Raphael, E. M. Clive, E. Colvin, and Z. K. Bankowski.

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LEGAL RIGHTS

J. Raz*

What are legal rights? How do they relate to moral rights? It is common for philosophers to turn to the law for a model for their analysis of rights in general. Several leading legal philosophers, such as W. N. Hohfeld and H. L. A. Hart,[1] have proposed explanations of legal rights without establishing whether they apply to non-legal rights as well. They have thus assumed that the nature of legal rights can be established independently, that the success of an account of legal rights does not depend on its applicability (possibly somewhat modified) to other rights. Other philosophers like L. Becker, C. Welman and R. Flatham,[2] make some account of legal rights, usually Hohfeld's, the starting point for their explanation of rights in general.

This mode of approach is not, and has never been, universal. J. Feinberg and R. M. Dworkin are but two prominent contemporary writers who base their analysis of legal rights on an explanation of rights in general.[3] Elsewhere I have proposed a general account of rights.[4] Its gist is that to say of an individual or a group that he or it has a right is to say that an aspect of their well-being is a ground for holding another to be under a duty. My purpose in this article is to show that this account applies to legal rights and to defend my approach which regards moral, rather than legal, rights as the model for a general explanation of the concept. The article does not attempt a classification of legal rights. Nor does it offer an analysis of special kinds of rights. Its sole concern is the general idea of a legal right.

1. AGAINST THE INSTITUTIONAL MODEL

Not all writers who have been inspired by a legally-based account of rights, like that of Hohfeld, have chosen to base on it their explanations of rights in general by reason of its foundation in the law. Many of them simply saw it as a promising

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1 See W. N. Hohfeld, *Fundamental Legal Conceptions* (Yale U Press, New Haven); H. L. A. Hart, *Definition and Theory in Jurisprudence* (Oxford U Press 1953); 'Bentham on Legal Rights' in A. W. B. Simpson, ed, *Oxford Essays in Jurisprudence* (2nd series, Oxford U Press 1973).

2 See L. Becker, *Property Rights* (Routledge and Kegan Paul, London 1977); C. Welman, 'A New Conception of Human Rights' in E. Kamenka and A. E. S. Tay, eds, *Human Rights* (Arnold, London 1979); R. Flatham, *The Practice of Rights* (Cambridge 1976). Cf also T. D. Perry, 'A Paradigm of Philosophy: Hohfeld on Legal Rights' 14 *Am Phil Q* 41 (1977). Those deontic logicians who consider rights at all tend to base their work on Hohfeld's.

3 See J. Feinberg's *Rights, Justice and the Bounds of Liberty* (Princeton U Press, New Jersey 1980), essays 6–8. Dworkin, *Taking Rights Seriously* (Duckworth, London 1977) passim.

4 'The Nature of Rights' *Mind* (1984).

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starting-point. Since any complete theory of rights has to apply both to legal and to non-legal rights it may be thought unimportant whether a writer's source of inspiration is reflection on the law or not. The issue does, however, suggest a few points which deserve attention.

Some non-legal rights resemble legal rights more than others. Closest to them are institutional rights. These are rights conferred by the rules of associations such as political parties, trade unions, educational institutions and sports associations. They share with the law several of its defining characteristics. They are normative systems regulated by adjudicative institutions and by rules of recognition determining membership of the system.[5] Just as the law is a particular type of institutional normative system, so legal rights are a particular type of institutional rights.

Some other rights are custom-based. They derive from rules, customs and conventions observed in a certain community. Institutional rights are custom-based. But not all custom-based rights are institutional. Many social rules and conventions do not belong to systems of rules identified by rules of recognition and enforceable in courts or tribunals.[6]

It is at least arguable that many rights are not custom-based. People who believe in fundamental human rights usually believe that these rights do not derive from social practices which recognize and implement them even where such practices exist. They further believe that people have such rights even in societies in which the rights are neither recognized nor respected.

It is plausible to regard the law as the model for the analysis of institutional systems generally. The reason is not its greater importance but its greater self-conscious articulateness. Modern law is not just an institutional normative system, it is also a bureaucratic system. Its institutions are manned, for the most part, by professionals. Its proper functioning depends on full-time judges, barristers, solicitors and other legal officials, their professional associations, law schools and the like. Though legal systems have preceded their bureaucratization, contemporary law relies heavily on bureaucratic processes, many of which are designed, at least in part, to give conscious, explicit and complete articulation to the law. This makes it a particularly clear instance of an institutional normative system.

This high degree of self-conscious articulation may also incline one to regard legal rules and institutions as a paradigmatic example of all rules and normative arrangements. And, therefore, to view legal rights as a basis for the analysis of all rights. This tendency is, however, not without risks. The danger is that it will lead to an account based on the specific institutional features of legal rights and will distort our conception of rights in general.

5 See on institutional systems generally and on the law as a special kind of such systems, my *The Authority of Law* (Oxford U Press 1979), essay 6.

6 This way of distinguishing customary from other rights is crude and unsatisfactory but will do for present purposes.

One family of explanations which suffer from this pitfall is that comprising accounts basing rights on normative powers to enforce duties or to apply sanctions for disregarding them. Because the law is an institutional system it is concerned primarily with those rights and duties which it is willing to enforce or following the violation of which it is willing to provide remedies or sanctions. Let us examine the reasoning leading to this conclusion. Being an institutional normative system means being a system consisting of source-based rules which certain adjudicative bodies are bound by their rules of recognition to recognize and apply. That is, institutional systems consist of rules which are subject to adjudication before official bodies. Such adjudication is normally undertaken to obtain remedies or secure sanctions for violation of rights or for breach of duties, or to prevent such behaviour. The only important exception in modern legal systems is litigation to obtain a declaratory judgment. But even that is usually undertaken to facilitate or make unnecessary action for enforcement, remedies or sanctions, or in circumstances where by convention it is respected as if it were an ordinary enforcement or remedial action.[7]

Since litigation is almost invariably either for the enforcement of rights or duties or for remedies or sanctions for disregarding them, it is tempting to think that only rights and duties which can be litigated with a view to such results can be legal rights and duties. This is a mistake. There are legal rights and duties which cannot be enforced and violation of which does not give rise to action for penalties or remedies. The most important class of such exceptional legal rights and duties is certain rights and duties of or against officials. Rights and duties of officials and rights against them regulate the activities of courts and other legal officials and are therefore subject to adjudication. That is why they can meet the conditions for being legal rights and duties. But they are not always themselves protected by action in the courts. The law determines what appeals the highest Court of Appeal has a right to hear but if it decides to hear an appeal that it has no right to hear then no one can take legal action to stop it. I do not claim that the law must contain unprotected rights and duties, merely that all legal systems in fact contain them. They are, however, clearly exceptional and in a sense parasitical on rights and duties which are enforceable or which do give rise, when disregarded, to actions for remedies or for sanctions. Therefore, their existence does not disprove the statement that the law is primarily concerned with rights and duties which it is willing to enforce or for the violation of which it is willing to provide remedies or sanctions.

Moreover, the law typically, though not invariably, endows right-holders with power to take legal action to enforce their rights or obtain redress for their violations. This is normally a very sound policy. There are strong reasons for limiting access to court. If anyone could go to court to complain of the violation of any right regardless of whose right it was, the result would be that individuals would often face action alleging that they had transgressed someone's rights when

7 As is the case in action against the Crown in Britain.

the action was frivolous or malicious or based on no evidence. Right-holders are those most directly affected. They have in most cases the motivation to protect their rights and good access to available evidence. It is far better to give them access to the court and deny it to all others. We all know the flaws in any argument that the initiative for all legal actions to protect rights should rest exclusively with the right-holder. Our present interest is not, however, with these considerations of legal policy, but with their unfortunate impact on certain theories of rights.

Some writers on legal rights, seeing that most legal rights are protected by remedies, sanctions and enforcement measures and that right-holders normally have legal power to invoke such protective measures, have concluded that to have a legal right (or at least to have one kind of legal right) is to have control over its corresponding duty, i.e. to have legal powers to take protective legal action. Other writers, who found their accounts of rights generally on some such explanation of (one kind of) legal rights, have concluded that all (or one kind of) rights are no more than the possession of a normative power to control duties corresponding to the right. They have, therefore, looked for non-legal analogues of legal remedies and sanctions and of legal rules of locus standi.

The results were only too often a distorted view of morality. In the search for analogues of legal sanctions and remedies expressions of views about the rightness or wrongness of actions were often interpreted as sanctions. People's judgments that they had behaved badly were often regarded as internal sanctions. Pangs of conscience were compared with jail sentences.[8] Of course, people sometimes punish themselves or each other for wrongdoing. Of course, we all recognize obligations to compensate the victims of our wrongdoings. But punishment and demands for compensation are based on and justified by judgments about wrong-doings. Neither the formation of such judgments, nor their natural expression (be it through their open avowal or through feelings of shame or rage or whichever emotion is appropriate to one's belief, or through the natural expression of such feelings in word or action) should be confused with punishment. Punishment is a deliberate act intended to hurt because of a (believed) wrongdoing by the punished (or, in the case of collective punishment, by one of the punished). It is distinct both from the belief on which it is based and from its natural expression in words or deeds.[9]

Such distortions cannot be dismissed as aberrations which do not undermine credence in an account of (all or some kinds of) rights as the possession of a power to control a duty. Without these aberrations this account loses its appeal. Any sound morality recognizes rights whose purpose is not to protect economic interests, rights whose violation does not cause harm nor does it give rise to a

8 See on these points P. M. S. Hacker's important article 'Sanction Theories of Duty' in A. W. B. Simpson, ed, *Oxford Essays in Jurisprudence* (Oxford U Press 1973).

9 Though, of course, people can, and occasionally do, punish each other by expressing views in order to hurt, on the ground that the wrongdoer deserves such treatment.

right to punish or to obtain compensation. Many people believe in a right not to be deceived by members of one's family, a right not to be insulted or treated with contempt by anyone, and many other rights which derive from recognition of a person's dignity rather than a need to spare his feelings or his pocket. But their belief is not merely false but incoherent if rights consist in controlling another's duty by being able to punish its violation or demand compensation.

Some philosophers draw an analogy between legal locus standi rules and moral rules concerning the appropriateness of complaints about wrongdoings. While some similarity exists, it cannot be used to provide an account of rights as power to control duties without leading to exaggeration and distortion. Many conventions about the propriety of poking one's nose in other people's affairs are mere matters of etiquette or of good manners and cannot affect underlying moral rights. Some moralities, while recognizing rights, impose no moral restrictions on the right to punish their violation or to demand that compensation be given to the victims. Everyone is morally entitled, or even required, to do so, if his action is likely to be helpful. Where moral restrictions on the right to complain exist, they often fail to point to the right-holder. According to certain moral theories children are not allowed to complain of violations of (some of) their rights. Furthermore such restrictions may exist even where no right is violated. For example, breach of certain religious duties or of duties to the public at large is often not viewed as a violation of any right, and yet only the head of the family or the priest may be allowed to punish or demand compensatory action.

2. LEGAL JUSTIFICATIONS

I have dwelt on the shortcomings of one family of explanations of rights to illustrate the dangers in taking legal rights as the model for an explanation of rights in general, the danger of basing one's account on the institutional features of the law which are absent in non-institutional rights. My proposed account of rights generally as grounds for holding others to be subject to duties is certainly free of this danger. It identifies rights by their role in practical reasoning. They indicate intermediate conclusions between statements of the right-holder's interests and another's duty. To say that a person has a right is to say that an interest of his is sufficient ground for holding another to be subject to a duty, i.e. a duty to take some action which will serve that interest, or a duty the very existence of which serves such interest. One justifies a statement that a person has a right by pointing to an interest of his and to reasons why it is to be taken seriously.[10] One uses the statement that a right exists to derive (often with the aid of other premises) conclusions about the duties of other people towards the right-holder.[11]

10 One cannot specify in the abstract what importance those reasons must assign to the interest except circularly by saying 'sufficient to justify the conclusion that that person has a right'. One can and should of course develop a theory of which interests are protected by rights and when.

11 A duty is towards a certain person if and only if it is derived from his right.

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Such an account of rights certainly does not rely on any institutional features of law. When coming to use it to explain legal rights one encounters the opposite problem. The law, one may say, like other institutional systems, is primarily concerned with aspects of individual behaviour which can be adjudicated in courts and tribunals. It is, consequently, a system of rules for the guidance of behaviour. It is not a system of practical reasoning, but of operative action-guiding rules. An explanation of rights in terms of their role in practical reasoning is, therefore, incapable of explaining legal rights.

To prepare the ground for applying my general account of rights to legal rights it is, therefore, important to consider briefly the extent to which the law, as well as other institutional normative systems, are systems of practical reasoning. To regard them as such is compatible with thinking of them as normative systems, i.e. as systems of rules. All that is involved is the view that legal rules are sometimes hierarchically nested in justificatory structures. That the law is a system of practical reasoning means no more than that it follows from this fact that belief in the normative force of some of the legal rules commits one to belief in the normative force of some of the others.

To say of the law that it is a system of practical reasoning is then to claim that it consists of rules some of which justify some of the others. It is a statement of the logical properties of the law. It is not a psychological or sociological statement about people's beliefs about the law or their attitude to it. Nor is it a moral or other value judgment about the value or merit of the law.

Lawyers commonly conceive of the law as made of sets of nested rules linked by justificatory chains. One rule in a set justifies one or more of the others which in turn justify a few of the rest, and so on. A rule enacted by a Minister of the Crown derives its legal force from an Act of Parliament. Anyone who believes that the Act of Parliament is normatively binding[12] is committed to believe that so is the ministerial rule, since that conclusion is entailed by his premise (together with certain true factual premises). This illustrates the fact that the law is a structure of authority. The authority of some of its rules is vindicated by the fact that they were created in modes authorized by other of its rules.

There is no reason to think that each legal system is a pyramid of authority leading to one apex, to one supreme legal rule which authorizes all the others. I am merely pointing to the familiar fact that some rules of law authorize the creation of some others. Many legal rules can be grouped by their common origin. In Britain statutory law, for example, derives its authority from the authority of Parliament to make law, whereas case law derives its authority from the power of the higher courts to do the same. Borrowing Hart's terminology,[13] we can call the type of

12 I use the expression 'normatively binding' where others may have used 'morally binding'. Though on occasion I will refer to moral force or to moral justifications, 'moral' is often used in a narrower sense in which 'moral' considerations are only one kind of normative consideration.

13 H. L. A. Hart, 'Moral and Legal Obligations' in A. I. Melden, ed, *Essays in Moral Philosophy* (Seattle 1958), and *Essays on Bentham* (Oxford 1982) 254.

justificatory nexus we have considered so far content-independent justification. In our example it was assumed that the ministerial regulation is normatively binding regardless of its content, becase it was issued by a person who had authority to do so.[14] But some legal rules provide content-dependent justification for some others.

Consider the relation between the following three (hypothetical) legal rules:

(1) Every person has a right to freedom of expression.

(2) No person shall be subject to a duty restraining the publication of a sincerely-held opinion or of true information without his consent, unless such restriction is necessary for reasons of security of state or of the maintenance of essential public services.

(3) Publication of details of the working of an essential public service such as the water supply cannot be prohibited by law, even if possession of such information can assist anyone who may wish to disrupt such service, unless there is a clear and immediate danger that it may be used for such a purpose.

I should emphasize that it is not my claim that these rules either are or should be law. They are merely useful since they resemble several actual rules and they illustrate typical justificatory relations between rules. Each of these rules justifies the ones that follow it. They, therefore, form a justificatory hierarchy. The first rule is the most general. It justifies not only the other two but many more. For example it justifies the rules:

(4) There is no legal duty protecting the reputation of the dead.

(5) Journalists have a right not to disclose the sources of their information except when this is necessary to secure prosecution and conviction for an offence for which the maximum penalty is five years or more.

Rule (2) justifies (3) but not (4) or (5). It is, therefore, lower in the justificatory hierarchy than (1) but higher than (3). The justificatory structures these rules exemplify are content-dependent. In this they differ from structures of authority which are content-independent justificatory structures. But otherwise they greatly resemble them. Both determine partial ordering among certain legal rules and yet neither is a connected relation.

They can be said to divide the law into (possibly overlapping) groups of rules in each of which one (or several in combination) provide a justification for the rest. When the justification is content-independent the groups are identified by their common, direct or indirect, source. When the justification is content-dependent the groups it creates are based on doctrinal unity. They are all articulations and implementations of one or more core doctrines.

Let me try and explain the justificatory relation I have been referring to more precisely. All legal statements can be expressed by 'It is the law that P' sentences where 'P' is replaced by a (non-legal) sentence. Let us define a relation of legal justification as follows. The statement 'It is the law that P' legally justifies the statement 'It is the law that R' just in case 'It is the law that P' is true and there is a set of true statements (legal or non-legal) <Q>, such that <Q> and it is the law

14 Though his authority may be and usually is, limited to rules which meet certain conditions.

that P state a complete reason to believe that R (and <Q> by itself does not state such a reason).

I shall refer to the embedded statement P of a legal statement 'It is the law that P' as its content. The content of a legal statement may be true even if the legal statement itself is false and vice versa. It is true that one ought to keep one's promises but false that it is the law that one ought to do so. It is (in many legal systems) true that it is the law that one may kill one's pets at will but it is false that one may do so. The sentence-forming expression 'it is the law that . . .' is not a truth functional operator. To establish the truth of a legal statement one has to establish not that its content is true but that it has legal status, that it has the force of law. Justifying a legal statement is not to be confused with proving or establishing its truth. It concerns the truth of its content. Since in normal discourse part of a reason, i.e. an incomplete reason, is a reason, a legal statement justifies another legal statement if it states a reason to believe in the truth of its content. But while the justifying statement provides a reason for believing in the truth of the content of the justified one, it falls short of proving its truth. The reason it provides need not be a conclusive reason. It may rely on inductive or on practical (deontic) inferences both of which are defeasible.

We can define a conclusive justification as follows. One legal statement, it is the law that P, conclusively justifies a second legal statement, it is the law that R, if there is a set of true premises <Q> which does not entail R but such that <Q> and 'it is the law that P' entails 'R'. Finally a justification should be distinguished from a complete justification. A complete justification of a legal statement is the set of all the non-redundant premises which constitute a complete reason to believe in the content of the justified statement.

As our examples illustrate, the justificatory relation between legal rules[15] is not that of a complete justification. The doctrine of free speech stated in (1) is not a complete reason for believing in the content of the rule (2), nor is (2) itself a complete reason for believing in the content of (3). The route from (1) to (2) goes through additional premises. Some elaborate and explain (1), its scope and its point. They may be premises which explain what is an act of expression and what counts as a restriction on its freedom. They also include explanations of why it matters. They will lead to the conclusion (which (1) by itself does not yield) that suppression of sincerely held opinion is worse than the suppression of the publication of opinions not held by the speaker, or that (1) protects only unconsented-to restrictions on publication (or at least that consent to a restriction on publication makes it less objectionable). Beside these premises, rules such as (2) and (3) reflect the force of other doctrines which conflict with (1), doctrines such as:

(6) The public interest in the maintenance of essential services warrants measures necessary to guarantee their continued operation.

15 One legal rule justifies another in case the statement of the one justifies the statement of the other.

Rules (2) and (3) reflect the legal resolution of conflicting legal doctrines. They do not just apply their general justifying doctrines such as (1). They also indicate their limits and allow for certain exceptions to them.

When we refer to one rule as justifying another we rarely have a complete justification in mind. Nor do we always assume the justification to be successful. I can reject the suggestion that (1) justifies (2) if I believe that the additional premises which are required to entail the contents of (2) are false. I may then say that it is a mistake, albeit a common one, to think that (1) justifies (2). Here 'justifies' means successfully justifies. But in another key I can say that the rule that the suitability of a person to have custody of his child depends entirely on the interest of the child is the justification of the legal practice of denying custody to homosexuals, without regarding the justification as successful. Here 'justification' means what is taken by the courts or the law or by people generally, to justify. In this article this will be the sense in which 'justifies' will normally be used.

3. LEGAL JUSTIFICATION AND VALIDITY

To recap: a legal system can be regarded as a system of practical reasoning for many of its rules are nested in justificatory structures. Rules are so nested if, of any two of them, one legally justifies the other. The relation of legal justification between legal rules is just an instance of a wider relation of legal justification between legal statements. It holds between 'it is the law that p' and 'it is the law that q' if and only if 'it is the law that p' is true and there is a set of true statements <Q> such that <Q> and 'it is the law that p' are a complete reason to believe that q. In other words one legal statement justifies a second legal statement just in case it is a reason to believe in the content embedded in the second.

It should be obvious why the justificatory relation is said to exist between legal statements if the justifying legal statement is a reason for accepting *the content* of the justified one. A rule should have the force of law only if its content is successfully justified—whether by another legal rule (i.e. by a legal justification) or not is immaterial. This necessary condition can be strengthened into a sufficient condition as follows: if p is justified and if the matter it deals with should be regulated by law then it should be the case that it is the law that p.[16] The general justificatory relation helps in the evaluation of the merit of the law. Our specific interest here is in legal justification only, i.e. those justifications based on legal premises. We are concerned only with the way one legal rule justifies another.

Where the justification starts from non-legal premises it is clear that it cannot establish the truth of a legal statement or the validity of a legal rule. At best it is part of an argument for its desirability. But where a successful legal justification is concerned does it not establish the validity of a legal rule by showing that its content is entailed by another legal rule and other true premises? Is not this

16 This of course does not entail that it is now best to change the law to that effect. Though it is best that p has the force of law it may be wrong to enact it because of the consequences of the very act of introducing the change.

precisely the way that the validity of delegated legislation is established? Consider, for example, (7) and (7a):

(7) Everyone has a legal right to his good name (i.e. it is the law that everyone has a right to his good name).

(7a) Jimmy has a legal right to his good name.

Is not the fact that (7a) is legally justified by (7) the only way in which its truth can be established?

This crucial and difficult problem has not received as much explicit attention as it deserves. I do not know of anyone who denies that a successful legal justification does, under certain conditions, establish the truth of the justified legal statements. Kelsen came close to doing this. He denied that content-dependent justification can ever establish the truth of the justified legal statement.[17] He would have denied that the truth of (7a) can be learnt from that of (7). His reasons for this view, if consistently pursued, would, however, lead to the conclusion that content-independent justifications also fail to establish the truth of the justified statement. That means that the validity of delegated legislation cannot be established by reference to the authorizing statutes but depends on judicial declarations of their validity. But this undermines the very emphasis on the structure of authority which is the backbone of Kelsen's theory of law. It also raises questions about the authority of the courts to make decisions validating delegated legislation. That authority itself rarely rests on the historically-first constitution. It depends on the very chain of reasoning that Kelsen is committed to reject.

I am not sure whether anyone has advocated the opposite view, namely that all successful legal justifications establish the truth of the justified statement. It is possible that this is R. M. Dworkin's view. My own view is determined by the Sources Thesis. It says that the existence and contents of the law can be determined without resorting to any moral argument. In its widest and strongest interpretation the thesis applies not merely to the existence and content of all legal rules, but more generally to the truth and content of all legal statements. It follows that a successful legal justification can establish the truth of the justified legal statement only if it does not resort to moral arguments (i.e. if no moral premises are among the additional premises <Q> which form part of the complete justification concerned).[18] Subject to that condition it is true that a successful legal justification establishes the truth of the justified statement.

Therefore, content-independent justification which does not involve moral premises does indeed establish the validity of the delegated legal rules. Similarly the truth of (7a) can be established by reference to (7). On the other hand while (1) justifies (2) it cannot establish its legal validity. If (2) is valid law it is so in virtue of courts' decisions which have adopted it and which have the force of precedent,

17 See Kelsen, 'Law and Logic' in *Essays in Legal and Moral Philosophy* (Reidel, Dordrecht 1973).

18 See J. Raz, *The Authority of Law*, chap 3; *The Concept of a Legal System* 2nd edn (Oxford 1980) 210–16.

or in virtue of being incorporated into a statute. It cannot be regarded as valid law just on account of being successfully justified by (1).

A successful justificatory relation between one legal statement and another is of great legal significance even when it does not by itself establish the truth of the justified statement.[19] If the justified statement is not a true statement of law the justification provides a reason for changing the law so as to make the justified statement true. As has already been noted it is not necessarily a conclusive reason. Though the change is shown by the justification to be desirable, its introduction may have undesirable aspects or consequences which outweigh the reason for it. If on the other hand the justified legal statement is already the law then the justification shows that it is a morally-valid law. A morally-valid law may not be a good law if its validity derives from an authority-based content-independent justification. The moral validity of a rule means that it has the moral force that it purports to have. If a rule imposing a certain duty on its subjects is morally valid then its subjects have the duty it imposes on them. It does not follow that it is best that they should have it. They may have it because of the authority of the person who made the rule but he may have made a mistake in making the rule, which should be rectified by changing it.

A content-dependent successful legal justification of an existing legal rule does establish not merely that it is morally valid but also that it is good that it exists. It is therefore a reason against changing it but once more this is not necessarily a conclusive reason. The very introduction of a change, even one substituting a less satisfactory rule for the existing one, may have aspects and consequences which make it desirable and which may outweigh the reasons against it.

We now have a reasonably complete picture of the sense in which law is a system of practical reasoning. First, some legal rules justify some others. In this they illuminate their point and purpose. The former are invaluable guides to the interpretation of the latter and they help decide what weight to give the latter when these conflict with others. Secondly, legal rules constitute legal reasons for developing the law in certain ways. The importance of the fact that they are *legal* reasons for developing the law is that they are reasons on which courts are required to act, given the appropriate opportunity. Elsewhere I have likened them to directed administrative powers.[20] Consider a case in which an administrative authority is given the power to grant certain privileges and rights (say, grant planning permission) and directed to do so if certain conditions are met (e.g. the development proposed preserves the character of the neighbourhood, meets the required safety standards and will not significantly increase the traffic in the area).

19 The following remarks assume that the justification proceeds from a morally-justified legal rule. (That is they represent the perspective of a person who is willing to make the justifying legal statement in a committed way. I am using the distinction between committed and detached legal statements explained in *The Authority of Law*, essay 8). This is normally the point of view of the courts. Hence its importance to legal analysis.

20 See my 'The Inner Logic of the Law' forthcoming in the proceedings of the 1983 Congress for Legal and Social Philosophy.

The authority is required by law to use its powers as directed. The fact that one legal statement successfully justifies another which does not yet have the force of law is a reason for courts, which have the power to do so, to give it legal effect. It makes their power to change and develop the law into a directed power.

4. LEGAL RIGHTS AND LEGAL JUSTIFICATIONS

If rights are protected interests in that a person has a right if and only if an interest of his is a sufficient ground for holding another to be subject to a duty then legal rights are legally-protected interests. Such an account gives 'rights' the same sense in legal as in non-legal contexts. It presupposes that the law is (at least in part) a system of practical reasoning. The previous two sections explained the sense in which this is so. How do their conclusions help to clarify the nature of legal rights?

An explanation of legal rights has to include two parts. It has to explain how it is possible to come to have legal rights and it has to explain what can be the legal consequences of having a right. People can come to have legal rights in the same ways in which they can come to have duties, powers, liabilities or any other legal condition. Legal right-statements are either pure or applied. A legal right-statement is pure if its truth can be established by reference to the existence of certain laws alone. Other legal right-statements are applied statements. Their truth can only be established by facts which include facts other than the existence of law. It should be remembered that both kinds of legal right-statements are subject to the condition imposed by the Sources Thesis, namely that their truth can be established without using moral argument.

Consider the following examples:

(8) Everyone has a right to damages against anyone who defames him without lawful excuse.

(8a) Jim has a right to damages against anyone who defames him without lawful excuse.

(9) Jim has a right to £1,500 defamation damages against Smith.

(9a) Smith has a duty to pay Jim £1,500.

(10) Children have a right to maintenance against their parents.

(10a) Jill has a right to maintenance against her mother.

(11) Jill has a right that her mother pay for her piano lessons.

(11a) Jill's mother has a duty to pay for her piano lessons.

Of these (8) and (10) are pure legal right-statements. So is (7). (7) justifies (8). It is wrong, however, to think that (8) is applied. Its legal force is due to the legal sources, precedents and statutes which establish it in law. Its justification by (7) presupposes moral arguments and is therefore incapable of establishing its legal force. Common lawyers are more likely to say that (7) is inferred from (8). The Common Law is preoccupied with providing remedial rights. But the reasoning used by the courts shows clearly that they regard the remedies as justified by a

right to reputation. The choice of remedies and their adequacy is assessed (in part) by their adequacy in protecting that right. Given the discussion of the previous section there is no surprise in one rule which creates a right justifying another such rule, which derives its legal force not from that justification, but from independent legal sources. Nor is there any surprise that (7a), (8a) and (10a), which are justified respectively by the rules (7), (8) and (10) without recourse to any moral argument, derive their very legal force from that justification, and are applied legal statements.

The crucial question is how can one tell that an enactment or a precedent establishes a right. We normally think that the question arises only if the language adopted in legislation or in a judicial decision is obscure or ambiguous. Otherwise it all depends on the language of the enacted rule. But though, where the language is plain, the question may be easy to answer it still requires an answer. Why do we say that the rule made is the one expressed by the language of the enactment understood in its ordinary meaning, or in the meaning its language has, according to legal rules and conventions? The reason lies, crudely speaking, in the fact that where a law is laid down by authority its meaning is dictated by the intentions of that authority. If it were not so then there would have been little reason to ascribe law-making power to that authority.[21] This lesson is particularly important when the issue is, not what precisely is the duty or the right that the law creates, but does the rule in question impose a duty or does it merely set a condition for one's ability to achieve certain consequences? Does it grant a power or a right? And suchlike doubts about the very type of legal condition the law creates.

H. L. A. Hart has shown that one cannot tell the difference between a duty breach of which incurs, e.g. a fine, and an activity one is free to undertake but has to pay a tax if one does, except by reference to the intentions of the law, i.e. of the legal institutions which have created and which enforce the rule.[22] In a similar vein I have argued that one cannot identify a legal power with the ability to perform an act which has legal consequences. This would yield the paradoxical consequence that people have legal power to break the law. (Do we need legal powers for *that*?) A legal power can only be identified by the reasons which led the law (i.e. the institutions which make and sustain it) to attach those legal consequences to the act. The act is an exercise of a legal power only if the reason for attributing to it the legal consequences it has, is that it is held desirable to enable people to perform that act as a means to achieve those consequences, if they so wish.[23]

Similarly, a law creates a right if it is based on and expresses the view that someone has an interest which is sufficient ground for holding another to be

21 Needless to say this brief answer is a rough one. Among many complications let me mention that this answer cannot be the whole story regarding old laws. But the details of a doctrine of interpretation need not concern us here.

22 H. L. A. Hart, 'Kelsen Visited', 10 *UCLA L Rev* 709 (1963).

23 Cf *Practical Reason and Norms* (Hutchinson, London 1975), s 8 and *The Authority of Law*, 17–18.

subject to a duty. One way of creating a right is therefore by the use of the term 'right'. (For example: 'An employer shall have the right to . . .'.) This is an obvious way for the law to confer rights, for given that 'a right' means that an interest is sufficient for holding another to be subject to a duty, its use is a natural way to express that thought. But, as Bentham pointed out long ago, this is neither the only nor the most common way in which the law creates rights. It may do so by the use of specific technical terms such as 'a holding' or 'a share'. Or it may do so by imposing duties with the intention to protect someone's interest thus endowing him with a legal right.

An individual has a right if an interest of his is sufficient to hold another to be subject to a duty. His right is a legal right if it is recognized by law, that is if the law holds his interest to be sufficient ground to hold another to be subject to a duty. This is the core of the account here proposed. It explains why I said above that a rule is identified as a right-conferring one by the reasons for its adoption. To be a rule conferring a right it has to be motivated by a belief in the fact that someone's (the right-holder's) interest should be protected by the imposition of duties on others.

The other aspect of the explanation of legal rights follows naturally from the core idea. If a legal rule creates a legal right then its consequences are that others have duties to protect an interest of the right holder. Such duties are the consequences of a right in the sense that it legally justifies those duties. This legal justification can have either of the two results we distinguished in the previous section. If the justification does not involve any resort to moral argument then the justification establishes the justified duty as a legal duty. In this way if A has a right to £5 against B then B has a duty to give £5 to A. But very commonly the right can justify the duty only in conjunction with other moral premises. In this case the legal right is insufficient to endow the duty with legal force. But the legal right is a reason for giving that duty legal force, for making it into a legal duty.

Consider statements (9), (9a), (11) and (11a) above. (9a) is justified by (9) and (11a) is justified by (11) without resort to moral argument. But while both (9) and (9a) are justified by (8), and (11) and (11a) are justified by (10), these justifications do involve moral judgments about the adequacy of certain payments. Therefore the rights and duties specified in (9), (9a), (11) and (11a) are not legally binding until there is a decision in the court, or an agreement between the parties to that effect. But (8) and (10) provide powerful reasons for reaching such agreements and for rendering these judicial decisions.

An important part of our understanding of legal rights consists in grasping their logical consequences. These are, as we have just seen, that they legally justify other rights and duties. Some of these derive legal force from this justification. Others will be legal rights and duties established by independent legal sources. Others still are not yet legally binding. These last consequences of legal rights deserve special attention since they show legal rights to constitute legal reasons for giving the justified rights and duties legal force. They establish the dynamic

aspect of rights. Legal rights can be legal reasons for legal change. They are grounds for developing the law in certain directions. Because of their dynamic aspect legal rights cannot be reduced, as has often been suggested, to the legal duties which they justify. To do so is to overlook their role as reasons for changing and developing the law.[24]

5. LEGAL RIGHTS AND MORAL PRINCIPLES

The core account of legal rights presented above requires further explanation and refinement. These can best be supplied by examining a few of the objections which are liable to be raised to it. This section explores two groups of objections concerned with the relations between law and morality.

(*a*) *Legal rights need not be recognized moral rights*

The Objection: according to the account proposed above every legal right is a legally recognized pre-existing moral right. This assumes a stronger connection between law and morality than in fact exists. It also misconstrues the nature of this connection. There are two reasons why a legal right may not be the giving of legal force to a pre-existing moral right. First, the law may quite deliberately create a right where none existed. There was no right to initiate the liquidation of a company or to obtain planning permission prior to their creation by law. Secondly, while intending to recognize a pre-existing right the law may fail to do so. It may detect an interest which deserves protection where none exists. Alternatively, the interest may exist but may be insufficient to be the ground of a duty on another. Where a legal right does not recognize a pre-existing moral right it may yet create a moral right based not on the interest of the right-holder but on the reasons we have or may have to obey that law. On the other hand where such reasons are absent or insufficient no moral right is created by the law, but it does create a legal right, one with no moral force.

The Reply: to begin to respond to this complex objection it is useful to remind ourselves of the different kinds of legal discourse. There is the sociological description of social institutions and of people's attitudes and beliefs which H. L. A. Hart called discourse from the external point of view. In this way we talk of the beliefs and actions of courts and legislators. Occasionally sentences such as 'x has a right to y' are used in such discourse to state that legal institutions hold x to have a right to y.

Much more common is the use of such right-sentences to make statements which Hart described as internal, or statements made from the internal point of view, and which I called committed statements.[25] Committed right-statements

24 I have discussed this point in *The Concept of a Legal System*, 225–7.

25 See H. L. A. Hart, *The Concept of Law* (Oxford 1961) 55–6, 86–8. J. Raz, *The Authority of Law*, 140–3, 153–7.

state that the right-holders do have those rights, that they are, if you like, moral rights or rights that morality recognizes as valid. (One should remember that in this article 'morality' is used very widely to include binding normative considerations of any kind.) The important point is that a committed statement that someone has a legal right simply means that that person has a right which is recognized in law, i.e. by the legal institutions.

The elucidation offered above explained 'legal rights' as used in committed statements, for they are the central type of legal discourse. First, not only is it the type of discourse most commonly employed in discourse concerning the law in countries in which the population is not estranged from the government, but it is also the normal mode of discourse in the sense that the law claims normative force and validity to itself. It is treated as it requires to be treated only by people who recognize its normative force and are therefore normally talking of it in committed discourse. Secondly, in every legal system, the officials manning its legal institutions have the internal point of view and are normally using committed statements to describe the law.

Finally, the non-committed modes of discourse are parasitical on the committed discourse. This is evident in the case of external statements. It is also true of the third common type of legal discourse which I call detached discourse. A statement is a detached normative statement if it describes a normative situation as seen from a committed point of view without being committed to it. A person who asserts the existence of legal rights in a detached way is not committed to the moral or normative validity of those rights. His statement is true if it would have been true had the law moral or normative force. Saying that there can be legal rights which have no moral force, or even such that are immoral, is saying that one can make true detached statements about legal rights while morally condemning them and being right to do so.

There is another point raised by the objection which is still to be met. While some legal rights are legally-recognized moral rights, (for example, one's right to a good name) other legal rights are legally-created moral rights. They are moral rights one has because the law has granted them. The account of legal rights which I have offered fails to explain these cases.

There are three types of cases where a legal right can be thought of as a legally-created moral right. My explanation of legal rights adequately accounts for two of them. It requires a certain natural extension to apply to the third.

First is the case where the law changes a person's interests. Thereby it changes his moral rights which it then proceeds to recognize. Strictly speaking this is not a case where the law creates the moral right, it merely creates the interest which is the foundation of the right. Consider the following example. Until planning restrictions were introduced everyone was free to build on his land as he liked. Then the law prohibited building without planning permission and appointed planning authorities with powers to grant such permission. This created for some people an interest they did not have before, i.e. to obtain planning permission.

Given general moral principles and the circumstances of those people it is probable that some of them had a (moral) right to be given planning permission. In some countries the law recognizes those rights by giving a legal right to planning permission when certain conditions obtain, and where these conditions are those which morally entitle the applicants to the permission. It may look as if the law creates a moral right to planning permissions, for the whole of planning law is the law's creation. But upon inspection we can see that the law creates an interest which is the basis of a moral right which is in turn recognized by the law. This combination is in fact very common in technical legal areas such as company law, or licensing law.

Secondly, the possession of some rights depends on the consent or authority of others. I have a right to be on your premises if you consent to my being there. In such cases the right is there to protect some interest of the right-holder. But that interest is sufficient to justify holding another subject to a duty only if the condition is met. My interest in being on your premises if I wish is insufficient by itself to establish a duty on you to let me do so unless you consent to my being there. Your consent removes certain objections to holding you bound to respect my interest and it thus enables the interest to found a right.

Similarly, there are many cases where a moral right exists only if it is recognized by authoritative legal institutions. Sometimes they even have a duty to give their recognition to the right in order to bring it into existence (both as a moral and as a legal right), just as sometimes you ought to consent to my being on your premises, even though I do not have a right to be there unless you consent. In all cases where the consent of a legal authority is a moral condition for the existence of a moral right, a legal right *is* a legally recognized moral right. The legal recognition is self-referential, that is it recognizes that once it (i.e. the legal recognition) is given, a moral right comes into force.

The third type of case involves an extension of the core account. It concerns legal rights which though they purport to be recognized rights fail to be so, and yet they create a morally recognized legal right. Suppose that in a certain country Parliament enacts a legal right to use contraceptives. Some people believe that there is no moral right to use contraceptives, not even a moral right conditional on legal recognition. They recognize of course that Parliament in granting this legal right assumes otherwise. But they do not agree. Yet they think that Parliament's authority carries such moral force as to entail that once the legal right is granted people are morally bound to respect it and not to stop others from using contraceptives. On my account, strictly speaking this is not a case of a moral right. One's moral duty not to prevent the use of contraceptives which is the consequence of the law is not based on the interest of the right-holder, but on respect for the authority of Parliament. But since this is respect for Parliament's mistake about moral rights, and since its moral consequences are to give individuals all they would have had, had they a right to contraceptives, it is a natural extension of the concept to regard such legislation as conferring a (legal)

right. (Though of course it is, in the eyes of the anti-contraceptionists, a right to do wrong, and therefore one which should not be exercised.)[26]

(b) If rights are subject to the Sources Thesis then in many areas there are no legally justified rights

The Objection: Legal rights have two kinds of legal implications. They justify other existing legal rights and duties and they are legal reasons for developing the law by creating further rights and duties where doing so is desirable in order to protect the interests on which the justifying rights are based. The second objection concerns the first implication—the role of legal rights in providing legal justification for other existing legal rights and duties. The objection arises out of the claim that, in accordance with the Sources Thesis, all rights and duties can be identified without resort to any moral argument.

Legally-justified legal rights are either legally valid because they are successfully legally justified without recourse to moral argument, or they are legally valid because they have been directly enacted or acquired the force of precedent. Let us take the first case first. Can a right ever derive legal validity from the fact that it is successfully justified by another legal right? The objection is that this cannot happen in a way consistent with the Sources Thesis for the justification of any right requires moral argument. Consider, for example, the right of a child to be maintained by his parents. To conclude that in virtue of it he has any more specific right (to three meals a day, to proper clothing, etc.), one has to engage in moral argument on the purpose of the right and its place among other moral concerns: is it a right to minimal or to optimal support, is the level of support required relative to the parents' ability to pay, or to their life-style (they may be rich people who lead very simple lives), is it relative to the parents' moral beliefs (so that they may deny him certain experiences or opportunities because they object to them)? Does it include moral as well as material support? The right to maintenance against one's parents has no specific implications which do not involve answering these or some similar questions. These questions cannot be answered without using moral argument. Therefore no legal right has concrete legal implications if the Sources Thesis is to be believed.

Turning to the other class of legally-justified legal rights, i.e. those which derive their legal force from statute or precedent, even they cannot be explained in conformity with the Sources Thesis. At least such explanation is impossible in those areas of the law where rights are liable to be overridden by moral considerations. This is true, it could be claimed, of all equitable remedies and equity-based rights. It is also true wherever considerations of public policy or public morality entitle the courts to override otherwise established rights. It is arguable that the courts have an inherent jurisdiction to this effect in all cases brought before them. Wherever they have this discretion no concrete rights or

26 These objections are suggestive rather than conclusive. For an excellent detailed discussion of the issue see J. Waldron, 'A Right to Do Wrong' 92 *Ethics* 21 (1981).

duties can be attributed to the legislated right which is thus deprived of content. Its content can be restored only if we allow that the content of the law and of legal rights is determined by moral considerations.

The Reply: Both parts of the objections are based on simple mistakes. The fact that a given right can be overridden by moral considerations, just like the fact that it can be overridden by another legal right, shows nothing except that it is not an absolute right which defeats all contrary considerations. But legal rules rarely, if ever, have absolute force. In general they are liable to be overridden by contrary legal considerations where such exist, and where the law gives them greater force. Often, it is true, they are liable to be overridden by certain moral considerations as well, for often the law provides for this. But the account offered in the previous section is an account of defeasible rights. It does not presuppose that they have absolute force.

As to the objection concerning legal rights which derive their legal force from being justified by other legal rights, it is simply incorrect that all such justifications depend on moral assumptions. Suppose that it is morally right that parents can do with their children whatever they think is in the children's best interest (including killing them). If so, it is false that children have a right to maintenance against their parents. One cannot argue that this is what that right means. One cannot argue that a child's right to maintenance is respected by a parent who starves him because he, the parent, sincerely but falsely believes that this is in the best interests of the child. 'A right to maintenance' has as part of its meaning a descriptive content which can be established without use of moral argument. It establishes the legal force of those rights and duties which can be justified in virtue of its core descriptive content without invoking other moral principles.

6. FURTHER OBJECTIONS

In order further to explain and defend my account of legal rights I will briefly consider three other possible objections to it which, unlike the objections considered above, do not turn on the relation between legal and moral rights.

(*c*) *Legal rights as reasons for legal change*

The Objection: much play was made in section 4 of the fact that legal rights not only justify other existing legal rights and duties but also direct the courts to develop the law in certain ways. They are legal reasons for creating new laws, new rights and duties. They are therefore not reducible to a compendium statement of existing duties. One may object to this and claim that a statement that someone has a right to something is logically equivalent to a statement of existing duties. The dynamic aspect of rights, the fact that they are reasons for new duties simply means that there is an existing duty on the courts to impose certain new duties on other people in certain circumstances. A's right to ø is a reason for the court to allow him to ø, to stop others from hindering him, etc.

The Reply: the courts may have reasons to do all that they are required to do in order to protect a right but these reasons are based on different grounds. They may be based on considerations of general welfare or of public safety, or public order, etc. Sometimes their duty is grounded on A's rights. The nature of the grounds for the courts' duties is clarified by a right statement, but lost by the reduction. Stating the legally-recognized ground of the court's reason for certain actions is no mere rhetoric. It may, for example, be crucial for determining the weight the court is allowed to attribute to this reason when it conflicts with others.

(*d*) *Rights of officials and corporations*

It could be objected that even if my account explains individual rights it cannot explain official rights, nor those of corporations. Their rights are not meant to protect their interests, but the interests of others who are not the right-holders. This objection is based on a misunderstanding. Rights protect the interests of the right-holders. But these interests need not be intrinsically valuable. The reason for protecting them may be that by doing so one does protect the interests of others. Officials have interests. They are determined by their powers and duties, for their interest is to be able to use their powers and to discharge their duties. Corporations also have interests determined similarly by their purposes, powers and duties. It is true that protecting these interests is not intrinsically valuable. Nevertheless corporations and officials have rights in the same sense as other individuals. They have rights if and only if their interests are sufficient to justify holding others to be subject to duties.

(*e*) *Liberty rights*

Some may object that at best I have explained one sense of 'rights', that in which they correspond to duties. But there is a second quite separate sense of rights, i.e. the absence of duty. One has a right to ø if it is neither wrong for one to ø nor is it wrong if one does not.

The issue of the so-called liberty rights is a complex one. Here I will confine myself to a few brief and rather dogmatic observations. The absence of duty does not amount to a right. A person who says to another 'I have a right to do it' is not saying that he has no duty not to or that it is not wrong to do it. He is claiming that the other has a duty not to interfere. It is not necessarily a duty not to interfere in any way whatsoever. It is, however, a claim that there are some ways of interference which would be wrong because they are against an interest of the right-holder. 'I have a right to do it and you have a right to stop me if you can' is paradoxical only if it means 'if you can with no holds barred'.

The difficulty is that though a statement of a right to do something is not a statement that it is right to do so, it is sometimes impossible to decide whether the speaker claims one or the other. The difficulty is all the greater because people rarely say, 'I am acting wrongly but I have a right to do what I am doing'.

Nevertheless, they can say this. There is no contradiction in this statement. It is paradoxical for if I know that I am acting wrongly why don't I stop? Consider, however, the past tense of the same sentence: I acted wrongly but I had a right to do what I did. This is not only in perfect logical order, it lacks the air of paradox. In fact it is quite a common thing to say. It is used when one concedes that one should not have done what one did and yet claims that nonetheless the other had no right to interfere. Such statements exemplify the fact that to have a right to ø is not the same as to have no duty to ø or not to ø.

Though the objection is based on a mistake, it points to an important distinction which is yet to be introduced. We need to distinguish between legal rights and what I shall call legally-respected rights. It is arguable that the right to privacy is respected by English law. This means that there are no legal duties compliance with which violates the right to privacy. If this is so, then the right to privacy fares better than the right to establish a family because in England immigration officials have a duty to prevent entry into the country of husbands and fiancées of some women who have a right of permanent residence in England. This duty violates the right to establish a family. Though the right to privacy is respected (in the technical sense I have given this expression) in English law, it is not a legal right in England. The courts refuse to use it as a ground for imposing duties on officials or on other citizens to stop them from invading privacy.[27] Nor is it used by the courts to justify already existing rights.

Failure to distinguish between a legal right and a legally-respected right may lead to the view that mere absence of a duty is a right. But if so, then privacy is a legal right in English law, and everyone agrees that this is not so.[28]

27 See *Re X (a minor)* [1975] 1 All ER 703 (CA) and *Malone* v *Comnr of Police of the Metropolis (No. 2)* [1979] 2 All ER 620. One important aspect of the right to privacy is at least partially recognized as a legal right in English law, i.e. the right to confidentiality.

28 I am grateful to P. A. Bulloch and to the Editor for helpful comments on the draft of this article and to Wayne Sumner for a very useful discussion of a much earlier draft.

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HARVARD LAW REVIEW

HARD CASES †

Ronald Dworkin *

Philosophers and legal scholars have long debated the means by which decisions of an independent judiciary can be reconciled with democratic ideals. The problem of justifying judicial decisions is particularly acute in "hard cases," those cases in which the result is not clearly dictated by statute or precedent. The positivist theory of adjudication — that judges use their discretion to decide hard cases — fails to resolve this dilemma of judicial decisionmaking. Professor Dworkin has been an effective critic of the positivist position and in this essay he provides an alternative theory of adjudication that is more consistent with democratic ideals. He first posits a distinction between arguments of principle and arguments of policy and suggests that decisions in hard cases should be and are based on arguments of principle. He then illustrates how this distinction is used in cases involving constitutional provisions, statutes, and common law precedents.

THIS essay is a revised form of an inaugural lecture given at Oxford in June of 1971. I should like to repeat what I said then about my predecessor in the Chair of Jurisprudence. The philosophers of science have developed a theory of the growth of science; it argues that from time to time the achievement of a single man is so powerful and so original as to form a new paradigm, that is, to change a discipline's sense of what its problems are and what counts as success in solving them. Professor H.L.A. Hart's work is a paradigm for jurisprudence, not just in his country and not just in mine, but throughout the world. The province of jurisprudence is now the province he has travelled; it extends from the modal logic of legal concepts to the details of the law of criminal responsibility, and in each corner his is the view that others must take as their point of departure. It is difficult to think of any serious writing in jurisprudence in recent years, certainly in Great Britain and America, that has not either claimed his support or taken him as a principal antagonist. This essay is no exception.

His influence has extended, I might add, to form as well as

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substance. His clarity is famous and his diction contagious: other legal philosophers, for example, once made arguments, but now we only deploy them, and there has been a perfect epidemic of absent-mindedness in imitation of the master. How shall we account for this extraordinary influence? In him reason and passion do not contend, but combine in intelligence, the faculty of making clear what was dark without making it dull. In his hands clarity enhances rather than dissipates the power of an idea. That is magic, and it is the magic that jurisprudence needs to work.

* * *

I. Introduction

A. *The Rights Thesis*

Theories of adjudication have become more sophisticated, but the most popular theories still put judging in the shade of legislation. The main outlines of this story are familiar. Judges should apply the law that other institutions have made; they should not make new law. That is the ideal, but for different reasons it cannot be realized fully in practice. Statutes and common law rules are often vague and must be interpreted before they can be applied to novel cases. Some cases, moreover, raise issues so novel that they cannot be decided even by stretching or reinterpreting existing rules. So judges must sometimes make new law, either covertly or explicitly. But when they do, they should act as deputy to the appropriate legislature, enacting the law that they suppose the legislature would enact if seized of the problem.

That is perfectly familiar, but there is buried in this common story a further level of subordination not always noticed. When judges make law, so the expectation runs, they will act not only as deputy to the legislature but as a deputy legislature. They will make law in response to evidence and arguments of the same character as would move the superior institution if it were acting on its own. This is a deeper level of subordination because it makes any understanding of what judges do in hard cases parasitic on a prior understanding of what legislators do all the time. This deeper subordination is therefore conceptual as well as political.

In fact, however, judges neither should be nor are deputy legislators, and the familiar assumption, that when they go beyond political decisions already made by someone else they are legislating, is misleading. It misses the importance of a fundamental distinction within political theory, which I shall now introduce in a crude form. This is the distinction between arguments

of principle on the one hand and arguments of policy on the other.[1]

Arguments of policy justify a political decision by showing that the decision advances or protects some collective goal of the community as a whole. The argument in favor of a subsidy for aircraft manufacturers, that the subsidy will protect national defense, is an argument of policy. Arguments of principle justify a political decision by showing that the decision respects or secures some individual or group right. The argument in favor of antidiscrimination statutes, that a minority has a right to equal respect and concern, is an argument of principle. These two sorts of argument do not exhaust political argument. Sometimes, for example, a political decision, like the decision to allow extra income tax exemptions for the blind, may be defended as an act of public generosity or virtue rather than on grounds of either policy or principle. But principle and policy are the major grounds of political justification.

The justification of a legislative program of any complexity will ordinarily require both sorts of argument. Even a program that is chiefly a matter of policy, like a subsidy program for important industries, may require strands of principle to justify its particular design. It may be, for example, that the program provides equal subsidies for manufacturers of different capabilities, on the assumption that weaker aircraft manufacturers have some right not to be driven out of business by government intervention, even though the industry would be more efficient without them. On the other hand, a program that depends chiefly on principle, like an antidiscrimination program, may reflect a sense that rights are not absolute and do not hold when the consequences for policy are very serious. The program may provide, for example, that fair employment practice rules do not apply when they might prove especially disruptive or dangerous. In the subsidy case we might say that the rights conferred are generated by policy and qualified by principle; in the antidiscrimination case they are generated by principle and qualified by policy.

It is plainly competent for the legislature to pursue arguments of policy and to adopt programs that are generated by such arguments. If courts are deputy legislatures, then it must be competent for them to do the same. Of course, unoriginal judicial decisions that merely enforce the clear terms of some plainly valid

[1] I discussed the distinction between principles and policies in an earlier article. *See* Dworkin, *The Model of Rules*, 35 U. CHI. L. REV. 14, 22–29 (1967). The more elaborate formulation in Part II of this essay is an improvement; among other virtues it prevents the collapse of the distinction under the (artificial) assumptions described in the earlier article.

statute are always justified on arguments of principle, even if the statute itself was generated by policy. Suppose an aircraft manufacturer sues to recover the subsidy that the statute provides. He argues his right to the subsidy; his argument is an argument of principle. He does not argue that the national defense would be improved by subsidizing him; he might even concede that the statute was wrong on policy grounds when it was adopted, or that it should have been repealed, on policy grounds, long ago. His right to a subsidy no longer depends on any argument of policy because the statute made it a matter of principle.

But if the case at hand is a hard case, when no settled rule dictates a decision either way, then it might seem that a proper decision could be generated by either policy or principle. Consider, for example, the problem of the recent *Spartan Steel* case.[2] The defendant's employees had broken an electrical cable belonging to a power company that supplied power to the plaintiff, and the plaintiff's factory was shut down while the cable was repaired. The court had to decide whether to allow the plaintiff recovery for economic loss following negligent damage to someone else's property. It might have proceeded to its decision by asking either whether a firm in the position of the plaintiff had a right to a recovery, which is a matter of principle, or whether it would be economically wise to distribute liability for accidents in the way the plaintiff suggested, which is a matter of policy.

If judges are deputy legislators, then the court should be prepared to follow the latter argument as well as the former, and decide in favor of the plaintiff if that argument recommends. That is, I suppose, what is meant by the popular idea that a court must be free to decide a novel case like *Spartan Steel* on policy grounds; and indeed Lord Denning described his own opinion in that case in just that way.[3] I do not suppose he meant to distinguish an argument of principle from an argument of policy in the technical way I have, but he in any event did not mean to rule out an argument of policy in that technical sense.

I propose, nevertheless, the thesis that judicial decisions in civil cases, even in hard cases like *Spartan Steel*, characteristically are and should be generated by principle not policy. That thesis plainly needs much elaboration, but we may notice that certain arguments of political theory and jurisprudence support the thesis even in its abstract form. These arguments are not decisive, but they are sufficiently powerful to suggest the importance of the thesis, and to justify the attention that will be needed for a more careful formulation.

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[2] Spartan Steel & Alley Ltd. v. Martin & Co., [1973] 1 Q.B. 27.

[3] *Id.* at 36.

B. Principles and Democracy

The familiar story, that adjudication must be subordinated to legislation, is supported by two objections to judicial originality. The first argues that a community should be governed by men and women who are elected by and responsible to the majority. Since judges are, for the most part, not elected, and since they are not, in practice, responsible to the electorate in the way legislators are, it seems to compromise that proposition when judges make law. The second argues that if a judge makes new law and applies it retroactively in the case before him, then the losing party will be punished, not because he violated some duty he had, but rather a new duty created after the event.

These two arguments combine to support the traditional ideal that adjudication should be as unoriginal as possible. But they offer much more powerful objections to judicial decisions generated by policy than to those generated by principle. The first objection, that law should be made by elected and responsible officials, seems unexceptionable when we think of law as policy; that is, as a compromise among individual goals and purposes in search of the welfare of the community as a whole. It is far from clear that interpersonal comparisons of utility or preference, through which such compromises might be made objectively, make sense even in theory; but in any case no proper calculus is available in practice. Policy decisions must therefore be made through the operation of some political process designed to produce an accurate expression of the different interests that should be taken into account. The political system of representative democracy may work only indifferently in this respect, but it works better than a system that allows nonelected judges, who have no mail bag or lobbyists or pressure groups, to compromise competing interests in their chambers.

The second objection is also persuasive against a decision generated by policy. We all agree that it would be wrong to sacrifice the rights of an innocent man in the name of some new duty created after the event; it does, therefore, seem wrong to take property from one individual and hand it to another in order just to improve overall economic efficiency. But that is the form of the policy argument that would be necessary to justify a decision in *Spartan Steel*. If the plaintiff had no right to the recovery and the defendant no duty to offer it, the court could be justified in taking the defendant's property for the plaintiff only in the interest of wise economic policy.

But suppose, on the other hand, that a judge successfully justifies a decision in a hard case, like *Spartan Steel*, on grounds

not of policy but of principle. Suppose, that is, that he is able to show that the plaintiff has a *right* to recover its damages. The two arguments just described would offer much less of an objection to the decision. The first is less relevant when a court judges principle, because an argument of principle does not often rest on assumptions about the nature and intensity of the different demands and concerns distributed throughout the community. On the contrary, an argument of principle fixes on some interest presented by the proponent of the right it describes, an interest alleged to be of such a character as to make irrelevant the fine discriminations of any argument of policy that might oppose it. A judge who is insulated from the demands of the political majority whose interests the right would trump is, therefore, in a better position to evaluate the argument.

The second objection to judicial originality has no force against an argument of principle. If the plaintiff has a right against the defendant, then the defendant has a corresponding duty, and it is that duty, not some new duty created in court, that justifies the award against him. Even if the duty has not been imposed upon him by explicit prior legislation, there is, but for one difference, no more injustice in enforcing the duty than if it had been.

The difference is, of course, that if the duty had been created by statute the defendant would have been put on much more explicit notice of that duty, and might more reasonably have been expected to arrange his affairs so as to provide for its consequences. But an argument of principle makes us look upon the defendant's claim, that it is unjust to take him by surprise, in a new light. If the plaintiff does indeed have a right to a judicial decision in his favor, then he is entitled to rely upon that right. If it is obvious and uncontroversial that he has the right, the defendant is in no position to claim unfair surprise just because the right arose in some way other than by publication in a statute. If, on the other hand, the plaintiff's claim is doubtful, then the court must, to some extent, surprise one or another of the parties; and if the court decides that on balance the plaintiff's argument is stronger, then it will also decide that the plaintiff was, on balance, more justified in his expectations. The court may, of course, be mistaken in this conclusion; but that possibility is not a consequence of the originality of its argument, for there is no reason to suppose that a court hampered by the requirement that its decisions be unoriginal will make fewer mistakes of principle than a court that is not.

C. Jurisprudence

We have, therefore, in these political considerations, a strong reason to consider more carefully whether judicial arguments cannot be understood, even in hard cases, as arguments generated by principle. We have an additional reason in a familiar problem of jurisprudence. Lawyers believe that when judges make new law their decisions are constrained by legal traditions but are nevertheless personal and original. Novel decisions, it is said, reflect a judge's own political morality, but also reflect the morality that is embedded in the traditions of the common law, which might well be different. This is, of course, only law school rhetoric, but it nevertheless poses the problem of explaining how these different contributions to the decision of a hard case are to be identified and reconciled.

One popular solution relies on a spatial image: it says that the traditions of the common law contract the area of a judge's discretion to rely upon his personal morality, but do not entirely eliminate that area. But this answer is unsatisfactory on two grounds. First, it does not elucidate what is at best a provocative metaphor, which is that some morality is embedded in a mass of particular decisions other judges have reached in the past. Second, it suggests a plainly inadequate phenomenological account of the judicial decision. Judges do not decide hard cases in two stages, first checking to see where the institutional constraints end, and then setting the books aside to stride off on their own. The institutional constraints they sense are pervasive and endure to the decision itself. We therefore need an account of the interaction of personal and institutional morality that is less metaphorical and explains more successfully that pervasive interaction.

The rights thesis, that judicial decisions enforce existing political rights, suggests an explanation that is more successful on both counts. If the thesis holds, then institutional history acts not as a constraint on the political judgment of judges but as an ingredient of that judgment, because institutional history is part of the background that any plausible judgment about the rights of an individual must accommodate. Political rights are creatures of both history and morality: what an individual is entitled to have, in civil society, depends upon both the practice and the justice of its political institutions. So the supposed tension between judicial originality and institutional history is dissolved: judges must make fresh judgments about the rights of the parties who come before them, but these political rights reflect, rather than oppose, political decisions of the past. When a judge chooses between the rule established in precedent and some new rule

thought to be fairer, he does not choose between history and justice. He rather makes a judgment that requires some compromise between considerations that ordinarily combine in any calculation of political right, but here compete.

The rights thesis therefore provides a more satisfactory explanation of how judges use precedent in hard cases than the explanation provided by any theory that gives a more prominent place to policy. Judges, like all political officials, are subject to the doctrine of political responsibility. This doctrine states, in its most general form, that political officials must make only such political decisions as they can justify within a political theory that also justifies the other decisions they propose to make. The doctrine seems innocuous in this general form; but it does, even in this form, condemn a style of political administration that might be called, following Rawls, intuitionistic.[4] It condemns the practice of making decisions that seem right in isolation, but cannot be brought within some comprehensive theory of general principles and policies that is consistent with other decisions also thought right. Suppose a Congressman votes to prohibit abortion, on the ground that human life in any form is sacred, but then votes to permit the parents of babies born deformed to withhold medical treatment that will keep such babies alive. He might say that he feels that there is some difference, but the principle of responsibility, strictly applied, will not allow him these two votes unless he can incorporate the difference within some general political theory he sincerely holds.

The doctrine demands, we might say, articulate consistency. But this demand is relatively weak when policies are in play. Policies are aggregative in their influence on political decisions and it need not be part of a responsible strategy for reaching a collective goal that individuals be treated alike. It does not follow from the doctrine of responsibility, therefore, that if the legislature awards a subsidy to one aircraft manufacturer one month it must award a subsidy to another manufacturer the next. In the case of principles, however, the doctrine insists on distributional consistency from one case to the next, because it does not allow for the idea of a strategy that may be better served by unequal distribution of the benefit in question. If an official believes, for example, that sexual liberty of some sort is a right of individuals, then he must protect that liberty in a way that distributes the benefit reasonably equally over the class of those whom he supposes to have the right. If he allows one couple to use contraceptives on the ground that this right would otherwise be invaded,

[4] *See generally* Dworkin, *The Original Position*, 40 U. Chi. L. Rev. 500 (1973).

then he must, so long as he does not recant that earlier decision, allow the next couple the same liberty. He cannot say that the first decision gave the community just the amount of sexual liberty it needed, so that no more is required at the time of the second.

Judicial decisions are political decisions, at least in the broad sense that attracts the doctrine of political responsibility. If the rights thesis holds, then the distinction just made would account, at least in a very general way, for the special concern that judges show for both precedents and hypothetical examples. An argument of principle can supply a justification for a particular decision, under the doctrine of responsibility, only if the principle cited can be shown to be consistent with earlier decisions not recanted, and with decisions that the institution is prepared to make in the hypothetical circumstances. That is hardly surprising, but the argument would not hold if judges based their decisions on arguments of policy. They would be free to say that some policy might be adequately served by serving it in the case at bar, providing, for example, just the right subsidy to some troubled industry, so that neither earlier decisions nor hypothetical future decisions need be understood as serving the same policy.

Consistency here, of course, means consistency in the application of the principle relied upon, not merely in the application of the particular rule announced in the name of that principle. If, for example, the principle that no one has the duty to make good remote or unexpected losses flowing from his negligence is relied upon to justify a decision for the defendant in *Spartan Steel*, then it must be shown that the rule laid down in other cases, which allows recovery for negligent misstatements, is consistent with that principle; not merely that the rule about negligent misstatements is a different rule from the rule in *Spartan Steel.*

D. Three Problems

We therefore find, in these arguments of political theory and jurisprudence, some support for the rights thesis in its abstract form. Any further defense, however, must await a more precise statement. The thesis requires development in three directions. It relies, first, on a general distinction between individual rights and social goals, and that distinction must be stated with more clarity than is provided simply by examples. The distinction must be stated, moreover, so as to respond to the following problem. When politicians appeal to individual rights, they have in mind grand propositions about very abstract and fundamental interests, like the right to freedom or equality or respect. These grand rights do not seem apposite to the decision of hard cases at law,

except, perhaps, constitutional law; and even when they are apposite they seem too abstract to have much argumentative power. If the rights thesis is to succeed, it must demonstrate how the general distinction between arguments of principle and policy can be maintained between arguments of the character and detail that do figure in legal argument. In Part II of this essay I shall try to show that the distinction between abstract and concrete rights, suitably elaborated, is sufficient for that purpose.

The thesis provides, second, a theory of the role of precedent and institutional history in the decision of hard cases. I summarized that theory in the last section, but it must be expanded and illustrated before it can be tested against our experience of how judges actually decide cases. It must be expanded, moreover, with an eye to the following problem. No one thinks that the law as it stands is perfectly just. Suppose that some line of precedents is in fact unjust, because it refuses to enforce, as a legal right, some political right of the citizens. Even though a judge deciding some hard case disapproves of these precedents for that reason, the doctrine of articulate consistency nevertheless requires that he allow his argument to be affected by them. It might seem that his argument cannot be an argument of principle, that is, an argument designed to establish the political rights of the parties, because the argument is corrupted, through its attention to precedent, by a false opinion about what these rights are. If the thesis is to be defended, it must be shown why this first appearance is wrong. It is not enough to say that the argument may be an argument of principle because it establishes the legal, as distinguished from the political, rights of the litigants. The rights thesis supposes that the right to win a law suit is a genuine political right, and though that right is plainly different from other forms of political rights, like the right of all citizens to be treated as equals, just noticing that difference does not explain why the former right may be altered by misguided earlier decisions. It is necessary, in order to understand that feature of legal argument, to consider the special qualities of institutional rights in general, which I consider in Part III, and the particular qualities of legal rights, as a species of institutional rights, which I consider in Part IV.

But the explanation I give of institutional and legal rights exposes a third and different problem for the rights thesis. This explanation makes plain that judges must sometimes make judgments of political morality in order to decide what the legal rights of litigants are. The thesis may therefore be thought open, on that ground, to the first challenge to judicial originality that I mentioned earlier. It might be said that the thesis is indefensible

because it cheats the majority of its right to decide questions of political morality for itself. I shall consider that challenge in Part V.

These, then, are three problems that any full statement of the rights thesis must face. If that full statement shows these objections to the thesis misconceived, then it will show the thesis to be less radical than it might first have seemed. The thesis presents, not some novel information about what judges do, but a new way of describing what we all know they do; and the virtues of this new description are not empirical but political and philosophical.

II. Rights and Goals

A. Types of Rights

Arguments of principle are arguments intended to establish an individual right; arguments of policy are arguments intended to establish a collective goal. Principles are propositions that describe rights; policies are propositions that describe goals. But what are rights and goals and what is the difference? It is hard to supply any definition that does not beg the question. It seems natural to say, for example, that freedom of speech is a right, not a goal, because citizens are entitled to that freedom as a matter of political morality, and that increased munitions manufacture is a goal, not a right, because it contributes to collective welfare, but no particular manufacturer is entitled to a government contract. This does not improve our understanding, however, because the concept of entitlement uses rather than explains the concept of a right.

In this essay I shall distinguish rights from goals by fixing on the distributional character of claims about rights, and on the force of these claims, in political argument, against competing claims of a different distributional character. I shall make, that is, a formal distinction that does not attempt to show which rights men and women actually have, or indeed that they have any at all. It rather provides a guide for discovering which rights a particular political theory supposes men and women to have. The formal distinction does suggest, of course, an approach to the more fundamental question: it suggests that we discover what rights people actually have by looking for arguments that would justify claims having the appropriate distributional character. But the distinction does not itself supply any such arguments.

I begin with the idea of a political aim as a generic political justification. A political theory takes a certain state of affairs as a political aim if, for that theory, it counts in favor of any political decision that the decision is likely to advance, or to protect,

that state of affairs, and counts against the decision that it will retard or endanger it. A political right is an individuated political aim. An individual has a right to some opportunity or resource or liberty if it counts in favor of a political decision that the decision is likely to advance or protect the state of affairs in which he enjoys the right, even when no other political aim is served and some political aim is disserved thereby, and counts against that decision that it will retard or endanger that state of affairs, even when some other political aim is thereby served.[5] A goal is a nonindividuated political aim, that is, a state of affairs whose specification does not in this way call for any particular opportunity or resource or liberty for particular individuals.

Collective goals encourage trade-offs of benefits and burdens within a community in order to produce some overall benefit for the community as a whole. Economic efficiency is a collective goal: it calls for such distribution of opportunities and liabilities as will produce the greatest aggregate economic benefit defined in some way. Some conception of equality may also be taken as a collective goal; a community may aim at a distribution such that maximum wealth is no more than double minimum wealth, or, under a different conception, so that no racial or ethnic group is much worse off than other groups. Of course, any collective goal will suggest a particular distribution, given particular facts. Economic efficiency as a goal will suggest that a particular industry be subsidized in some circumstances, but taxed punitively in others. Equality as a goal will suggest immediate and complete redistribution in some circumstances, but partial and discriminatory redistribution in others. In each case distributional principles are subordinate to some conception of aggregate collective good, so that offering less of some benefit to one man can be justified simply by showing that this will lead to a greater benefit overall.

Collective goals may, but need not, be absolute. The community may pursue different goals at the same time, and it may compromise one goal for the sake of another. It may, for example, pursue economic efficiency, but also military strength. The suggested distribution will then be determined by the sum of the two policies, and this will increase the permutations and combinations of possible trade-offs. In any case, these permutations and combinations will offer a number of competing strategies for serving each goal and both goals in combination. Economic efficiency may be well served by offering subsidies to all farmers, and to no

[5] I count legal persons as individuals, so that corporations may have rights; a political theory that counts special groups, like racial groups, as having some corporate standing within the community may therefore speak of group rights.

manufacturers, and better served by offering double the subsidy to some farmers and none to others. There will be alternate strategies of pursuing any set of collective goals, and, particularly as the number of goals increases, it will be impossible to determine in a piecemeal or case-by-case way the distribution that best serves any set of goals. Whether it is good policy to give double subsidies to some farmers and none to others will depend upon a great number of other political decisions that have been or will be made in pursuit of very general strategies into which this particular decision must fit.

Rights also may be absolute: a political theory which holds a right to freedom of speech as absolute will recognize no reason for not securing the liberty it requires for every individual; no reason, that is, short of impossibility. Rights may also be less than absolute; one principle might have to yield to another, or even to an urgent policy with which it competes on particular facts. We may define the weight of a right, assuming it is not absolute, as its power to withstand such competition. It follows from the definition of a right that it cannot be outweighed by all social goals. We might, for simplicity, stipulate not to call any political aim a right unless it has a certain threshold weight against collective goals in general; unless, for example, it cannot be defeated by appeal to any of the ordinary, routine goals of political administration, but only by a goal of special urgency. Suppose, for example, some man says he recognizes the right of free speech, but adds that free speech must yield whenever its exercise would inconvenience the public. He means, I take it, that he recognizes the pervasive goal of collective welfare, and only such distribution of liberty of speech as that collective goal recommends in particular circumstances. His political position is exhausted by the collective goal; the putative right adds nothing and there is no point to recognizing it as a right at all.

These definitions and distinctions make plain that the character of a political aim — its standing as a right or goal — depends upon its place and function within a single political theory. The same phrase might describe a right within one theory and a goal within another, or a right that is absolute or powerful within one theory but relatively weak within another. If a public official has anything like a coherent political theory that he uses, even intuitively, to justify the particular decisions he reaches, then this theory will recognize a wide variety of different types of rights, arranged in some way that assigns rough relative weight to each.

Any adequate theory will distinguish, for example, between background rights, which are rights that provide a justification

for political decisions by society in the abstract, and institutional rights, that provide a justification for a decision by some particular and specified political institution. Suppose that my political theory provides that every man has a right to the property of another if he needs it more. I might yet concede that he does not have a legislative right to the same effect; I might concede, that is, that he has no institutional right that the present legislature enact legislation that would violate the Constitution, as such a statute presumably would. I might also concede that he has no institutional right to a judicial decision condoning theft. Even if I did make these concessions, I could preserve my initial background claim by arguing that the people as a whole would be justified in amending the Constitution to abolish property, or perhaps in rebelling and overthrowing the present form of government entirely. I would claim that each man has a residual background right that would justify or require these acts, even though I concede that he does not have the right to specific institutional decisions as these institutions are now constituted.

Any adequate theory will also make use of a distinction between abstract and concrete rights, and therefore between abstract and concrete principles. This is a distinction of degree, but I shall discuss relatively clear examples at two poles of the scale it contemplates, and therefore treat it as a distinction in kind. An abstract right is a general political aim the statement of which does not indicate how that general aim is to be weighed or compromised in particular circumstances against other political aims. The grand rights of political rhetoric are in this way abstract. Politicians speak of a right to free speech or dignity or equality, with no suggestion that these rights are absolute, but with no attempt to suggest their impact on particular complex social situations.

Concrete rights, on the other hand, are political aims that are more precisely defined so as to express more definitely the weight they have against other political aims on particular occasions. Suppose I say, not simply that citizens have a right to free speech, but that a newspaper has a right to publish defense plans classified as secret provided this publication will not create an immediate physical danger to troops. My principle declares for a particular resolution of the conflict it acknowledges between the abstract right of free speech, on the one hand, and competing rights of soldiers to security or the urgent needs of defense on the other. Abstract rights in this way provide arguments for concrete rights, but the claim of a concrete right is more definitive than any claim of abstract right that supports it.[6]

[6] A complete political theory must also recognize two other distinctions that I

B. *Principles and Utility*

The distinction between rights and goals does not deny a thesis that is part of popular moral anthropology. It may be entirely reasonable to think, as this thesis provides, that the principles the members of a particular community find persuasive will be causally determined by the collective goals of that community. If many people in a community believe that each individual has a right to some minimal concern on the part of others, then this fact may be explained, as a matter of cultural history, by the further fact that their collective welfare is advanced by that belief. If some novel arrangement of rights would serve their collective welfare better, then we should expect, according to this thesis, that in due time their moral convictions will alter in favor of that new arrangement.

I do not know how far this anthropological theory holds in our own society, or any society. It is certainly untestable in anything like the simple form in which I have put it, and I do not see why its claim, that rights are psychologically or culturally determined by goals, is a priori more plausible that the contrary claim. Perhaps men and women choose collective goals to accommodate some prior sense of individual rights, rather than delineating rights according to collective goals. In either case, however, there must be an important time lag, so that at any given time most people will recognize the conflict between rights and goals, at least in particular cases, that the general distinction between these two kinds of political aims presupposes.

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use implicitly in this essay. The first is the distinction between rights against the state and rights against fellow citizens. The former justify a political decision that requires some agency of the government to act; the latter justify a decision to coerce particular individuals. The right to minimum housing, if accepted at all, is accepted as a right against the state. The right to recover damages for a breach of contract, or to be saved from great danger at minimum risk of a rescuer, is a right against fellow citizens. The right to free speech is, ordinarily, both. It seems strange to define the rights that citizens have against one another as political rights at all; but we are now concerned with such rights only insofar as they justify political decisions of different sorts. The present distinction cuts across the distinction between background and institutional rights; the latter distinguishes among persons or institutions that must make a political decision, the former between persons or institutions whom that decision directs to act or forbear. Ordinary civil cases at law, which are the principal subject of this essay, involve rights against fellow citizens; but I also discuss certain issues of constitutional and criminal law and so touch on rights against the state as well.

The second distinction is between universal and special rights; that is, between rights that a political theory provides for all individuals in the community, with exceptions only for phenomena like incapacity or punishment, and rights it provides for only one section of the community, or possibly only one member. I shall assume, in this essay, that all political rights are universal.

The distinction presupposes, that is, a further distinction between the force of a particular right within a political theory and the causal explanation of why the theory provides that right. This is a formal way of putting the point, and it is appropriate only when, as I am now supposing, we can identify a particular political theory and so distinguish the analytical question of what it provides from the historical question of how it came to provide it. The distinction is therefore obscured when we speak of the morality of a *community* without specifying which of the many different conceptions of a community morality we have in mind. Without some further specification we cannot construct even a vague or abstract political theory as the theory of the community at any particular time, and so we cannot make the distinction between reasons and force that is analytically necessary to understand the concepts of principle and policy. We are therefore prey to the argument that the anthropological thesis destroys the distinction between the two; we speak as if we had some coherent theory in mind, as the community's morality, but we deny that it distinguishes principle from policy on the basis of an argument that seems plausible just because we do not have any particular theory in mind. Once we do make plain what we intend by some reference to the morality of a community, and proceed to identify, even crudely, what we take the principles of that morality to be, the anthropological argument is tamed.

There are political theories, however, that unite rights and goals not causally but by making the force of a right contingent upon its power, as a right, to promote some collective goal. I have in mind various forms of the ethical theory called rule utilitarianism. One popular form of that theory, for example, holds that an act is right if the general acceptance of a rule requiring that act would improve the average welfare of members of the community.[7] A political theory might provide for a right to free speech, for example, on the hypothesis that the general acceptance of that right by courts and other political institutions would promote the highest average utility of the community in the long run.

But we may nevertheless distinguish institutional rights, at least, from collective goals within such a theory. If the theory provides that an official of a particular institution is justified in making a political decision, and not justified in refusing to make it, whenever that decision is necessary to protect the freedom to speak of any individual, without regard to the impact of the decision on collective goals, the theory provides free speech as a

[7] *See* Brandt, *Toward a Credible Form of Utilitarianism*, in MORALITY AND THE LANGUAGE OF CONDUCT 107 (H. Castenada and G. Nakhnikian, eds. 1963).

right. It does not matter that the theory stipulates this right on the hypothesis that if all political institutions do enforce the right in that way an important collective goal will in fact be promoted. What is important is the commitment to a scheme of government that makes an appeal to the right decisive in particular cases.

So neither the anthropological thesis nor rule utilitarianism offers any objection to the distinction between arguments of principle and arguments of policy. I should mention, out of an abundance of caution, one further possible challenge to that distinction. Different arguments of principle and policy can often be made in support of the same political decision. Suppose that an official wishes to argue in favor of racial segregation in public places. He may offer the policy argument that mixing races causes more overall discomfort than satisfaction. Or he may offer an argument of principle appealing to the rights of those who might be killed or maimed in riots that desegregation would produce. It might be thought that the substitutibility of these arguments defeats the distinction between arguments of principle and policy, or in any case makes the distinction less useful, for the following reason. Suppose it is conceded that the right to equality between races is sufficiently strong that it must prevail over all but the most pressing argument of policy, and be compromised only as required by competing arguments of principle. That would be an empty concession if arguments of principle could always be found to substitute for an argument of policy that might otherwise be made.

But it is a fallacy to suppose that because some argument of principle can always be found to substitute for an argument of policy, it will be as cogent or as powerful as the appropriate argument of policy would have been. If some minority's claim to an antidiscrimination statute were itself based on policy, and could therefore be defeated by an appeal to overall general welfare or utility, then the argument that cites the majority's discomfort or annoyance might well be powerful enough. But if the claim cites a right to equality that must prevail unless matched by a competing argument of principle, the only such argument available may be, as here, simply too weak. Except in extraordinary cases, the danger to any particular man's life that flows from desegregation adequately managed and policed will be very small. We might therefore concede that the competing right to life offers some argument countervailing against the right to equality here, and yet maintain that that argument is of negligible weight; strong enough, perhaps to slow the pace of desegregation but not strong enough even to slow it very much.

C. *Economics and Principle*

The rights thesis, in its descriptive aspect, holds that judicial decisions in hard cases are characteristically generated by principle not policy. Recent research into the connections between economic theory and the common law might be thought to suggest the contrary: that judges almost always decide on grounds of policy rather than principle. We must, however, be careful to distinguish between two propositions said to be established by that research. It is argued, first, that almost every rule developed by judges in such disparate fields as tort, contract and property can be shown to serve the collective goal of making resource allocation more efficient.[8] It is argued, second, that in certain cases judges explicitly base their decisions on economic policy.[9] Neither of these claims subverts the rights thesis.

The first claim makes no reference to the intentions of the judges who decided the cases establishing rules that improve economic efficiency. It does not suppose that these judges were aware of the economic value of their rules, or even that they would have acknowledged that value as an argument in favor of their decisions. The evidence, for the most part, suggests the contrary. The courts that nourished the unfortunate fellow-servant doctrine, for example, thought that the rule was required by fairness, not utility, and when the rule was abolished it was because the argument from fairness, not the argument from utility, was found wanting by a different generation of lawyers.[10]

If this first claim is sound, it might seem to some an important piece of evidence for the anthropological thesis described in the last section. They will think that it suggests that judges and lawyers, reflecting the general moral attitudes of their time, thought that corporations and individuals had just those rights that an explicit rule utilitarian would legislate to serve the general welfare. But the first claim might equally well suggest the contrary conclusion I mentioned, that our present ideas of general welfare reflect our ideas of individual right. Professor Posner, for example, argues for that claim by presupposing a particular conception of efficient resource allocation. He says that the value of some scarce resource to a particular individual is measured by the amount of money he is willing to pay for it, so that community welfare is maximized when each resource is in the hands of some-

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[8] *See, e.g.*, R. Posner, Economic Analysis of Law 10–104 (1972).

[9] *See, e.g.*, Coase, *The Problem of Social Cost*, 3 J. Law & Econ. 1, 19–28 (1960).

[10] *See* Posner, *A Theory of Negligence*, 1 J. Legal Stud. 29, 71 (1972).

one who would pay more than anyone else to have it.[11] But that is hardly a self-evident or neutral conception of value. It is congenial to a political theory that celebrates competition, but far less congenial to a more egalitarian theory, because it demotes the claims of the poor who are willing to spend less because they have less to spend. Posner's conception of value, therefore, seems as much the consequence as the cause of a theory of individual rights. In any case, however, the anthropological thesis of the first claim offers no threat to the rights thesis. Even if we concede that a judge's theory of rights is determined by some instinctive sense of economic value, rather than the other way about, we may still argue that he relies on that theory, and not economic analysis, to justify decisions in hard cases.

The second claim we distinguished, however, may seem to present a more serious challenge. If judges explicitly refer to economic policy in some cases, then these cases cannot be understood simply as evidence for the anthropological thesis. Learned Hand's theory of negligence is the most familiar example of this explicit reference to economics. He said, roughly, that the test of whether the defendant's act was unreasonable, and therefore actionable, is the economic test which asks whether the defendant could have avoided the accident at less cost to himself than the plaintiff was likely to suffer if the accident occurred, discounted by the improbability of the accident.[12] It may be said that this economic test provides an argument of policy rather than principle, because it makes the decision turn on whether the collective welfare would have been advanced more by allowing the accident to take place or by spending what was necessary to avoid it. If so, then cases in which some test like Hand's is explicitly used, however few they might be, would stand as counterexamples to the rights thesis.

But the assumption that an economic calculation of any sort must be an argument of policy overlooks the distinction between abstract and concrete rights. Abstract rights, like the right to speak on political matters, take no account of competing rights; concrete rights, on the other hand, reflect the impact of such competition. In certain kinds of cases the argument from competing abstract principles to a concrete right can be made in the language of economics. Consider the principle that each member of a community has a right that each other member treat him with the minimal respect due a fellow human being.[13] That is a very abstract

[11] R. POSNER, *supra* note 8, at 4.

[12] United States v. Carroll Towing Co., 159 F.2d 169, 173 (2d Cir. 1947). Coase, *supra* note 9, at 22–23, gives other examples, mostly of nuisance cases interpreting the doctrine that a "reasonable" interference with the plaintiff's use of his property is not a nuisance.

[13] A more elaborate argument of principle might provide a better justification

principle: it demands some balance, in particular cases, between the interests of those to be protected and the liberty of those from whom the principle demands an unstated level of concern and respect. It is natural, particularly when economic vocabulary is in fashion, to define the proper balance by comparing the sum of the utilities of these two parties under different conditions. If one man acts in a way that he can foresee will injure another so that the collective utility of the pair will be sharply reduced by his act, he does not show the requisite care and concern. If he can guard or insure against the injury much more cheaply or effectively than the other can, for example, then he does not show care and concern unless he takes these precautions or arranges that insurance.

That character of argument is by no means novel, though perhaps its economic dress is. Philosophers have for a long time debated hypothetical cases testing the level of concern that one member of a community owes to another. If one man is drowning, and another may save him at minimal risk to himself, for example, then the first has a moral right to be saved by the second. That proposition might easily be put in economic form: if the collective utility of the pair is very sharply improved by a rescue, then the drowning man has a right to that rescue and the rescuer a duty to make it. The parallel legal proposition may, of course, be much more complex than that. It may specify special circumstances in which the crucial question is not whether the collective utility of the pair will be sharply advanced, but only whether it will be marginally advanced. It might put the latter question, for example, when one man's positive act, as distinct from a failure to act, creates a risk of direct and foreseeable physical injury to the person or property of another. If the rights thesis is sound, of course, then no judge may appeal to that legal proposition unless he believes that the principle of minimal respect states an abstract legal right; but if he does, then he may cast his argument in economic form without thereby changing its character from principle to policy.

Since Hand's test, and the parallel argument about rescuing a drowning man, are methods of compromising competing rights, they consider only the welfare of those whose abstract rights are at stake. They do not provide room for costs or benefits to the community at large, except as these are reflected in the

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for Hand's test than does this simple principle. I described a more elaborate argument in a set of Rosenthal Lectures delivered at Northwestern University Law School in March, 1975. The simple principle, however, provides a sufficiently good justification for the present point.

welfare of those whose rights are in question. We can easily imagine an argument that does not concede these restrictions. Suppose someone argued that the principle requiring rescue at minimal risk should be amended so as to make the decision turn, not on some function of the collective utilities of the victim and rescuer, but on marginal utility to the community as a whole, so that the rescuer must take into account not only the relative risks to himself and the victim, but the relative social importance of the two. It might follow that an insignificant man must risk his life to save a bank president, but that a bank president need not even tire himself to save a nobody. The argument is no longer an argument of principle, because it supposes the victim to have a right to nothing but his expectations under general utility. Hand's formula, and more sophisticated variations, are not arguments of that character; they do not subordinate an individual right to some collective goal, but provide a mechanism for compromising competing claims of abstract right.

Negligence cases are not the only cases in which judges compromise abstract rights in defining concrete ones. If a judge appeals to public safety or the scarcity of some vital resource, for example, as a ground for limiting some abstract right, then his appeal might be understood as an appeal to the competing rights of those whose security will be sacrificed, or whose just share of that resource will be threatened if the abstract right is made concrete. His argument is an argument of principle if it respects the distributional requirements of such arguments, and if it observes the restriction mentioned in the last section: that the weight of a competing principle may be less than the weight of the appropriate parallel policy. We find a different sort of example in the familiar argument that certain sorts of law suits should not be allowed because to do so would "swamp" the courts with litigation. The court supposes that if it were to allow that type of suit it would lack the time to consider promptly enough other law suits aiming to vindicate rights that are, taken together, more important than the rights it therefore proposes to bar.

This is an appropriate point to notice a certain limitation of the rights thesis. It holds in standard civil cases, when the ruling assumption is that one of the parties has a right to win; but it holds only asymmetrically when that assumption cannot be made. The accused in a criminal case has a right to a decision in his favor if he is innocent, but the state has no parallel right to a conviction if he is guilty. The court may therefore find in favor of the accused, in some hard case testing rules of evidence, for example, on an argument of policy that does not suppose that the accused has any right to be acquitted. The

Supreme Court in *Linkletter v. Walker* [14] said that its earlier decision in *Mapp v. Ohio* [15] was such a decision. The Court said it had changed the rules permitting the introduction of illegally obtained evidence, not because Miss Mapp had any right that such evidence not be used if otherwise admissible, but in order to deter policemen from collecting such evidence in the future. I do not mean that a constitutional decision on such grounds is proper, or even that the Court's later description of its earlier decision was accurate. I mean only to point out how the geometry of a criminal prosecution, which does not set opposing rights in a case against one another, differs from the standard civil case in which the rights thesis holds symmetrically.

III. Institutional Rights

The rights thesis provides that judges decide hard cases by confirming or denying concrete rights. But the concrete rights upon which judges rely must have two other characteristics. They must be institutional rather than background rights, and they must be legal rather than some other form of institutional rights. We cannot appreciate or test the thesis, therefore, without further elaboration of these distinctions.

Institutional rights may be found in institutions of very different character. A chess player has a "chess" right to be awarded a point in a tournament if he checkmates an opponent. A citizen in a democracy has a legislative right to the enactment of statutes necessary to protect his free speech. In the case of chess, institutional rights are fixed by constitutive and regulative rules that belong distinctly to the game, or to a particular tournament. Chess is, in this sense, an autonomous institution; I mean that it is understood, among its participants, that no one may claim an institutional right by direct appeal to general morality. No one may argue, for example, that he has earned the right to be declared the winner by his general virtue. But legislation is only partly autonomous in that sense. There are special constitutive and regulative rules that define what a legislature is, and who belongs to it, and how it votes, and that it may not establish a religion. But these rules belonging distinctly to legislation are rarely sufficient to determine whether a citizen has an institutional right to have a certain statute enacted; they do not decide, for example, whether he has a right to minimum wage legislation. Citizens are expected to repair to general considerations of political morality when they argue for such rights.

[14] 381 U.S. 618 (1965).

[15] 367 U.S. 643 (1961).

The fact that some institutions are fully and others partly autonomous has the consequence mentioned earlier, that the institutional rights a political theory acknowledges may diverge from the background rights it provides. Institutional rights are nevertheless genuine rights. Even if we suppose that the poor have an abstract background right to money taken from the rich, it would be wrong, not merely unexpected, for the referees of a chess tournament to award the prize money to the poorest contestant rather than the contestant with the most points. It would provide no excuse to say that since tournament rights merely describe the conditions necessary for calling the tournament a chess tournament, the referee's act is justified so long as he does not use the word "chess" when he hands out the award. The participants entered the tournament with the understanding that chess rules would apply; they have genuine rights to the enforcement of these rules and no others.

Institutional autonomy insulates an official's institutional duty from the greater part of background political morality. But how far does the force of this insulation extend? Even in the case of a fully insulated institution like chess some rules will require interpretation or elaboration before an official may enforce them in certain circumstances. Suppose some rule of a chess tournament provides that the referee shall declare a game forfeit if one player "unreasonably" annoys the other in the course of play. The language of the rule does not define what counts as "unreasonable" annoyance; it does not decide whether, for example, a player who continually smiles at his opponent in such a way as to unnerve him, as the Russian grandmaster Tal once smiled at Fischer, annoys him unreasonably.

The referee is not free to give effect to his background convictions in deciding this hard case. He might hold, as a matter of political theory, that individuals have a right to equal welfare without regard to intellectual abilities. It would nevertheless be wrong for him to rely upon that conviction in deciding difficult cases under the forfeiture rule. He could not say, for example, that annoying behavior is reasonable so long as it has the effect of reducing the importance of intellectual ability in deciding who will win the game. The participants, and the general community that is interested, will say that his duty is just the contrary. Since chess is an intellectual game, he must apply the forfeiture rule in such a way as to protect, rather than jeopardize, the role of intellect in the contest.

We have, then, in the case of the chess referee, an example of an official whose decisions about institutional rights are understood to be governed by institutional constraints even when the

force of these constraints is not clear. We do not think that he is free to legislate interstitially within the "open texture" of imprecise rules.[16] If one interpretation of the forfeiture rule will protect the character of the game, and another will not, then the participants have a right to the first interpretation. We may hope to find, in this relatively simple case, some general feature of institutional rights in hard cases that will bear on the decision of a judge in a hard case at law.

I said that the game of chess has a character that the referee's decisions must respect. What does that mean? How does a referee know that chess is an intellectual game rather than a game of chance or an exhibition of digital ballet? He may well start with what everyone knows. Every institution is placed by its participants in some very rough category of institution; it is taken to be a game rather than a religious ceremony or a form of exercise or a political process. It is, for that reason, definitional of chess that it is a game rather than an exercise in digital skill. These conventions, exhibited in attitudes and manners and in history, are decisive. If everyone takes chess to be a game of chance, so that they curse their luck and nothing else when a piece *en prise* happens to be taken, then chess is a game of chance, though a very bad one.

But these conventions will run out, and they may run out before the referee finds enough to decide the case of Tal's smile. It is important to see, however, that the conventions run out in a particular way. They are not incomplete, like a book whose last page is missing, but abstract, so that their full force can be captured in a concept that admits of different conceptions; that is, in a *contested* concept.[17] The referee must select one or another of these conceptions, not to supplement the convention, but to enforce it. He must *construct* the game's character by putting to himself different sets of questions. Given that chess is an intellectual game, is it, like poker, intellectual in some sense that includes ability at psychological intimidation? Or is it, like mathematics, intellectual in some sense that does not include that ability? This first set of questions asks him to look more closely at the game, to determine whether its features support one rather than the other of these conceptions of intellect. But he must also ask a different set of questions. Given that chess is an intellectual game of some sort, what follows about reasonable behavior in a chess game? Is ability at psychological intimidation, or ability

[16] *See generally* H.L.A. HART, THE CONCEPT OF LAW 121–32 (1961).

[17] *See* Gallie, *Essentially Contested Concepts*, 56 PROCEEDINGS OF THE ARISTOTELIAN SOCIETY 167, 167–68 (1955–56). *See also* Dworkin, *The Jurisprudence of Richard Nixon*, NEW YORK REVIEW OF BOOKS, May 4, 1972, at 27.

to resist such intimidation, really an intellectual quality? These questions ask him to look more closely at the concept of intellect itself.

The referee's calculations, if they are self-conscious, will oscillate between these two sets of questions, progressively narrowing the questions to be asked at the next stage. He might first identify, by reflecting on the concept, different conceptions of intellect. He might suppose at this first stage, for example, that physical grace of the sort achieved in ballet is one form of intelligence. But he must then test these different conceptions against the rules and practices of the game. That test will rule out any physical conception of intelligence. But it may not discriminate between a conception that includes or a conception that rejects psychological intimidation, because either of these conceptions would provide an account of the rules and practices that is not plainly superior, according to any general canons of explanation, to the account provided by the other. He must then ask himself which of these two accounts offers a deeper or more successful account of what intellect really is. His calculations, so conceived, oscillate between philosophy of mind and the facts of the institution whose character he must elucidate.

This is, of course, only a fanciful reconstruction of a calculation that will never take place; any official's sense of the game will have developed over a career, and he will employ rather than expose that sense in his judgments. But the reconstruction enables us to see how the concept of the game's character is tailored to a special institutional problem. Once an autonomous institution is established, such that participants have institutional rights under distinct rules belonging to that institution, then hard cases may arise that must, in the nature of the case, be supposed to have an answer. If Tal does not have a right that the game be continued, it must be because the forfeiture rule, properly understood, justifies the referee's intervention; if it does, then Fischer has a right to win at once. It is not useful to speak of the referee's "discretion" in such a case. If some weak sense of discretion is meant, then the remark is unhelpful; if some strong sense is meant, such that Tal no longer has a right to win, then this must be, again, because the rule properly understood destroys the right he would otherwise have.[18] Suppose we say that in such a case all the parties have a right to expect is that the referee will use his best judgment. That is, in a sense, perfectly true, because they can have no more, by way of the referee's judgment, than his best judgment. But they are nevertheless entitled to his best judgment about which behavior is, in the circumstances of the game, un-

[18] *See* Dworkin, *The Model of Rules*, 35 U. Chi. L. Rev. 14, 32–40 (1967).

reasonable; they are entitled, that is, to his best judgment about what their rights are. The proposition that there is some "right" answer to that question does not mean that the rules of chess are exhaustive and unambiguous; rather it is a complex statement about the responsibilities of its officials and participants.

But if the decision in a hard case must be a decision about the rights of the parties, then an official's reason for that judgment must be the sort of reason that justifies recognizing or denying a right. He must bring to his decision a general theory of why, in the case of his institution, the rules create or destroy any rights at all, and he must show what decision that general theory requires in the hard case. In chess the general ground of institutional rights must be the tacit consent or understanding of the parties. They consent, in entering a chess tournament, to the enforcement of certain and only those rules, and it is hard to imagine any other general ground for supposing that they have any institutional rights. But if that is so, and if the decision in a hard case is a decision about which rights they actually have, then the argument for the decision must apply that general ground to the hard case.

The hard case puts, we might say, a question of political theory. It asks what it is fair to suppose that the players have done in consenting to the forfeiture rule. The concept of a game's character is a conceptual device for framing that question. It is a contested concept that internalizes the general justification of the institution so as to make it available for discriminations within the institution itself. It supposes that a player consents not simply to a set of rules, but to an enterprise that may be said to have a character of its own; so that when the question is put — To what did he consent in consenting to that? — the answer may study the enterprise as a whole and not just the rules.

IV. Legal Rights

A. Legislation

Legal argument, in hard cases, turns on contested concepts whose nature and function are very much like the concept of the character of a game. These include several of the substantive concepts through which the law is stated, like the concepts of a contract and of property. But they also include two concepts of much greater relevance to the present argument. The first is the idea of the "intention" or "purpose" of a particular statute or statutory clause. This concept provides a bridge between the political justification of the general idea that statutes create rights and those hard cases that ask what rights a particular statute has created. The second is the concept of principles that "underlie"

or are "embedded in" the positive rules of law. This concept provides a bridge between the political justification of the doctrine that like cases should be decided alike and those hard cases in which it is unclear what that general doctrine requires. These concepts together define legal rights as a function, though a very special function, of political rights. If a judge accepts the settled practices of his legal system — if he accepts, that is, the autonomy provided by its distinct constitutive and regulative rules — then he must, according to the doctrine of political responsibility, accept some general political theory that justifies these practices. The concepts of legislative purpose and common law principles are devices for applying that general political theory to controversial issues about legal rights.

We might therefore do well to consider how a philosophical judge might develop, in appropriate cases, theories of what legislative purpose and legal principles require. We shall find that he would construct these theories in the same manner as a philosophical referee would construct the character of a game. I have invented, for this purpose, a lawyer of superhuman skill, learning, patience and acumen, whom I shall call Hercules. I suppose that Hercules is a judge in some representative American jurisdiction. I assume that he accepts the main uncontroversial constitutive and regulative rules of the law in his jurisdiction. He accepts, that is, that statutes have the general power to create and extinguish legal rights, and that judges have the general duty to follow earlier decisions of their court or higher courts whose rationale, as lawyers say, extends to the case at bar.

1. The Constitution. — Suppose there is a written constitution in Hercules' jurisdiction which provides that no law shall be valid if it establishes a religion. The legislature passes a law purporting to grant free busing to children in parochial schools. Does the grant establish a religion? [19] The words of the constitutional provision might support either view. Hercules must nevertheless decide whether the child who appears before him has a right to her bus ride.

He might begin by asking why the constitution has any power at all to create or destroy rights. If citizens have a background right to salvation through an established church, as many believe they do, then this must be an important right. Why does the fact that a group of men voted otherwise several centuries ago prevent this background right from being made a legal right as well? His answer must take some form such as this. The constitution sets out a general political scheme that is sufficiently just to be taken

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[19] *See* Everson v. Board of Educ., 330 U.S. 1 (1947).

as settled for reasons of fairness. Citizens take the benefit of living in a society whose institutions are arranged and governed in accordance with that scheme, and they must take the burdens as well, at least until a new scheme is put into force either by discrete amendment or general revolution. But Hercules must then ask just what scheme of principles has been settled. He must construct, that is, a constitutional theory; since he is Hercules we may suppose that he can develop a full political theory that justifies the constitution as a whole. It must be a scheme that fits the particular rules of this constitution, of course. It cannot include a powerful background right to an established church. But more than one fully specified theory may fit the specific provision about religion sufficiently well. One theory might provide, for example, that it is wrong for the government to enact any legislation that will cause great social tension or disorder; so that, since the establishment of a church will have that effect, it is wrong to empower the legislature to establish one. Another theory will provide a background right to religious liberty, and therefore argue that an established church is wrong, not because it will be socially disruptive, but because it violates that background right. In that case Hercules must turn to the remaining constitutional rules and settled practices under these rules to see which of these two theories provides a smoother fit with the constitutional scheme as a whole.

But the theory that is superior under this test will nevertheless be insufficiently concrete to decide some cases. Suppose Hercules decides that the establishment provision is justified by a right to religious liberty rather than any goal of social order. It remains to ask what, more precisely, religious liberty is. Does a right to religious liberty include the right not to have one's taxes used for any purpose that helps a religion to survive? Or simply not to have one's taxes used to benefit one religion at the expense of another? If the former, then the free transportation legislation violates that right, but if the latter it does not. The institutional structure of rules and practice may not be sufficiently detailed to rule out either of these two conceptions of religious liberty, or to make one a plainly superior justification of that structure. At some point in his career Hercules must therefore consider the question not just as an issue of fit between a theory and the rules of the institution, but as an issue of political philosophy as well. He must decide which conception is a more satisfactory elaboration of the general idea of religious liberty. He must decide that question because he cannot otherwise carry far enough the project he began. He cannot answer in sufficient detail the question of what political scheme the constitution establishes.

So Hercules is driven, by this project, to a process of reasoning that is much like the process of the self-conscious chess referee. He must develop a theory of the constitution, in the shape of a complex set of principles and policies that justify that scheme of government, just as the chess referee is driven to develop a theory about the character of his game. He must develop that theory by referring alternately to political philosophy and institutional detail. He must generate possible theories justifying different aspects of the scheme and test the theories against the broader institution. When the discriminating power of that test is exhausted, he must elaborate the contested concepts that the successful theory employs.

2. *Statutes.* — A statute in Hercules' jurisdiction provides that it is a federal crime for someone knowingly to transport in interstate commerce "any person who shall have been unlawfully seized, confined, inveigled, decoyed, kidnapped, abducted, or carried away by any means whatsoever. . . ." Hercules is asked to decide whether this statute makes a federal criminal of a man who persuaded a young girl that it was her religious duty to run away with him, in violation of a court order, to consummate what he called a celestial marriage.[20] The statute had been passed after a famous kidnapping case, in order to enable federal authorities to join in the pursuit of kidnappers. But its words are sufficiently broad to apply to this case, and there is nothing in the legislative record or accompanying committee reports that says they do not.

Do they apply? Hercules might himself despise celestial marriage, or abhor the corruption of minors, or celebrate the obedience of children to their parents. The groom nevertheless has a right to his liberty, unless the statute properly understood deprives him of that right; it is inconsistent with any plausible theory of the constitution that judges have the power retroactively to make conduct criminal. Does the statute deprive him of that right? Hercules must begin by asking why any statute has the power to alter legal rights. He will find the answer in his constitutional theory: this might provide, for example, that a democratically elected legislature is the appropriate body to make collective decisions about the conduct that shall be criminal. But that same constitutional theory will impose on the legislature certain responsibilities: it will impose not only constraints reflecting individual rights, but also some general duty to pursue collective goals defining the public welfare. That fact provides a useful test for Hercules in this hard case. He might ask which interpretation more satisfactorily ties the language the legislature used to its

[20] *See* Chatwin v. United States, 326 U.S. 455 (1946).

constitutional responsibilities. That is like the referee's question about the character of a game. It calls for the construction, not of some hypotheses about the mental state of particular legislators, but of a special political theory that justifies this statute, in the light of the legislature's more general responsibilities, better than any alternative theory.[21]

Which arguments of principle and policy might properly have persuaded the legislature to enact just that statute? It should not have pursued a policy designed to replace state criminal enforcement by federal enforcement whenever constitutionally possible. That would represent an unnecessary interference with the principle of federalism that must be part of Hercules' constitutional theory. It might, however, responsibly have followed a policy of selecting for federal enforcement all crimes with such an interstate character that state enforcement was hampered. Or it could responsibly have selected just specially dangerous or widespread crimes of that character. Which of these two responsible policies offers a better justification of the statute actually drafted? If the penalties provided by the statute are large, and therefore appropriate to the latter but not the former policy, the latter policy must be preferred. Which of the different interpretations of the statute permitted by the language serves that policy better? Plainly a decision that inveiglement of the sort presented by the case is not made a federal crime by the statute.

I have described a simple and perhaps unrepresentative problem of statutory interpretation, because I cannot now develop a theory of statutory interpretation in any detail. I want only to suggest how the general claim, that calculations judges make about the purposes of statutes are calculations about political rights,

[21] One previous example of the use of policy in statutory interpretations illustrates this form of construction. In Charles River Bridge v. Warren Bridge, 24 Mass. (7 Pick.) 344 (1830), *aff'd*, 36 U.S. (11 Pet.) 420 (1837), the court had to decide whether a charter to construct a bridge across the Charles River was to be taken to be exclusive, so that no further charters could be granted. Justice Morton of the Supreme Judicial Court held that the grant was not to be taken as exclusive, and argued, in support of that interpretation, that:

> [I]f consequences so inconsistent with the improvement and prosperity of the state result from the liberal and extended construction of the charters which have been granted, we ought, if the terms used will admit of it, rather to adopt a more limited and restricted one, than to impute such improvidence to the legislature.
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> . . . [Construing the grant as exclusive] would amount substantially to a covenant, that during the plaintiffs' charter an important portion of our commonwealth, as to facilities for travel and transportation, should remain *in statu quo*. I am on the whole irresistibly brought to the conclusion, that this construction is neither consonant with sound reason, with judicial authorities, with the course of legislation, nor with the principles of our free institutions.

Id. at 460.

might be defended. There are, however, two points that must be noticed about even this simple example. It would be inaccurate, first, to say that Hercules supplemented what the legislature did in enacting the statute, or that he tried to determine what it would have done if it had been aware of the problem presented by the case. The act of a legislature is not, as these descriptions suggest, an event whose force we can in some way measure so as to say it has run out at a particular point; it is rather an event whose content is contested in the way in which the content of an agreement to play a game is contested. Hercules constructs his political theory as an argument about what the legislature has, on this occasion, done. The contrary argument, that it did not actually do what he said, is not a realistic piece of common sense, but a competitive claim about the true content of that contested event.

Second, it is important to notice how great a role the canonical terms of the actual statute play in the process described. They provide a limit to what must otherwise be, in the nature of the case, unlimited. The political theory Hercules developed to interpret the statute, which featured a policy of providing federal enforcement for dangerous crimes, would justify a great many decisions that the legislature did not, on any interpretation of the language, actually make. It would justify, for example, a statute making it a federal crime for a murderer to leave the state of his crime. The legislature has no general duty to follow out the lines of any particular policy, and it would plainly be wrong for Hercules to suppose that the legislature had in some sense enacted that further statute. The statutory language they did enact enables this process of interpretation to operate without absurdity; it permits Hercules to say that the legislature pushed some policy to the limits of the language it used, without also supposing that it pushed that policy to some indeterminate further point.

B. The Common Law

1. Precedent. — One day lawyers will present a hard case to Hercules that does not turn upon any statute; they will argue whether earlier common law decisions of Hercules' court, properly understood, provide some party with a right to a decision in his favor. *Spartan Steel* was such a case. The plaintiff did not argue that any statute provided it a right to recover its economic damages; it pointed instead to certain earlier judicial decisions that awarded recovery for other sorts of damage, and argued that the principle behind these cases required a decision for it as well.

Hercules must begin by asking why arguments of that form are ever, even in principle, sound. He will find that he has avail-

able no quick or obvious answer. When he asked himself the parallel question about legislation he found, in general democratic theory, a ready reply. But the details of the practices of precedent he must now justify resist any comparably simple theory.

He might, however, be tempted by this answer. Judges, when they decide particular cases at common law, lay down general rules that are intended to benefit the community in some way. Other judges, deciding later cases, must therefore enforce these rules so that the benefit may be achieved. If this account of the matter were a sufficient justification of the practices of precedent, then Hercules could decide these hard common law cases as if earlier decisions were statutes, using the techniques he worked out for statutory interpretation. But he will encounter fatal difficulties if he pursues that theory very far. It will repay us to consider why, in some detail, because the errors in the theory will be guides to a more successful theory.

Statutory interpretation, as we just noticed, depends upon the availability of a canonical form of words, however vague or unspecific, that set limits to the political decisions that the statute may be taken to have made. Hercules will discover that many of the opinions that litigants cite as precedents do not contain any special propositions taken to be a canonical form of the rule that the case lays down. It is true that it was part of Anglo-American judicial style, during the last part of the nineteenth century and the first part of this century, to attempt to compose such canonical statements, so that one could thereafter refer, for example, to the rule in *Rylands v. Fletcher*.[22] But even in this period, lawyers and textbook writers disagreed about which parts of famous opinions should be taken to have that character. Today, in any case, even important opinions rarely attempt that legislative sort of draftsmanship. They cite reasons, in the form of precedents and principles, to justify a decision, but it is the decision, not some new and stated rule of law, that these precedents and principles are taken to justify. Sometimes a judge will acknowledge openly that it lies to later cases to determine the full effect of the case he has decided.

Of course, Hercules might well decide that when he does find, in an earlier case, a canonical form of words, he will use his techniques of statutory interpretation to decide whether the rule composed of these words embraces a novel case.[23] He might well

[22] L.R. 1 Ex. 265 (1866), *aff'd*, L.R. 3 H.L. 330 (1868).

[23] But since Hercules will be led to accept the rights thesis, *see* pp. 1091–93 *infra*, his "interpretation" of judicial enactments will be different from his interpretation of statutes in one important respect. When he interprets statutes he fixes to some statutory language, as we saw, arguments of principle or policy that

acknowledge what could be called an enactment force of precedent. He will nevertheless find that when a precedent does have enactment force, its influence on later cases is not taken to be limited to that force. Judges and lawyers do not think that the force of precedents is exhausted, as a statute would be, by the linguistic limits of some particular phrase. If *Spartan Steel* were a New York case, counsel for the plaintiff would suppose that Cardozo's earlier decision in *MacPherson v. Buick*,[24] in which a woman recovered damages for injuries from a negligently manufactured automobile, counted in favor of his client's right to recover, in spite of the fact that the earlier decision contained no language that could plausibly be interpreted to enact that right. He would urge that the earlier decision exerts a gravitational force on later decisions even when these later decisions lie outside its particular orbit.

This gravitational force is part of the practice Hercules' general theory of precedent must capture. In this important respect, judicial practice differs from the practice of officials in other institutions. In chess, officials conform to established rules in a way that assumes full institutional autonomy. They exercise originality only to the extent required by the fact that an occasional rule, like the rule about forfeiture, demands that originality. Each decision of a chess referee, therefore, can be said to be directly required and justified by an established rule of chess, even though some of these decisions must be based on an interpretation, rather than on simply the plain and unavoidable meaning, of that rule.

Some legal philosophers write about common law adjudication as if it were in this way like chess, except that legal rules are much more likely than chess rules to require interpretation. That is the spirit, for example, of Professor Hart's argument that hard cases arise only because legal rules have what he calls "open texture." [25] In fact, judges often disagree not simply about how some rule or principle should be interpreted, but whether the rule or principle one judge cites should be acknowledged to be a rule or principle at all. In some cases both the majority and the dissenting opinions recognize the same earlier cases as relevant, but disagree about what rule or principle these precedents should be understood to have established. In adjudication, unlike chess, the argu-

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provide the best justification of that language in the light of the legislature's responsibilities. His argument remains an argument of principle; he uses policy to determine what rights the legislature has already created. But when he "interprets" judicial enactments he will fix to the relevant language only arguments of principle, because the rights thesis argues that only such arguments acquit the responsibility of the "enacting" court.

[24] MacPherson v. Buick Motor Co., 217 N.Y. 382, 111 N.E. 1050 (1916).

[25] H.L.A. HART, *supra* note 18, at 121–32.

ment *for* a particular rule may be more important than the argument *from* that rule to the particular case; and while the chess referee who decides a case by appeal to a rule no one has ever heard of before is likely to be dismissed or certified, the judge who does so is likely to be celebrated in law school lectures.

Nevertheless, judges seem agreed that earlier decisions do contribute to the formulation of new and controversial rules in some way other than by interpretation; they are agreed that earlier decisions have gravitational force even when they disagree about what that force is. The legislator may very often concern himself only with issues of background morality or policy in deciding how to cast his vote on some issue. He need not show that his vote is consistent with the votes of his colleagues in the legislature, or with those of past legislatures. But the judge very rarely assumes that character of independence. He will always try to connect the justification he provides for an original decision with decisions that other judges or officials have taken in the past.

In fact, when good judges try to explain in some general way how they work, they search for figures of speech to describe the constraints they feel even when they suppose that they are making new law, constraints that would not be appropriate if they were legislators. They say, for example, that they find new rules imminent in the law as a whole, or that they are enforcing an internal logic of the law through some method that belongs more to philosophy than to politics, or that they are the agents through which the law works itself pure, or that the law has some life of its own even though this belongs to experience rather than logic. Hercules must not rest content with these famous metaphors and personifications, but he must also not be content with any description of the judicial process that ignores their appeal to the best lawyers.

The gravitational force of precedent cannot be captured by any theory that takes the full force of precedent to be its enactment force as a piece of legislation. But the inadequacy of that approach suggests a superior theory. The gravitational force of a precedent may be explained by appeal, not to the wisdom of enforcing enactments, but to the fairness of treating like cases alike. A precedent is the report of an earlier political decision; the very fact of that decision, as a piece of political history, provides some reason for deciding other cases in a similar way in the future. This general explanation of the gravitational force of precedent accounts for the feature that defeated the enactment theory, which is that the force of a precedent escapes the language of its opinion. If the government of a community has forced the manufacturer of defective motor cars to pay damages to a woman who was injured because of the defect, then that historical fact

must offer some reason, at least, why the same government should require a contractor who has caused economic damage through the defective work of his employees to make good that loss. We may test the weight of that reason, not by asking whether the language of the earlier decision, suitably interpreted, requires the contractor to pay damages, but by asking the different question whether it is fair for the government, having intervened in the way it did in the first case, to refuse its aid in the second.

Hercules will conclude that this doctrine of fairness offers the only adequate account of the full practice of precedent. He will draw certain further conclusions about his own responsibilities when deciding hard cases. The most important of these is that he must limit the gravitational force of earlier decisions to the extension of the arguments of principle necessary to justify those decisions. If an earlier decision were taken to be entirely justified by some argument of policy, it would have no gravitational force. Its value as a precedent would be limited to its enactment force, that is, to further cases captured by some particular words of the opinion. The distributional force of a collective goal, as we noticed earlier, is a matter of contingent fact and general legislative strategy. If the government intervened on behalf of Mrs. MacPherson, not because she had any right to its intervention, but only because wise strategy suggested that means of pursuing some collective goal like economic efficiency, there can be no effective argument of fairness that it therefore ought to intervene for the plaintiff in *Spartan Steel*.

We must remind ourselves, in order to see why this is so, of the slight demands we make upon legislatures in the name of consistency when their decisions are generated by arguments of policy.[26] Suppose the legislature wishes to stimulate the economy and might do so, with roughly the same efficiency, either by sub-

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[26] In Williamson v. Lee Optical Co., 348 U.S. 483 (1955), Justice Douglas suggested that legislation generated by policy need not be uniform or consistent:

> The problem of legislative classification is a perennial one, admitting of no doctrinaire definition. Evils in the same field may be of different dimensions and proportions, requiring different remedies. Or so the legislature may think. Or the reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind. The legislature may select one phase of one field and apply a remedy there, neglecting the others. The prohibition of the Equal Protection Clause goes no further than the invidious discrimination.

Id. at 489 (citations omitted).

Of course the point of the argument here, that the demands of consistency are different in the cases of principle and policy, is of great importance in understanding the recent history of the equal protection clause. It is the point behind attempts to distinguish "old" from "new" equal protection, or to establish "suspect" classifications, and it provides a more accurate and intelligible distinction than these attempts have furnished.

sidizing housing or by increasing direct government spending for new roads. Road construction companies have no right that the legislature choose road construction; if it does, then home construction firms have no right, on any principle of consistency, that the legislature subsidize housing as well. The legislature may decide that the road construction program has stimulated the economy just enough, and that no further programs are needed. It may decide this even if it now concedes that subsidized housing would have been the more efficient decision in the first place. Or it might concede even that more stimulation of the economy is needed, but decide that it wishes to wait for more evidence — perhaps evidence about the success of the road program — to see whether subsidies provide an effective stimulation. It might even say that it does not now wish to commit more of its time and energy to economic policy. There is, perhaps, some limit to the arbitrariness of the distinctions the legislature may make in its pursuit of collective goals. Even if it is efficient to build all shipyards in southern California, it might be thought unfair, as well as politically unwise, to do so. But these weak requirements, which prohibit grossly unfair distributions, are plainly compatible with providing sizeable incremental benefits to one group that are withheld from others.

There can be, therefore, no general argument of fairness that a government which serves a collective goal in one way on one occasion must serve it that way, or even serve the same goal, whenever a parallel opportunity arises. I do not mean simply that the government may change its mind, and regret either the goal or the means of its earlier decision. I mean that a responsible government may serve different goals in a piecemeal and occasional fashion, so that even though it does not regret, but continues to enforce, one rule designed to serve a particular goal, it may reject other rules that would serve that same goal just as well. It might legislate the rule that manufacturers are responsible for damages flowing from defects in their cars, for example, and yet properly refuse to legislate the same rule for manufacturers of washing machines, let alone contractors who cause economic damage like the damage of *Spartan Steel*. Government must, of course, be rational and fair; it must make decisions that overall serve a justifiable mix of collective goals and nevertheless respect whatever rights citizens have. But that general requirement would not support anything like the gravitational force that the judicial decision in favor of Mrs. MacPherson was in fact taken to have.

So Hercules, when he defines the gravitational force of a particular precedent, must take into account only the arguments of principle that justify that precedent. If the decision in favor of

Mrs. MacPherson supposes that she has a right to damages, and not simply that a rule in her favor supports some collective goal, then the argument of fairness, on which the practice of precedent relies, takes hold. It does not follow, of course, that anyone injured in any way by the negligence of another must have the same concrete right to recover that she has. It may be that competing rights require a compromise in the later case that they did not require in hers. But it might well follow that the plaintiff in the later case has the same abstract right, and if that is so then some special argument citing the competing rights will be required to show that a contrary decision in the later case would be fair.

2. *The Seamless Web.* — Hercules' first conclusion, that the gravitational force of a precedent is defined by the arguments of principle that support the precedent, suggests a second. Since judicial practice in his community assumes that earlier cases have a *general* gravitational force, then he can justify that judicial practice only by supposing that the rights thesis holds in his community. It is never taken to be a satisfactory argument against the gravitational force of some precedent that the goal that precedent served has now been served sufficiently, or that the courts would now be better occupied in serving some other goal that has been relatively neglected, possibly returning to the goal the precedent served on some other occasion. The practices of precedent do not suppose that the *rationales* that recommend judicial decisions can be served piecemeal in that way. If it is acknowledged that a particular precedent is justified for a particular reason; if that reason would also recommend a particular result in the case at bar; if the earlier decision has not been recanted or in some other way taken as a matter of institutional regret; then that decision must be reached in the later case.

Hercules must suppose that it is understood in his community, though perhaps not explicitly recognized, that judicial decisions must be taken to be justified by arguments of principle rather than arguments of policy. He now sees that the familiar concept used by judges to explain their reasoning from precedent, the concept of certain principles that underlie or are embedded in the common law, is itself only a metaphorical statement of the rights thesis. He may henceforth use that concept in his decisions of hard common law cases. It provides a general test for deciding such cases that is like the chess referee's concept of the character of a game, and like his own concept of a legislative purpose. It provides a question — What set of principles best justifies the precedents? — that builds a bridge between the general justification of the practice of precedent, which is fairness, and his own

decision about what that general justification requires in some particular hard case.

Hercules must now develop his concept of principles that underlie the common law by assigning to each of the relevant precedents some scheme of principle that justifies the decision of that precedent. He will now discover a further important difference between this concept and the concept of statutory purpose that he used in statutory interpretation. In the case of statutes, he found it necessary to choose some theory about the purpose of the particular statute in question, looking to other acts of the legislature only insofar as these might help to select between theories that fit the statute about equally well. But if the gravitational force of precedent rests on the idea that fairness requires the consistent enforcement of rights, then Hercules must discover principles that fit, not only the particular precedent to which some litigant directs his attention, but all other judicial decisions within his general jurisdiction and, indeed, statutes as well, so far as these must be seen to be generated by principle rather than policy. He does not satisfy his duty to show that his decision is consistent with established principles, and therefore fair, if the principles he cites as established are themselves inconsistent with other decisions that his court also proposes to uphold.

Suppose, for example, that he can justify Cardozo's decision in favor of Mrs. MacPherson by citing some abstract principle of equality, which argues that whenever an accident occurs then the richest of the various persons whose acts might have contributed to the accident must bear the loss. He nevertheless cannot show that that principle has been respected in other accident cases, or, even if he could, that it has been respected in other branches of the law, like contract, in which it would also have great impact if it were recognized at all. If he decides against a future accident plaintiff who is richer than the defendant, by appealing to this alleged right of equality, that plaintiff may properly complain that the decision is just as inconsistent with the government's behavior in other cases as if *MacPherson* itself had been ignored. The law may not be a seamless web; but the plaintiff is entitled to ask Hercules to treat it as if it were.

You will now see why I called our judge Hercules. He must construct a scheme of abstract and concrete principles that provides a coherent justification for all common law precedents and, so far as these are to be justified on principle, constitutional and statutory provisions as well. We may grasp the magnitude of this enterprise by distinguishing, within the vast material of legal decisions that Hercules must justify, a vertical and a horizontal

ordering. The vertical ordering is provided by distinguishing layers of authority; that is, layers at which official decisions might be taken to be controlling over decisions made at lower levels. In the United States the rough character of the vertical ordering is apparent. The constitutional structure occupies the highest level, the decisions of the Supreme Court and perhaps other courts interpreting that structure the next, enactments of the various legislatures the next and decisions of the various courts developing the common law different levels below that. Hercules must arrange justification of principle at each of these levels so that the justification is consistent with principles taken to provide the justification of higher levels. The horizontal ordering simply requires that the principles taken to justify a decision at one level must also be consistent with the justification offered for other decisions at that level.

Suppose Hercules, taking advantage of his unusual skills, proposed to work out this entire scheme in advance, so that he would be ready to confront litigants with an entire theory of law should this be necessary to justify any particular decision. He would begin, deferring to vertical ordering, by setting out and refining the constitutional theory he has already used. That constitutional theory would be more or less different from the theory that a different judge would develop, because a constitutional theory requires judgments about complex issues of institutional fit, as well as judgments about political and moral philosophy, and Hercules' judgments will inevitably differ from those other judges would make. These differences at a high level of vertical ordering will exercise considerable force on the scheme each judge would propose at lower levels. Hercules might think, for example, that certain substantive constitutional constraints on legislative power are best justified by postulating an abstract right to privacy against the state, because he believes that such a right is a consequence of the even more abstract right to liberty that the constitution guarantees. If so, he would regard the failure of the law of tort to recognize a parallel abstract right to privacy against fellow citizens, in some concrete form, as an inconsistency. If another judge did not share his beliefs about the connection between privacy and liberty, and so did not accept his constitutional interpretation as persuasive, that judge would also disagree about the proper development of tort.

So the impact of Hercules' own judgments will be pervasive, even though some of these will be controversial. But they will not enter his calculations in such a way that different parts of the theory he constructs can be attributed to his independent convictions rather than to the body of law that he must justify.

He will not follow those classical theories of adjudication I mentioned earlier, which suppose that a judge follows statutes or precedent until the clear direction of these runs out, after which he is free to strike out on his own. His theory is rather a theory about what the statute or the precedent itself requires, and though he will, of course, reflect his own intellectual and philosophical convictions in making that judgment, that is a very different matter from supposing that those convictions have some independent force in his argument just because they are his.[27]

3. Mistakes. — I shall not now try to develop, in further detail, Hercules' theory of law. I shall mention, however, two problems he will face. He must decide, first, how much weight he must give, in constructing a scheme of justification for a set of precedents, to the arguments that the judges who decided these cases attached to their decisions. He will not always find in these opinions any proposition precise enough to serve as a statute he might then interpret. But the opinions will almost always contain argument, in the form of propositions that the judge takes to recommend his decision. Hercules will decide to assign these only an initial or prima facie place in his scheme of justification. The purpose of that scheme is to satisfy the requirement that the government must extend to all the rights it supposes some to have. The fact that one officer of the government offers a certain principle as the ground of his decision may be taken to establish prima facie that the government does rely that far upon that principle.

But the main force of the underlying argument of fairness is forward-looking, not backward-looking. The gravitational force of Mrs. MacPherson's case depends not simply on the fact that she recovered for her Buick, but also on the fact that the government proposes to allow others in just her position to recover in the future. If the courts proposed to overrule the decision, no substantial argument of fairness, fixing on the actual decision in the case, survives in favor of the plaintiff in *Spartan Steel.* If, therefore, a principle other than the principle Cardozo cited can be found to justify *MacPherson*, and if this other principle also justifies a great deal of precedent that Cardozo's does not, or if it provides a smoother fit with arguments taken to justify decisions of a higher rank in vertical order, then this new principle is a more satisfactory basis for further decisions. Of course, this argument for not copying Cardozo's principle is unnecessary if the new principle is more abstract, and if Cardozo's principle can be seen as only a concrete form of that more abstract principle. In that case Hercules incorporates, rather than rejects, Cardozo's account of his decision. Cardozo, in fact, used the opinion in the

[27] *See* pp. 1101–09 *infra.*

earlier case of *Thomas v. Winchester*,[28] on which case he relied, in just that fashion. It may be, however, that the new principle strikes out on a different line, so that it justifies a precedent or a series of precedents on grounds very different from what their opinions propose. Brandeis' and Warren's famous argument about the right to privacy [29] is a dramatic illustration: they argued that this right was not unknown to the law but was, on the contrary, demonstrated by a wide variety of decisions, in spite of the fact that the judges who decided these cases mentioned no such right. It may be that their argument, so conceived, was unsuccessful, and that Hercules in their place, would have reached a different result. Hercules' theory nevertheless shows why their argument, sometimes taken to be a kind of brilliant fraud, was at least sound in its ambition.

Hercules must also face a different and greater problem. If the history of his court is at all complex, he will find, in practice, that the requirement of total consistency he has accepted will prove too strong, unless he develops it further to include the idea that he may, in applying this requirement, disregard some part of institutional history as a mistake. For he will be unable, even with his superb imagination, to find any set of principles that reconciles all standing statutes and precedents. This is hardly surprising: the legislators and judges of the past did not all have Hercules' ability or insight, nor were they men and women who were all of the same mind and opinion. Of course, any set of statutes and decisions can be explained historically, or psychologically, or sociologically, but consistency requires justification, not explanation, and the justification must be plausible and not sham. If the justification he constructs makes distinctions that are arbitrary and deploys principles that are unappealing, then it cannot count as a justification at all.

Suppose the law of negligence and accidents in Hercules' jurisdiction has developed in the following simplified and imaginary way. It begins with specific common law decisions recognizing a right to damages for bodily injury caused by very dangerous instruments that are defectively manufactured. These cases are then reinterpreted in some landmark decision, as they were in *MacPherson*, as justified by the very abstract right of each person to the reasonable care of others whose actions might injure his person or property. This principle is then both broadened and pinched in different ways. The courts, for example, decide that no concrete right lies against an accountant who has been negligent in the preparation of financial statements. They also

[28] 6 N.Y. 397 (1852).

[29] Warren & Brandeis, *The Right of Privacy*, 4 HARV. L. REV. 193 (1890).

decide that the right cannot be waived in certain cases; for example, in a standard form contract of automobile purchase. The legislature adds a statute providing that in certain cases of industrial accident, recovery will be allowed unless the defendant affirmatively establishes that the plaintiff was entirely to blame. But it also provides that in other cases, for example, in airplane accidents, recovery will be limited to a stipulated amount, which might be much less than the actual loss; and it later adds that the guest in an automobile cannot sue his host even if the host drives negligently and the guest is injured. Suppose now, against this background, that Hercules is called upon to decide *Spartan Steel*.

Can he find a coherent set of principles that justifies this history in the way that fairness requires? He might try the proposition that individuals have no right to recover for damages unless inflicted intentionally. He would argue that they are allowed to recover damages in negligence only for policy reasons, not in recognition of any abstract right to such damages, and he would cite the statutes limiting liability to protect airlines and insurance companies, and the cases excluding liability against accountants, as evidence that recovery is denied when policy argues the other way. But he must concede that this analysis of institutional history is incompatible with the common law decisions, particularly the landmark decision recognizing a general right to recovery in negligence. He cannot say, compatibly with the rest of his theory, that these decisions may themselves be justified on policy grounds, if he holds, by virtue of the rights thesis, that courts may extend liability only in response to arguments of principle and not policy. So he must set these decisions aside as mistakes.

He might try another strategy. He might propose some principle according to which individuals have rights to damages in just the circumstances of the particular cases that decided they did, but have no general right to such damages. He might concede, for example, a legal principle granting a right to recover for damages incurred within an automobile owned by the plaintiff, but deny a principle that would extend to other damage. But though he could in this way tailor his justification of institutional history to fit that history exactly, he would realize that this justification rests on distinctions that are arbitrary. He can find no room in his political theory for a distinction that concedes an abstract right if someone is injured driving his own automobile but denies it if he is a guest or if he is injured in an airplane. He has provided a set of arguments that cannot stand as a coherent justification of anything.

He might therefore concede that he can make no sense of insti-

tutional history except by supposing some general abstract right to recover for negligence: but he might argue that it is a relatively weak right and so will yield to policy considerations of relatively minor force. He will cite the limiting statutes and cases in support of his view that the right is a weak one. But he will then face a difficulty if, though the statute limiting liability in airplane accidents has never been repealed, the airlines have become sufficiently secure, and the mechanisms of insurance available to airlines so efficient and inexpensive, that a failure to repeal the statute can only be justified by taking the abstract right to be so weak that relatively thin arguments of policy are sufficient to defeat it. If Hercules takes the right to be that weak then he cannot justify the various common law decisions that support the right, as a concrete right, against arguments of policy much stronger than the airlines are now able to press. So he must choose either to take the failure to repeal the airline accident limitation statute, or the common law decisions that value the right much higher, as mistakes.

In any case, therefore, Hercules must expand his theory to include the idea that a justification of institutional history may display some part of that history as mistaken. But he cannot make impudent use of this device, because if he were free to take any incompatible piece of institutional history as a mistake, with no further consequences for his general theory, then the requirement of consistency would be no genuine requirement at all. He must develop some theory of institutional mistakes, and this theory of mistakes must have two parts. It must show the consequences for further arguments of taking some institutional event to be mistaken; and it must limit the number and character of the events than can be disposed of in that way.

He will construct the first part of this theory of mistakes by means of two sets of distinctions. He will first distinguish between the specific authority of any institutional event, which is its power as an institutional act to effect just the specific institutional consequences it describes, and its gravitational force. If he classifies some event as a mistake, then he does not deny its specific authority, but he does deny its gravitational force, and he cannot consistently appeal to that force in other arguments. He will also distinguish between embedded and corrigible mistakes; embedded mistakes are those whose specific authority is fixed so that it survives their loss of gravitational force; corrigible mistakes are those whose specific authority depends on gravitational force in such a way that it cannot survive this loss.

The constitutional level of his theory will determine which mistakes are embedded. His theory of legislative supremacy, for

example, will insure that any statutes he treats as mistakes will lose their gravitational force but not their specific authority. If he denies the gravitational force of the aircraft liability limitation statute, the statute is not thereby repealed; the mistake is embedded so that the specific authority survives. He must continue to respect the limitations the statute imposes upon liability, but he will not use it to argue in some other case for a weaker right. If he accepts some strict doctrine of precedent, and designates some judicial decision, like the decision denying a right in negligence against an accountant, a mistake, then the strict doctrine may preserve the specific authority of that decision, which might be limited to its enactment force, but the decision will lose its gravitational force; it will become, in Justice Frankfurter's phrase, a piece of legal flotsam or jetsam. It will not be necessary to decide which.

That is fairly straightforward, but Hercules must take more pains with the second part of his theory of mistakes. He is required, by the justification he has fixed to the general practice of precedent, to compose a more detailed justification, in the form of a scheme of principle, for the entire body of statutes and common law decisions. But a justification that designates part of what is to be justified as mistaken is prima facie weaker than one that does not. The second part of his theory of mistakes must show that it is nevertheless a stronger justification than any alternative that does not recognize any mistakes, or that recognizes a different set of mistakes. That demonstration cannot be a deduction from simple rules of theory construction, but if Hercules bears in mind the connection he earlier established between precedent and fairness, this connection will suggest two guidelines for his theory of mistakes. In the first place, fairness fixes on institutional history, not just as history but as a political program that the government proposed to continue into the future; it seizes, that is, on forward-looking, not the backward-looking implications of precedent. If Hercules discovers that some previous decision, whether a statute or a judicial decision, is now widely regretted within the pertinent branch of the profession, that fact in itself distinguishes that decision as vulnerable. He must remember, second, that the argument from fairness that demands consistency is not the only argument from fairness to which government in general, or judges in particular, must respond. If he believes, quite apart from any argument of consistency, that a particular statute or decision was wrong because unfair, within the community's own concept of fairness, then that belief is sufficient to distinguish the decision, and make it vulnerable. Of course, he must apply the guidelines with a sense of the

vertical structure of his overall justification, so that decisions at a lower level are more vulnerable than decisions at a higher.

Hercules will therefore apply at least two maxims in the second part of his theory of mistakes. If he can show, by arguments of history or by appeal to some sense of the legal community, that a particular principle, though it once had sufficient appeal to persuade a legislature or court to a legal decision, has now so little force that it is unlikely to generate any further such decisions, then the argument from fairness that supports that principle is undercut. If he can show by arguments of political morality that such a principle, apart from its popularity, is unjust, then the argument from fairness that supports that principle is overridden. Hercules will be delighted to find that these discriminations are familiar in the practice of other judges. The jurisprudential importance of his career does not lie in the novelty, but just in the familiarity, of the theory of hard cases that he has now created.

V. Political Objections

The rights thesis has two aspects. Its descriptive aspect explains the present structure of the institution of adjudication. Its normative aspect offers a political justification for that structure. The story of Hercules shows how familiar judicial practice might have developed from a general acceptance of the thesis. This at once clarifies the thesis by showing its implications in some detail, and offers powerful, if special, argument for its descriptive aspect. But the story also provides a further political argument in favor of its normative aspect. Hercules began his calculations with the intention, not simply to replicate what other judges do, but to enforce the genuine institutional rights of those who came to his court. If he is able to reach decisions that satisfy our sense of justice, then that argues in favor of the political value of the thesis.

It may now be said, however, by way of rebuttal, that certain features of Hercules' story count against the normative aspect of the thesis. In the introductory part of this essay I mentioned a familiar objection to judicial originality: this is the argument from democracy that elected legislators have superior qualifications to make political decisions. I said that this argument is weak in the case of decisions of principle, but Hercules' story may give rise to fresh doubts on that score. The story makes plain that many of Hercules' decisions about legal rights depend upon judgments of political theory that might be made differently by different judges or by the public at large. It does not matter, to this objection, that the decision is one of principle rather than

policy. It matters only that the decision is one of political conviction about which reasonable men disagree. If Hercules decides cases on the basis of such judgments, then he decides on the basis of his own convictions and preferences, which seems unfair, contrary to democracy, and offensive to the rule of law.

That is the general form of the objection I shall consider in this final Part. It must first be clarified in one important respect. The objection charges Hercules with relying upon his own convictions in matters of political morality. That charge is ambiguous, because there are two ways in which an official might rely upon his own opinions in making such a decision. One of these, in a judge, is offensive, but the other is inevitable.

Sometimes an official offers, as a reason for his decision, the fact that some person or group holds a particular belief or opinion. A legislator might offer, as a reason for voting for an anti-abortion statute, the fact that his constituents believe that abortion is wrong. That is a form of appeal to authority: the official who makes that appeal does not himself warrant the substance of the belief to which he appeals, nor does he count the soundness of the belief as part of his argument. We might imagine a judge appealing, in just this way, to the fact that he *himself* has a particular political preference. He might be a philosophical skeptic in matters of political morality. He might say that one man's opinion in such matters is worth no more than another's, because neither has any objective standing, but that, since he himself happens to favor abortion, he will hold anti-abortion statutes unconstitutional.

That judge relies upon the naked fact that he holds a particular political view as itself a justification for his decision. But a judge may rely upon his own belief in the different sense of relying upon the truth or soundness of that belief. Suppose he believes, for example, that the due process clause of the Constitution, as a matter of law, makes invalid any constraint of a fundamental liberty, and that anti-abortion statutes constrain a fundamental liberty. He might rely upon the soundness of those convictions, not the fact that he, as opposed to others, happens to hold them. A judge need not rely upon the soundness of any *particular* belief in this way. Suppose the majority of his colleagues, or the editors of a prominent law journal, or the majority of the community voting in some referendum, holds a contrary view about abortion. He may decide that it is his duty to defer to their judgment of what the Constitution requires, in spite of the fact that their view is, as he thinks, unsound. But in that case he relies upon the soundness of his own conviction that his institutional duty is to defer to the judgment of others in this

matter. He must, that is, rely upon the substance of his own judgment at some point, in order to make any judgment at all.

Hercules does not rely upon his own convictions in the first of these two ways. He does not count the fact that he himself happens to favor a particular conception of religious liberty, for example, as providing an argument in favor of a decision that advances that conception. If the objection we are considering is pertinent, therefore, it must be an objection to his relying upon his own convictions in the second way. But in that case the objection cannot be a blanket objection to his relying upon any of his convictions, because he must, inevitably, rely on some. It is rather an objection to his relying on the soundness of certain of his own convictions; it argues that he ought to defer to others in certain judgments even though their judgments are, as he thinks, wrong.

It is difficult, however, to see *which* of his judgments the objection supposes he should remand to others. We would not have any such problem if Hercules had accepted, rather than rejected, a familiar theory of adjudication. Classical jurisprudence supposes, as I said earlier, that judges decide cases in two steps: they find the limit of what the explicit law requires, and they then exercise an independent discretion to legislate on issues which the law does not reach. In the recent abortion cases,[30] according to this theory, the Supreme Court justices first determined that the language of the due process clause and of prior Supreme Court decisions did not dictate a decision either way. They then set aside the Constitution and the cases to decide whether, in their opinion, it is fundamentally unfair for a state to outlaw abortion in the first trimester.

Let us imagine another judge, called Herbert, who accepts this theory of adjudication and proposes to follow it in his decisions. Herbert might believe both that women have a background right to abort fetuses they carry, and that the majority of citizens think otherwise. The present objection argues that he must resolve that conflict in favor of democracy, so that, when he exercises his discretion to decide the abortion cases, he must decide in favor of the prohibitive statutes. Herbert might agree, in which case we should say that he has set aside his morality in favor of the people's morality. That is, in fact, a slightly misleading way to put the point. His own morality made the fact that the people held a particular view decisive; it did not withdraw in favor of the substance of that view. On the other hand, Herbert might disagree. He might believe that background rights in general, or this right in particular, must prevail against popular opinion even

[30] Roe v. Wade, 410 U.S. 113 (1973); Doe v. Bolton, 410 U.S. 179 (1973).

in the legislature, so that he has a duty, when exercising a legislative discretion, to declare the statutes unconstitutional. In that case, the present objection argues that he is mistaken, because he insufficiently weighs the principle of democracy in his political theory.

In any case, however, these arguments that seem tailor-made for Herbert are puzzling as arguments against Hercules. Hercules does not first find the limits of law and then deploy his own political convictions to supplement what the law requires. He uses his own judgment to determine what legal rights the parties before him have, and when that judgment is made nothing remains to submit to either his own or the public's convictions. The difference is not simply a difference in ways of describing the same thing: we saw in Part III that a judgment of institutional right, like the chess referee's judgment about the forfeiture rule, is very different from an independent judgment of political morality made in the interstices provided by the open texture of rules.

Herbert did not consider whether to consult popular morality until he had fixed the legal rights of the parties. But when Hercules fixes legal rights he has already taken the community's moral traditions into account, at least as these are captured in the whole institutional record that it is his office to interpret. Suppose two coherent justifications can be given for earlier Supreme Court decisions enforcing the due process clause. One justification contains some principle of extreme liberality that cannot be reconciled with the criminal law of most of the states, but the other contains no such principle. Hercules cannnot seize upon the former justification as license for deciding the abortion cases in favor of abortion, even if he is himself an extreme liberal. His own political convictions, which favor the more liberal justification of the earlier cases, must fall, because they are inconsistent with the popular traditions that have shaped the criminal law that his justification must also explain.

Of course, Hercules' techniques may sometimes require a decision that opposes popular morality on some issue. Suppose no justification of the earlier constitutional cases can be given that does not contain a liberal principle sufficiently strong to require a decision in favor of abortion. Hercules must then reach that decision, no matter how strongly popular morality condemns abortion. He does not, in this case, enforce his own convictions against the community's. He rather judges that the community's morality is inconsistent on this issue: its constitutional morality, which is the justification that must be given for its constitution as interpreted by its judges, condemns its discrete judgment on the particular issue of abortion. Such conflicts are familiar within

individual morality; if we wish to use the concept of a community morality in political theory, we must acknowledge conflicts within that morality as well. There is no question, of course, as to how such a conflict must be resolved. Individuals have a right to the consistent enforcement of the principles upon which their institutions rely. It is this institutional right, as defined by the community's constitutional morality, that Hercules must defend against any inconsistent opinion however popular.

These hypothetical cases show that the objection designed for Herbert is poorly cast as an objection against Hercules. Hercules' theory of adjudication at no point provides for any choice between his own political convictions and those he takes to be the political convictions of the community at large. On the contrary, his theory identifies a particular conception of community morality as decisive of legal issues; that conception holds that community morality is the political morality presupposed by the laws and institutions of the community. He must, of course, rely on his own judgment as to what the principles of that morality are, but this form of reliance is the second form we distinguished, which at some level is inevitable.

It is perfectly true that in some cases Hercules' decision about the content of this community morality, and thus his decision about legal rights, will be controversial. This will be so whenever institutional history must be justified by appeal to some contested political concept, like fairness or liberty or equality, but it is not sufficiently detailed so that it can be justified by only one among different conceptions of that concept. I offered, earlier, Hercules' decision of the free busing case as an example of such a decision; we may now take a more topical example. Suppose the earlier due process cases can be justified only by supposing some important right to human dignity, but do not themselves force a decision one way or the other on the issue of whether dignity requires complete control over the use of one's uterus. If Hercules sits in the abortion cases, he must decide that issue and must employ his own understanding of dignity to do so.

It would be silly to deny that this is a political decision, or that different judges, from different subcultures, would make it differently. Even so, it is nevertheless a very different decision from the decision whether women have, all things considered, a background right to abort their fetuses. Hercules might think dignity an unimportant concept; if he were to attend a new constitutional convention he might vote to repeal the due process clause, or at least to amend it so as to remove any idea of dignity from its scope. He is nevertheless able to decide whether that concept, properly understood, embraces the case of abortion. He is in the

shoes of the chess referee who hates meritocracy, but is nevertheless able to consider whether intelligence includes psychological intimidation.

It is, of course, necessary that Hercules have some understanding of the concept of dignity, even if he denigrates that concept; and he will gain that understanding by noticing how the concept is used by those to whom it is important. If the concept figures in the justification of a series of constitutional decisions, then it must be a concept that is prominent in the political rhetoric and debates of the time. Hercules will collect his sense of the concept from its life in these contexts. He will do the best he can to understand the appeal of the idea to those to whom it does appeal. He will devise, so far as he can, a conception that explains that appeal to them.

This is a process that can usefully be seen as occupying two stages. Hercules will notice, simply as a matter of understanding his language, which are the clear, settled cases in which the concept holds. He will notice, for example, that if one man is thought to treat another as his servant, though he is not in fact that man's employer, then he will be thought to have invaded his dignity. He will next try to put himself, so far as he can, within the more general scheme of beliefs and attitudes of those who value the concept, to look at these clear cases through their eyes. Suppose, for example, that they believe in some Aristotelian doctrine of the urgency of self-fulfillment, or they take self-reliance to be a very great virtue. Hercules must construct some general theory of the concept that explains why those who hold that belief, or accept that virtue, will also prize dignity; if his theory also explains why he, who does not accept the belief or the virtue, does not prize dignity, then the theory will be all the more successful for that feature.

Hercules will then use his theory of dignity to answer questions that institutional history leaves open. His theory of dignity may connect dignity with independence, so that someone's dignity is compromised whenever he is forced, against his will, to devote an important part of his activity to the concerns of others. In that case, he may well endorse the claim that women have a constitutional liberty of abortion, as an aspect of their conceded constitutional right to dignity.

That is how Hercules might interpret a concept he does not value, to reach a decision that, as a matter of background morality, he would reject. It is very unlikely, however, that Hercules will often find himself in that position; he is likely to value most of the concepts that figure in the justification of the institutions of his own community. In that case his analysis of these con-

cepts will not display the same self-conscious air of sociological inquiry. He will begin within, rather than outside, the scheme of values that approves the concept, and he will be able to put to himself, rather than to some hypothetical self, questions about the deep morality that gives the concept value. The sharp distinction between background and institutional morality will fade, not because institutional morality is displaced by personal convictions, but because personal convictions have become the most reliable guide he has to institutional morality.

It does not follow, of course, that Hercules will even then reach exactly the same conclusions that any other judge would reach about disputed cases of the concept in question. On the contrary, he will then become like any reflective member of the community willing to debate about what fairness or equality or liberty requires on some occasion. But we now see that it is wrong to suppose that reflective citizens, in such debates, are simply setting their personal convictions against the convictions of others. They too are contesting different conceptions of a concept they suppose they hold in common; they are debating which of different theories of that concept best explains the settled or clear cases that fix the concept. That character of their debate is obscured by the fact that they do value the concepts they contest, and therefore reason intuitively or introspectively rather than in the more sociological mode that an outsider might use; but, so long as they put their claims as claims about concepts held in common, these claims will have the same structure as the outsider's. We may summarize these important points this way: the community's morality, on these issues at least, is not some sum or combination or function of the competing claims of its members; it is rather what each of the competing claims claims to be. When Hercules relies upon his own conception of dignity, in the second sense of reliance we distinguished, he is still relying on his own sense of what the community's morality provides.

It is plain, therefore, that the present objection must be recast if it is to be a weapon against Hercules. But it cannot be recast to fit Hercules better without losing its appeal. Suppose we say that Hercules must defer, not to his own judgment of the institutional morality of his community, but to the judgment of most members of that community about what that is. There are two apparent objections to that recommendation. It is unclear, in the first place, how he could discover what that popular judgment is. It does not follow from the fact that the man in the street disapproves of abortion, or supports legislation making it criminal, that he has considered whether the concept of dignity presupposed by the Constitution, consistently applied, supports his

political position. That is a sophisticated question requiring some dialectical skill, and though that skill may be displayed by the ordinary man when he self-consciously defends his position, it is not to be taken for granted that his political preferences, expressed casually or in the ballot, have been subjected to that form of examination.

But even if Hercules is satisfied that the ordinary man has decided that dignity does not require the right to abortion, the question remains why Hercules should take the ordinary man's opinion on that issue as decisive. Suppose Hercules thinks that the ordinary man is wrong; that he is wrong, that is, in his philosophical opinions about what the community's concepts require. If Herbert were in that position, he would have good reason to defer to the ordinary man's judgments. Herbert thinks that when the positive rules of law are vague or indeterminate, the litigants have no institutional right at all, so that any decision he might reach is a piece of fresh legislation. Since nothing he decides will cheat the parties of what they have a right to have at his hands, the argument is plausible, at least, that when he legislates he should regard himself as the agent of the majority. But Hercules cannot take that view of the matter. He knows that the question he must decide is the question of the parties' institutional rights. He knows that if he decides wrongly, as he would do if he followed the ordinary man's lead, he cheats the parties of what they are entitled to have. Neither Hercules nor Herbert would submit an ordinary legal question to popular opinion; since Hercules thinks that parties have rights in hard cases as well as in easy ones, he will not submit to popular opinion in hard cases either.

Of course, any judge's judgment about the rights of parties in hard cases may be wrong, and the objection may try, in one final effort, to capitalize on that fact. It might concede, *arguendo,* that Hercules' technique is appropriate to Hercules, who by hypothesis has great moral insight. But it would deny that the same technique is appropriate for judges generally, who do not. We must be careful, however, in assessing this challenge, to consider the alternatives. It is a matter of injustice when judges make mistakes about legal rights, whether these mistakes are in favor of the plaintiff or defendant. The objection points out that they will sometimes make such mistakes, because they are fallible and in any event disagree. But of course, though we, as social critics, know that mistakes will be made, we do not know when because we are not Hercules either. We must commend techniques of adjudication that might be expected to reduce the number of mistakes overall based on some judgment of the relative capacities of men and women who might occupy different roles.

Hercules' technique encourages a judge to make his own judgments about institutional rights. The argument from judicial fallibility might be thought to suggest two alternatives. The first argues that since judges are fallible they should make no effort at all to determine the institutional rights of the parties before them, but should decide hard cases only on grounds of policy, or not at all. But that is perverse; it argues that because judges will often, by misadventure, produce unjust decisions they should make no effort to produce just ones. The second alternative argues that since judges are fallible they should submit questions of institutional right raised by hard cases to someone else. But to whom? There is no reason to credit any other particular group with better facilities of moral argument; or, if there is, then it is the process of selecting judges, not the techniques of judging that they are asked to use, that must be changed. So this form of skepticism does not in itself argue against Hercules' technique of adjudication, though of course it serves as a useful reminder to any judge that he might well be wrong in his political judgments, and that he should therefore decide hard cases with humility.

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Individual Rights and Collective Goods*

Robert Alexy

The relationship between individual rights and collective goods is one of the perennial themes for debate in the field of legal philosophy. Two reasons for this may be immediately identified: one normative, the other analytical. The normative problem arises from the fact that every determination of their relative standing, in the sense of a weighing of individual rights and collective goods, involves assumptions about the basic structure of state and society. Consensus about their rightful ranking presupposes agreement on what is just. The weighing of and balance between individual rights and collective goods will therefore remain unresolved for as long as there is lack of agreement regarding the theory of justice. The analytical problem originates from the fact that any definition of the relationship presupposes clarity about the constituents of the relationship; that is, clarity about the concepts of individual rights and collective goods. Lacking clear-cut concepts leads to confusion in resolving the normative problem.

The analytical problem stands at the forefront of the present discussion. My exposition will be in three parts. The first part will discuss the concepts of individual rights and collective goods. The subject matter of the second part will be the conceptual relations between individual rights and collective goods. The last part will expound several normative theses about the relationship between these two concepts.

THE CONCEPTS OF INDIVIDUAL RIGHTS AND COLLECTIVE GOODS

The Concept of an Individual Right

The analysis of the concept of an individual right to be given here rests on twin pillars as follows: (i) a three–stage model of individual rights, and (ii) a theory of principles underlying these rights. The three-stage model includes a system of fundamental legal positions.

A Three–Stage Model of Individual Rights

The basis of the three-stage model lies in the distinction between: (i) the reasons for individual rights, (ii) individual rights as legal positions and relations, and (iii) the enforce-

ability of individual rights.[1] The failure to distinguish between these three stages is a key reason for current disputes concerning the concept of an individual right.

Reasons for Rights Quite disparate factors can be adduced as reasons for rights. Classical reasons are the interest of the right-holder in the subject matter of the right and the opportunity afforded to the right-holder of exercising his or her free will. Such reasons for rights are quite different from the rights themselves. These consist of legal positions and relations and are thus to be considered at the second stage of the three–stage model. Just as the reason for a norm is to be distinguished from the norm which is supported by it, so too the reason for a right is one matter, and the right which is assumed on the basis of this reason is another. Many difficulties relating to both the interest theory and the choice theory arise from the fact that reasons for rights are treated as defining features of the concept of a right. Instances of the transformation of the basic relation into a conceptual relation occur in Jhering's definition of subjective rights as 'legally protected interests'[2] and Windscheid's definition as 'a power of willing or a superiority of will conferred by the legal order'[3]. The assumption that there must exist precisely one standard general ground for individual rights which has to be embraced in such definitions obscures the insight that there may exist a bundle of quite different reasons behind any individual right, and that different rights may rest on quite different reasons.

Once a distinction is made between reasons for rights and rights as legal positions and relations, it is possible to consider not only individual goods such as the interests of right-holders or their free will, but also collective goods as reasons for rights. Thus an attempt can be made to justify rights of individual possession of any individual by reference to a collective good – for example, through the general economic effectiveness of an economy based on private ownership.

Three justifications of rights can be distinguished on the basis of a dichotomy between individual and collective goods. A right may be justified either generally or in a specific context (i) solely by reference to individual goods, (ii) by reference both to individual and to collective goods, and (iii) exclusively by reference to collective goods. This can be taken into account in terminologically different ways. What is decisive within the framework of the three-stage model is that a right as such (that is, the legal position which obtains when a right exists) can be a right of one particular person, and thus an individual right, even when it is justified through collective goods. It therefore seems justifiable to designate all rights of the individual – and only such rights are to be considered here – as 'individual rights'. Such a concept of an individual right coincides with that of a 'subjective right' familiar to legal dogmatics in the German or French traditions, to the extent that all individual rights are subjective rights and all subjective rights of any particular person are individual rights. Wherever one is talking about the rights of the individual, as at present, the expressions 'individual right' and 'subjective right' are interchangeable.

Alternative terminologies are also possible, and everything to be said here is equally expressible in them. Thus it would be possible to call only those rights 'individual rights' which are exclusively or at least partially justified through individualistic reasons. Rights which are justified exclusively by reference to collective goods and (as the case may be) rights justified at least partly in terms of collective goods could then be classified for example as 'subjective rights'. For the reasons stated above, the present way of proceeding

with a wide concept of individual rights is to be preferred. The differences in justification can best be understood by designating the justification itself 'individualistic' and/or 'collectivist'.

Rights as Legal Positions and Relations The rights on which attention is focused at the second stage consist of legal positions and relations. Their nature and their different kinds can most easily be expounded in the context of a system of fundamental legal positions. It is possible to generate a system which is applicable to both theoretical and practical purposes by dividing up those positions which are to be designated 'rights' (by reference either to Bentham's distinction between 'rights to services', 'liberties', and 'powers'[4] or to Bierling's distinction between 'legal claim', 'simple legal permission', and 'legal ability'[5]) into (i) rights to something, (ii) liberties and (iii) powers.[6] The only thing of significance here is that the rights which are to be assigned to the second stage have a purely deontological character in whichever form they occur.

Rights to something are three place relations between the right-holder *a*, the addressee *b*, and the subject matter *G* of the right.[7] This relation can be expressed by '*R*'. It is precisely when the relation *R* exists between *a*, *b*, and *G* that *a* finds him or herself in a legal position characterized by saying that he or she has a right to *G* as against *b*. The most general form of a sentence about the right to something can be presented as *RabG*. Every sentence of this form is equivalent to a sentence about the corresponding relational duty: *ObaG*. '*O*' is a relational deontic operator. Rights to something are thus reducible to relational deontic modalities.

The simplest form of a legal liberty exists in the conjunction of the permission to do something and the permission not to do the same thing. More complicated forms arise by combining such positions with rights to something. The details can be set aside here. The only thing of significance in understanding the character of this part of the second stage of the three–stage model is that legal liberties can also be entirely grasped in all their forms with the help of deontic modalities in which these liberties are expressible in relational terms.

In the case of powers, it is not so easy to recognize their ultimate grounding in basic deontic modalities. The key is the concept of the possible or the potential ought. The normative content of a power is identical to the class of commands, prohibitions, and permissions directly and indirectly made possible by it. In this way, the potentialization next to the relationalization is the second operation by recourse to which stage two positions emerge solely from the basic deontic modalities.[8]

It is thus clear that the individual rights which are to be assigned to the second stage have a purely deontological character. By contrast the first stage (reasons for rights) requires talk of goods and interests, and hence the application of axiological and anthropological concepts.[9]

Enforceability Those legal positions related to the enforcement of a right are the focus of attention at the third stage, consisting mainly of powers and permissions. It is not unusual for an analytical relation to be established between such positions and the concept of a right; Kelsen, for example, writes: 'A subjective right in the specific sense is the legal power to advance the performance of an existing duty'.[10] The objection to this view is that

the existence of a right is a substantive reason for its enforceability.[11] This would not be possible if enforceability were already included in the concept of a right. Thus in addition to the basic relation between the first and the second level, there is a basic relation between the right and its enforceability, that is between the second and the third level. Where enforceability is included in the concept of a right, it is impossible to grasp this relation.

Theory of Principles

An analysis of the concept of an individual right sufficient for the purpose of determining the relation of individual rights and collective goods presupposes a further piece of theorizing in addition to the three-stage model, namely a theory of principles of individual rights. Such a theory is needed to reconstruct a familiar phenomenon central to the relationship between individual rights and collective goods. This is the conflict between the two, as well as its resolution through a process of weighing and balancing.

The theory of principles to be put forward here[12] ties in both with Esser's distinction between principles and norms[13] and with Dworkin's dichotomy between rules and principles[14]. It will be argued that while both writers correctly work out several characteristics of rules and principles, they fail to address the nub of the distinction – the fact that principles are optimization precepts. This means that they are norms which require that a certain state of affairs be realized to the highest degree possible relative to legal and factual possibilities. Rules, on the other hand, are definitive precepts. They contain stipulations within the realm of the factually and legally possible. All further differences between the two follow from this distinction, including the fact that – as optimization precepts – principles can be realized to different degrees while rules – as definitive precepts – can only either be satisfied or not.

The word 'precept' in the expressions 'optimization precept' and 'definitive precept' should here be applied in a wide sense which embraces both permissions and prohibitions. It was argued above that all legal positions are reducible to basic deontic modalities. It can thus be said that individual rights have the character either of optimization precepts or of definitive precepts.

To the extent that rights have the character of optimization precepts, they are to be considered not as definitive rights but rather as *prima facie* rights which can be limited when they come into conflict with collective goods or the rights of others. Only rights with the character of rules are definitive rights. Dworkin's thesis that rights are 'trumps over some background justification for political decisions that states a goal for the community as a whole'[15] implies that, at least with reference to collective goods, they have an essentially definitive character. It will be argued that this thesis is too crude both in its analytical and in its normative aspects. A decisive role in the argument will be played by inferences which may be drawn for the resolution of conflicts from the very structure of optimization precepts. First, however, a look at the concept of a collective good.

The Concept of a Collective Good

It is easier to offer examples of collective goods than to say what a collective good is. Examples of collective goods are internal and external security, a thriving economy, the

preservation of the environment and a vibrant culture. In order to establish what makes these collective goods, it is necessary to distinguish between (i) the distributive structure of collective goods, (ii) their normative status, and (iii) their justification.

The Distributive Structure of Collective Goods

The concept of a collective good has application in all practical disciplines but has been analysed most thoroughly in the field of economics. Two concepts most discussed in the attempt to define it are non-exclusivity of enjoyment and non-rivalry in consumption.[16] Thus external security is a relatively clear case of a collective good, firstly, because no one (more precisely, no one who is permitted to stay in the region in question) can be excluded from its enjoyment; and, secondly, because enjoyment of it on the part of *a* neither encroaches on nor impedes enjoyment of it on the part of *b*. When examined in detail, these two characteristics lead to numerous problems in the field of economic analysis which are not of interest here.

In order to distinguish individual rights from collective goods, there is a need for a concept of a collective good which forms a suitable counterpart to that of individual rights. Such a concept of a collective good can be formulated through the concept of its non-distributive character. A good is a collective good of a class of individuals if it is conceptually, actually or legally impossible to break up the good into parts and to assign shares to individuals. Where this is the case, the good has a non-distributive character. Collective goods are non-distributive goods.

The Normative Status of Collective Goods

The non-distributive character presented above is not sufficient on its own to define the concept of a collective good. It may also appertain to things which are not collective goods but collective evils such as a high crime rate, the ugliness of a town or a climate of intolerance. It must therefore be asked what it means for something to be a good.

Examination of arguments about collective goods reveals three conceptual approaches: anthropological, axiological, and deontological.[17] The anthropological approach comes into play when it is said that the *interest* in external security is to be balanced against an individual right. By contrast, when discussion turns to the *value* of external security, the axiological approach prevails. Finally the same good takes on a deontological character when it is said that the establishment and maintenance of external security are prescribed.

These three approaches are used interchangeably both in everyday language and in the language of jurisprudence. The deontological version is to be preferred from the jurisprudential standpoint. Interests can be reasons for distinguishing something as a legally relevant collective good. In order to become a collective good for a legal system, the purely factual interest must be transformed into a legally recognized and hence (in this sense) a justified interest. To be justified in this way, the pursuit of an interest must be *prima facie* or definitively required so that it assumes a normative status. The normative status of collective goods is more fully grasped by means of the deontological version than by the axiological one. As expounded above, rights have a deontological status. Where one chooses the axiological conception of collective goods, a conflict between individual rights and

collective goods becomes a conflict between the categorically distinct. This can be avoided by opting for the deontological version which does not give rise to any disadvantage, since the theory of principles makes it possible to translate from axiological to deontological language. Consider further that answers to rights-questions state what is required, prohibited, and permitted, it is preferable to start with the deontological approach already at the level of their justification.

The concept of a collective good can thus be defined as follows: *X* is a collective good if *X* is non-distributive and the establishment or maintenance of *X* is required either *prima facie* or definitively. This definition refers to all normative systems, but can be amended as follows to refer solely to legal systems: *X* is a collective good for the legal system *S* if *X* is non-distributive and the establishment or maintenance of *X* is required through *S* either *prima facie* or definitively. The adoption of the *prima facie*/definitive dichotomy in this definition makes explicit that, just like individual rights, collective goods can have the character of rules or principles.

The Justification of Collective Goods

The above definition of collective goods shows that whenever a collective good is adduced as a reason for or against a decision, reference is made to a precept or an imperative and hence to a norm. Something is a collective good for a legal system precisely when there exists a valid norm which makes it so. Clearly, then, the problem of the justification of collective goods is a problem of the justification of norms.

Only two of the numerous kinds of justifications will be of interest here: justification in terms of welfare economics and in terms of consensus theory – both significant because they could be used in defining the concept of a collective good. This, however, would mean supporting a definition which made reference *exclusively* to justification or which *also* made reference to justification, instead of a definition which made reference solely to distribution. The contention here is that it would be preferable to define the concept of a collective good without reference to justification – as was the case with individual rights.

Justification of a collective good in terms of welfare economics obtains when an attempt is made to justify this good as a function of individual goods (utilities, preferences). Such justifications involve problems of the aggregation of individual into collective utilities.[18] Where the individual utility to be aggregated is measured on a cardinal number scale then, at least in relation to the kinds of goods mentioned here, problems of an almost insuperable nature arise in terms of measurement and comparison of utilities.[19] These problems can be avoided by the application of ordinal scales. However, aggregation here falls foul of Arrow's impossibility theorem.[20] In this way the justification of collective goods as a function of individual goods meets serious problems, making it all the more necessary to exclude such a definition. In the eventuality of there being no adequate method of aggregation, then it would follow from the definition that there can be no 'collective goods'.

There are several variants of justification along the lines of consensus theory. According to one of the more modest, a collective good is justified when everyone actually agrees to it. According to a more exacting variant, a collective good is justified when everyone would agree to it under certain conditions of rationality. The second variant can be more fully explained in a theory of rational discourse.[21] What matters is that it is not desirable to

assimilate justification from consensus theory into the definition even when its suitability can be proven. The factual or hypothetical agreement of all is not a characteristic limited to collective goods which is shown by the fact that a consensus is possible not only with respect to collective goods, but also with respect to individual rights. This and also the general maxim that it is not advisable to encumber concepts (such as a norm,[22] an individual right or a collective good) with problems of justification comprise sufficient grounds for favouring a definition which refers exclusively to distribution.

CONCEPTUAL RELATIONS BETWEEN INDIVIDUAL RIGHTS AND COLLECTIVE GOODS

Four Theses

In order to examine the conceptual relationship between individual rights and collective goods, four possible theses pertaining to relations between these concepts will be discussed:

1. Means/End Relation I: all individual rights are exclusively means to collective goods.
2. Means/End Relation II: all collective goods are exclusively means to individual rights.
3. Identity Relation: all collective goods are identical with states in which individual rights exist and are satisfied.
4. Independence Relation: there exist neither means/end relations nor relations of identity between individual rights and collective goods.

It is immediately clear that these four theses do not exhaust the range of possible conceptual relations between individual rights and collective goods. One need only look at the first thesis. It is quite feasible that while not all individual rights are exclusively means to collective goods, several are; furthermore, it is quite possible that while some rights are means to collective goods, they are not exclusively so. Weakening the theses in such ways makes them more plausible but less interesting. This is a sufficient reason for examining them in the strongest form possible at this point rather than in a weakened version.

More important than the problem of weakening the four theses is the question of their status. Those who claim that individual rights are exclusively means to collective goods may wish to state further that this relation exists in all conceivable normative systems and is thus conceptually necessary. Such a claim has an analytical status. There is also an analytical problem about any conception of individual rights and collective goods in terms of which any of the four theses is supposed to be true independently of the substantive justification of this conception. It is not clear whether this is even conceivable and thus conceptually possible. By contrast, a non-analytical normative claim is at issue where one of the four theses is rejected, not for reasons of conceptual impossibility, but for substantive reasons – because it can only be supported on the basis of a conception of individual rights and collective goods which cannot itself be justified. The relationship between conceptual

possibility and substantive, normative correctness will play a key role in the following discussion.

Individual Rights as Means to Collective Goods

As has already been claimed above,[23] it is conceptually possible to think of some individual rights exclusively as means to collective goods. The right of ownership was cited as an example. It is possible to imagine a conception of property rights according to which they are exclusively a means to the establishment and maintenance of an effective economy. This can be generalized. Conceptually a characterization solely in terms of means – that is, a purely instrumental justification of rights – is possible for all individual rights. One need only look at such fundamental individual rights as those to dignity, liberty, and equality. Collective goods understood to be the exclusive ends of these rights can easily be identified. Examples are afforded by tolerance, or artistic and scientific flourishing and economic prosperity, as well as by the vivacity and solidarity of a society. If the three abstract rights named above can be justified exclusively via collective goods, then the same possibility holds for all more concrete rights.

Thus a characterization of individual rights solely in terms of means must founder not on conceptual but on normative problems. Two aspects have to be distinguished, the first as follows: an individual right which is exclusively a means to a collective good cannot, by definition, have any independent weight against that good. If the right ceases to be a means to the collective good or even becomes an impediment to it, there is no longer a reason for the right. It no longer has even *prima facie* validity in relation to the collective good. This is not an instance of a conflict at the level of theory of principles: there can be no question of weighing and balancing. In this way, every restriction on and every evasion of the individual right is justified where it furthers the collective good.[24]

The second aspect relates to conflicts between individual rights which are each justified by different collective goods, as well as conflicts between individual rights and collective goods other than those which justify them. Such conflict-situations admit of resolution through weighing and balancing. However, given the universal character postulated here of rights as means, such a process is in fact a weighing and balancing neither of individual rights nor between individual rights and collective goods, but rather solely between collective goods.

Taking these two aspects together, it can be said that, given a conception of individual rights as purely means to collective goods, there are no genuine conflicts between the legal positions of individuals and collective goods. Individual rights do not play any systematic or significant role in cases of conflict.

The recognition of individually (and not collectively) justified rights is an expression of the fact that the individual is taken seriously as an individual. On the other hand, denying such recognition is an expression of the fact that the individual is not taken seriously as an individual. For the first thesis, this means that while it is indeed conceptually possible, it can only be actualized in a normative system in which the individual is not taken seriously as an individual. It will be argued that such a normative system is not amenable to justification. Should this claim be substantiated, the first thesis will indeed be conceptually possible, but normatively impossible.

Collective Goods as Means to Individual Rights

The second thesis holds where it is conceptually and normatively possible to comprehend all collective goods exclusively as means to individual rights. A collective good is to be viewed exclusively as a means to individual rights when its establishment and preservation have no other significance than as a prerequisite for the enjoyment of rights by their holders and for their observance by their addressees.[25] The establishing of prerequisites for the enjoyment of rights can involve liberties and powers; the establishing of prerequisites for their observance involves rights to something.

The question arises whether collective goods might be viewed exclusively as prerequisites for individual rights in the double sense outlined above. Consider, for example, full employment as a goal of economic policy. Imagine this goal to be pursued by two governments, one of which supports a strictly individualistic theory of the tasks of the State, the other a fundamentally collectivist one. The former will pursue the goal of full employment exclusively to achieve a situation in which everyone can fully exercise his or her right to a free choice of workplace. Any other effects of full employment policy will be viewed partly as welcome (though not required) side–effects and partly as the necessary price for the most comprehensive realization possible of the right to work. Evidence that an exclusively individualistic orientation is not only proclaimed, but actually practised, is to be found in the following observation: that in cases where the goal of full employment conflicts with other goals, the relative weight of the goal is determined exclusively through the weight of the individual rights in question. The welcome side–effects play no part in the process of weighing and balancing. Nevertheless, the goal of full employment remains a collective goal. Even at the point of its fullest realization, it is not possible to determine who has what share in it and who has failed to gain. By contrast, for the basically collectivistically–oriented government, the securing of individual rights is only one reason among many for a policy of full employment. First and foremost, it strives for other goals such as social harmony and the general welfare of the population. In a conflict situation, it is these goals which play the decisive role.

This example makes clear that the question of whether a collective good can be solely a means to securing individual rights cannot be answered purely through the isolated consideration of the collective good. The answer rather depends on the role played by the collective good in a particular system of goods, norms, and rights.[26] This role in turn is conditioned by an underlying normative theory. It can thus be said that there are collective goods for which one may strive solely as means to securing individual rights, and that the existence of such collective goods depends on an underlying normative theory. This supports the conclusion that even the question whether collective goods can be exclusively means to individual rights revolves around purely normative issues and is not a conceptual problem. This hypothesis requires closer scrutiny.

An opponent of the thesis of the purely normative character of the problem might search for examples of collective goods which, even on conceptual grounds, could not be exclusively means to individual rights. The beauty of towns and of landscapes seems to afford such an example. Examples of this kind do, indeed, give rise to problems, these, however, are of a normative and not a conceptual nature. There are two possibilities for the advocate of a strictly individualistic theory: to cite individual rights to which this good is exclusively

a means, or to claim that it is not a matter of a good at all, and hence not a matter of a collective good. Choosing the first assumes rights to the beauty of the environment which are created in such a way that, relative to them, the collective good appears purely as a means. This is conceptually possible, but normatively problematic. In general terms, this leads to a situation in which corresponding individual rights must be invented as the goals of every useful, pleasant or valuable thing accomplished by the State. It is open to question whether all such rights are amenable to normative justification. The second way is also conceptually possible, but normatively problematic. It is difficult to dispute that – however one defines it – beauty of the environment is a good. The second example thus shows that it is conceptually possible to adhere to the idea of collective goods exclusively as means to individual rights, even in extreme cases. However, it also makes plain that the price of this is a problematic normative theory. It will be shown below that this price is too high.

Conceptual problems primarily arise for another reason, namely, the uncertain nature of the means/end relation. To be sure, this indeterminacy also persists where individual rights are seen exclusively as means to collective goods. However, it has a systematically different character where collective goods are meant exclusively to be means to individual rights. The reason for this lies in the non-distributive character of collective goods. A rise in the employment rate is not a means to the realization of any particular person's individual right to work. What is raised is only the chance that members of a class of individuals will realize their rights. This applies to those collective goods which do not procure for every individual the certain possibility of realizing their rights. In such cases, the collective good is, for conceptual reasons, only potentially a means to individual rights.

To recapitulate, therefore, it can be said to be conceptually possible to comprehend collective goods exclusively as means to individual rights. However, in some cases, for conceptual reasons, the means/end relation is only a potential one and in other cases the assumption of a means/end relation presupposes problematic normative theses.

Relation of Identity

The third of the four theses holds where all collective goods are identical with states of affairs in which individual rights exist and are realized. Three versions of this relation will be examined: (i) a general relation of identity, (ii) a special relation, and (iii) a relation of abstraction.

The General Relation of Identity

According to the first version, collective goods consist of nothing more than a class of existing, realized individual rights, having in principle any conceivable content. Since according to this version, the collective good is the same as a class of existing and satisfied rights of a general (that is, substantively indeterminate) kind, it is possible to speak of a 'general relation of identity'. This version is not consistent with the non-distributive nature of collective goods. Because of its wholly distributive character, a pure class of existing and realized rights is necessarily not a collective good. Rather, it is something which is perfectly distributed and hence the opposite of a collective good.

The Special Relation of Identity

A way round might be found by focusing on rights of a special kind rather than any rights whatever – that is, on rights which substantively either establish or secure the collective good. Such rights are rights to the collective good as a whole. It is already questionable from a normative perspective whether individuals have an individual right to the establishment and security of all collective goods. But the conceptual problems are more serious. The attempt to present identity in such a way as to postulate individual rights whose subject matters are precisely these collective goods involves not only a trivialization of the problem but also a fallacious solution for it. As the subject matter of individual rights to collective goods, these collective goods remain preserved as just that – as collective goods. However, the relation between a right and its subject matter is not a relation of identity. Any attempt to discover something like a 'special relation of identity' must therefore founder. There can be no such thing.

The Relation of Abstraction

The third possibility consists of an abstraction. Here, it is not the class of existing, realized individual rights which is viewed as the collective good, but rather the fact that they do exist and are realized. In this way the collective good relates to the state of affairs in which individual rights exist and are satisfied. The state of affairs constituted by the existence and realization of individual rights can in fact be viewed as a collective good. To be sure, it is not the same as the class of existing and realized individual rights, for it has a different logical status. It is for this reason that there is no strict relation of identity between such a state of affairs and the individual rights, although the situation is one of substantive identity. However, it is precisely this substantive identity which gives rise to problems. Whoever views the state of affairs in which individual rights exist and are satisfied as a collective good only does so because this state of affairs includes further elements. Otherwise, there would be no advantage to talk of the state of affairs in which individual rights exist and are satisfied rather than of the class of existing and realized rights. Among the additional elements to be included are reciprocal knowledge about the existence and realization of individual rights, the resulting trust, and (probably related to this) increased tranquillity and readiness to cooperate. These further elements are indeed collective goods which are certainly interconnected with individual rights but are in no way identical with them. A distinction must therefore be made between two states of affairs in which individual rights exist and are satisfied: one which does not include such further elements and one which does. Both are collective goods. The first is substantively identical with individual rights but is uninteresting as a collective good precisely for this reason; the second is interesting as a collective good but is not substantively identical with individual rights.

In this way, it is possible to have an identity thesis which says that the state of affairs in which individual rights exist and are satisfied is a collective good; to this extent, there is substantive identity. However, it must be pointed out that a substantive identity which goes beyond this special (and moreover normatively uninteresting) case must be rejected for conceptual reasons and in addition does not admit of normative justification.

Relation of Independence

There is not a lot to add to the discussion concerning the relation of independence. If we understand independence in the sense that there are conceptual grounds which in every case exclude each of the three relations examined above, such independence does not exist.

Referring to the first means/end relation, the thesis of independence cannot hold true analytically because it is conceptually possible to conceive of individual rights and collective goods in such a way that all individual rights are exclusively means for collective goods. Yet normative reasons do not establish its truth either. It is indeed the case, as will be shown shortly, that a normative theory – according to which all individual rights are exclusively means to collective goods – cannot be justified. Nevertheless it is quite plausible that some individual rights might among other things be possible candidates for means to collective goods.

It is even easier to argue against the independence thesis in its strong version in respect of the second means/end relation. There can be no doubt that some collective goods can be means to individual rights – if only in a potential sense. If one accepts problematic normative theories, one might even say that all collective goods are exclusively means to individual rights.

Finally, so far as concerns the relation of identity, it must be observed that the strong version of the independence thesis is untenable insofar as there is one collective good for which a substantive identity exists – namely the pure state of affairs in which individual rights exist and are satisfied.

Thus in its strong form, the independence thesis is revealed as easily refutable and hence quite uninteresting. Much more interesting are its weaker versions. These state that, despite various partial possibilities of reduction, there can be no possibility of a complete reduction of individual rights to collective goods or collective goods to individual rights in any of the three relations. With reference to the third relation, the possibility of reduction must be immediately rejected for conceptual reasons. With reference to the first and second, this depends on normative reasons, as the following brief consideration indicates.

NORMATIVE RELATIONS BETWEEN INDIVIDUAL RIGHTS AND COLLECTIVE GOODS

Two problems present themselves with regard to the normative relations of individual rights and collective goods: the problem of reduction and the problem of weighing. The former arises from the fact that (as was shown in the previous section) given corresponding normative theses, then individual rights can be reduced to collective goods and collective goods to individual rights by way of a means/end relation. The problem of weighing presents itself when such reductions are unacceptable, so that a genuine conflict arises between individual rights and collective goods which can be resolved by a process of weighing and balancing. Both problems lead to far-reaching questions of practical philosophy whose solution can only be outlined here.

The Problem of Reduction

With the help of a means/end relation, it is conceptually possible to present a complete reduction of individual rights to collective goods and of collective goods to individual rights. The normative possibility of the former will be examined first.

The Non-Reducibility of Individual Rights

As stated above, individual rights are not reducible to collective goods through the means/end relation where grounds for them persist which give expression to the idea that the individual is to be taken seriously as an individual. The discussion of these reasons is as old as those about human rights, involving many different strategies for justification and much rhetoric. There are six distinguishable strategies which can be combined in numerous ways: (i) theology, (ii) natural law, (iii) intuitionism, (iv) decisionism, (v) conventionalism, and (vi) rationalism. To present and discuss these justificatory strategies would involve a comprehensive legal and moral philosophy. Here only a cursory look will be taken at one variant of what is perhaps the most promising strategy: the rationalistic one. The discovery of convincing variants of the other strategies would obviously provide welcome additional support.

The rationalistic variant of justification put forward here is a transcendental–pragmatic one,[27] which substantially takes a Kantian line. It uses the method of presupposition-analysis.[28] The argument proceeds in two steps or stages. In the first stage, it is shown that anyone participating in discourse must make general and necessary presuppositions which include taking the addressee seriously as a discourse partner and hence as an individual. To give an example: an explicit violation of such presuppositions would occur if someone said: ‘A more intelligent person would easily recognize my argument as incorrect, but you have to let yourself be convinced by it’. Even on a superficial analysis three points can be made immediately about this utterance: (i) that it is somehow faulty; (ii) that its faultiness is due to its violation of necessary presuppositions of argumentation; such as that it is only possible to speak of an attempt at *convincing*, as distinct from *persuading*, where arguments are deployed which those who deploy them believe to be capable of convincing everyone,[29] and (iii) that the faultiness involves a failure to treat the other person in the argument seriously as an individual.

Clearly, what has been said so far only holds at the level of discourse. At this level even those who argue against the view that everyone must be acknowledged as possessing individually justified individual rights must take the addressees of their argument seriously. For to the extent that they are arguing, they must necessarily accept appropriate presuppositions of argumentation. However, the fact that individuals are taken seriously as discourse partners does not necessitate that they be taken seriously in everyday existence outside the realm of discourse.[30] To demonstrate this, a second justificatory step is required.

This second justificatory step begins with the observation that whoever can participate in the justification of norms on an equal footing is to that extent qualified as an autonomous individual. As such were she to agree to an arrangement of the normative order of social life which did not take her seriously as an individual, she would be acting both against her own potentialities and against those interests conferred by the qualification of autonomy. It is for this reason that such an order does not constitute a possible topic for consensus

achieved through discourse. It is discursively impossible.[31] This does not establish which individual rights require individual justification. However, it is inconceivable for an acceptable normative order not to contain any individual rights subject to individual justification. This is sufficient to refute the idea that individual rights are reducible to collective goods.

The Non-Reducibility of Collective Goods

It has become clear that there are two ways in which collective goods might be reduced to individual rights.[32] The first applies when, in order to support the thesis that collective goods are nothing more than means to the realization of individual rights, it is claimed that for every collective good there are corresponding individual rights which may be adduced as their sole ends. The second way applies when it is argued that everything which is commonly designated a 'collective good' (but which cannot be reduced to individual rights in the above manner) is normatively insignificant and thus not a good nor a collective good. Both theses lead to the conclusion that collective goods have no independent normative strength in moral and legal argumentation. It will be claimed here that both are mistaken.

That a society is organized in such a way that life in it is pleasant and varied can be considered a collective good. Also, where more fundamental matters have been secured, it can further be claimed that the State has a duty to establish and maintain this collective good. It is questionable, however, whether individual rights exist to which this good is exclusively a means. As explained above, the existence of an individual right is a substantive reason for its enforceability. However, because of its non-distributive character, enforcement could not be limited just to some parts of the collective good. If it would be reduced to individual rights, it would have to be constituted in such a way that every individual could enforce the collective good applicable to all. There might occasionally be good grounds to endow the individual with rights in such a way that he would be able to enforce collective goods either for himself or as an advocate of the community. However, this situation cannot be generalized. As a rule, more persuasive grounds exist in favour of establishing only collective modes of enforcement of collective goods, as we see in the political process of a democratic system.

The fact that there are no corresponding individual rights does not mean that the collective good does not exist. This can be recognized in the fact that once fundamental matters have been secured, the State can be held bound to foster the establishment of pleasant and varied living conditions and of beautiful and beneficial things. This seems to demonstrate a basic justification of the hypothesis that there are collective goods which are non-reducible. To state further which specific collective goods are to be accepted is a task for a normative theory of State and society, in particular for a theory of the duties of the State.

The Problem of Establishing Relative Weights

Accepting the arguments so far, it follows that in every normative system amenable to justification, there exist both individual rights and collective goods with their own inde-

pendent strengths. Experience shows that clashes between the two are a daily occurrence. The question of how to resolve such clashes leads to the problem of establishing their relative weights.

The Conflict between Individual Rights and Collective Goods

It is only possible to speak of conflicts between individual rights and collective goods where, and to the extent that, they have the character of principles – that is, of optimization precepts. Where and to the extent that they have the character of rules, it is only possible to have a conflict of rules, which is something quite different from a clash of principles.[33] An example from adjudication was the decision of the German Federal Constitutional Court on the admissibility of holding a trial on an accused who was in danger of suffering a stroke and a heart attack through the stress of such proceedings.[34] The Court recognized a conflict between the collective good of a well-functioning criminal justice system and the individual right to life and bodily integrity which it resolved by a process of weighing and balancing in this concrete case. In other words, it treated both the individual right and the collective good as principles.[35] To have treated the case as involving a conflict of rules, a resolution would have had to declare either the individual right or the collective good to be invalid and thus outside the legal order. Alternatively, it would have had to declare one or the other subject to an exception such that, in all future cases, the rule could be deemed either satisfied or not satisfied. The Court chose a different way. It established a qualified relation of priority with reference to the case in which it indicated conditions under which one principle had priority over the other. That this does not lead to mere *ad hoc* casuistry can be recognized in the fact that the conditions under which one principle has priority over the other form the operative facts of an admittedly relatively concrete rule; this expresses the legal application of the prioritized principle.[36]

The Process of Weighing and Balancing Individual Rights and Collective Goods

The qualified relation of priority (which resolved the above conflict) expresses a case–by–case determination of the relative weights of the principles concerned and is, to this extent, the result of a process of weighing and balancing. This process has repeatedly been objected to on the grounds of irrationality.[37] However, such an objection does not strike at the procedure of weighing and balancing any more effectively than at general practical and legal argumentation as such. The reason why the process of weighing and balancing is relatively immune to the objection of irrationality is that rules for rational weighing emerge from the structure of principles.

As optimization precepts, principles demand as wide a realization as possible relative to legal and factual possibilities. Three conclusions which follow from this can be illustrated by reference to a clash between the individual right of freedom of speech and the collective good of the external security of the State. Two of these concern the realization with respect to factual possibilities contained in the definition of the optimization precept. The first states that where an activity is not suited to furthering the realization of one principle (say external security) but does limit the realization of another principle (the right to freedom of speech), then it is forbidden with reference to both principles. The second states that where

two alternative activities exist which are equally apt to promote the realization of one principle (external security) while one of them imposes greater limitations on the other principle (the right to freedom of speech), then the latter is forbidden with reference to both principles. In both these cases the realm of factual possibilities contains alternative ways of acting which more fully satisfy the normative requirements of the principles under consideration. The two rules described above express the idea of a Pareto optimum. They correspond to the first two of three sub–rules of the rule of proportionality in German constitutional law: these are the rules of aptness and of necessity.[38]

Having regard to the legal possibilities, the third sub–rule follows from the nature of principles. It is the rule of proportionality in its narrowest and most specific sense. This comes into play where – in contrast to the two rules which refer to actual possibilities – the satisfaction of one principle is not possible without the non-satisfaction of, or encroachment on, the other. The following rule can be formulated as a precept for weighing and balancing in such cases: the greater the degree of non-satisfaction of, or encroachment on, the one principle, the greater must be the importance of the satisfaction of the other.[39] This precept of weighing and balancing expresses ideas that can be presented with the help of indifference curves.[40] It relates to weighing and balancing in the stricter and proper sense. This deals with the weight of principles where one can only be realized at the cost of another.

The precept of weighing and balancing can be countered with the observation that it does not offer a definitive procedure for decision–making; nevertheless it is not without value. It structures the process of weighing and balancing in necessitating the formulation and justification of statements about degrees of non-satisfaction and encroachment, as well as statements about degrees of importance in which every possible aspect of legal argumentation comes into play. Argumentation is thereby directed into paths which otherwise would not exist. To be sure, it must be remembered that such structuring is substantively neutral and, in this sense, formal in character. This changes nothing with respect to its indispensability and does not detract from its worth. However, it does mean that the quest for a substantive determination of the relationship between individual rights and collective goods thereby remains unsatisfied. It will now be shown that this quest need not remain entirely unfulfilled.

The Prima Facie *Priority of Individual Rights*

It will be claimed that, for normative reasons, a general substantive determination of the relationship between individual rights and collective goods is required, giving *prima facie* priority to individual rights. The main argument consists of an expansion of the transcendental–pragmatic justification given above – of the necessity for a normative ordering of social life which takes the individual seriously as an individual. The concept of 'taking seriously' does not include the view that the positions of individuals cannot ever be set aside or limited in favour of collective goods. However, it does include the view that there must be sufficient justification for such action. In this way the concept of 'taking seriously' can be explained in terms of a theory of justification. There is no sufficient justification for setting aside or limiting rights where, in the case of conflict, it remains doubtful whether the individual right or the collective good has better grounds or, alternatively, where each has equally sound reasons. The postulate of taking the individual seriously explained

through the requirement of sufficient justification, demands that priority be given to individual rights in both these cases. Priority in cases of doubt and priority in situations of certainty about the existence of equally sound reasons can be combined under the concept of *prima facie* priority. There thus exists a general *prima facie* priority in favour of individual rights. This *prima facie* priority effects a burden of argumentation in favour of individual rights and to the detriment of collective goods.

To counter a *prima facie* priority of individual rights which (in relation to what concerns rights to liberty) can be comprehended in the formula *in dubio pro libertate*, it has been maintained that such a priority leads to a normative order which is unjustifiably individualistic. There is thus talk of anarchic individualism and of excessive economic liberalism resulting from such a principle.[41] At the root of such an objection lies either an over–estimation of the substantive significance of *prima facie* priority, a failure to recognize its direction or a collectivist political theory which cannot be justified. The substantive significance of the *prima facie* priority is over–estimated where it is confused with a definitive priority or is perhaps interpreted as a regular priority. *Prima facie* priority does not exclude the setting aside of individual rights in favour of collective goods. It merely demands that there be stronger grounds in favour of the resolution required by collective goods than exist for that required by individual rights. In this way, the normative system does indeed uphold an individualistic tendency. However, this is so weak that it would not satisfy an advocate of a strictly individualistic political theory, which further illustrates the untenability of the objection on grounds of individualism. The direction of *prima facie* priority is misconstrued when it is interpreted not as a priority of all members of the class of individual rights in respect of collective goods, but rather as a priority pertaining only to a sub–class of these rights, perhaps only a priority of rights to liberty, for example. *Prima facie* priorities within the class of individual rights constitute a new problem not for discussion here. Finally, it can be said that a collectivist political theory not amenable to justification underlies the objection on grounds of individualism where there is no acceptance even of the weak individualistic tendency brought about by the *prima facie* priority. In the absence of such acceptance, it cannot be asserted that the individual is taken seriously as an individual.

NOTES

*The author's warm thanks are due to Dr Ruth Adler, who translated the original, and to Professor Neil MacCormick for advice on the final English version.

1 Compare R. Alexy (1985), *Theorie der Grundrechte*, Baden-Baden; reprint Frankfurt-on-Main, 1986, 164 ff.
2 R. v. Jhering (1906), *Geist des römischen Rechts auf den verschiedenen Stufen seiner Entwicklung*, Part 3, 5th edition, Leipzig, 339.
3 B. Windscheid (1906), *Lehrbuch des Pandektenrechts*, 9th edition, rev. Th. Kipp, Vol. I, Frankfurt-on-Main, 156.
4 J. Bentham (1970), *Of Laws in General*, edited by H.L.A. Hart, London, 57 f., 82 ff., 98, 119, 173 ff.
5 E.R. Bierling (1883), *Zur Kritik der juristischen Grundbegriffe*, Part 2, Gotha, 49 ff.
6 Compare this and what follows with R. Alexy, *Theorie der Grundrechte*, 171 ff.
7 For a similar conception which, however, in contrast to the requirements of the three-stage model also includes the justificatory reason, compare A. Gewirth (1986), 'Why Rights are Indispensable', *Mind*, **95**, 328.

8 If one considers further that the basic deontic modalities (command, prohibition, permission) can be reduced to one another by means of negation, Ross' reduction thesis is proved. See A. Ross (1968), *Directives and Norms*, London, 117 ff. This states that one basic modality is sufficient in the realm of ought. Three operations are needed to achieve the reduction: negation, relationalization, and potentialization.
9 Compare R. Alexy, *Theorie der Grundrechte*, 126 f.
10 H. Kelsen (1979), *Allgemeine Theorie der Normen*, Vienna, 269; also his *Reine Rechtslehre* (1960), 2nd edition, Vienna, 139 ff.
11 Compare N. MacCormick (1977), 'Rights in Legislation' in P.M.S. Hacker and J. Raz (eds), *Law, Morality, and Society*, Essays in Honour of H.L.A. Hart, Oxford, 203 f., 207 f.
12 Further discussion in R. Alexy (1985), 'Rechtsregeln und Rechtsprinzipien', *Archives for Philosophy of Law and Social Philosophy*, suppl. 25, 13 ff., and in his *Theorie der Grundrechte*, 71 ff.
13 J. Esser (1974), *Grundsatz und Norm in der richterlichen Fortbildung des Privatrechts*, 3rd edition, Tübingen, 95 ff.
14 R. Dworkin (1978), *Taking Rights Seriously*, 2nd edition, London, 22 ff.
15 R. Dworkin (1985), *A Matter of Principle*, Cambridge, Mass. and London, 359.
16 Compare here among others M. Peston (1972), *Public Goods and the Public Sector*, London and Basingstoke, 13 ff. For a definition of the collective good in legal and moral philosophy which is related to the principle of exclusivity, see J. Raz (1984), 'Right-Based Moralities' in J. Waldron (ed.), *Theories of Rights*, Oxford, 187.
17 On this tripartite division of practical concepts, see G.H. v. Wright (1963), *The Logic of Preference*, Edinburgh, 7.
18 On this compare B. Schlink (1976), *Abwägung im Verfassungsrecht*, Berlin, 131 ff.
19 Compare R. Alexy, *Theorie der Grundrechte*, 139 ff.
20 K. J. Arrow (1963), *Social Choice and Individual Values*, 2nd edition, New York, London, and Sydney; R.D. Luce and H. Raiffa (1957), *Games and Decisions*, New York, London, and Sydney, 327 ff.
21 On this compare R. Alexy (1989), *A Theory of Legal Argumentation*, Oxford, 47 ff., 111ff.; also R. Alexy (1988), 'Problems of Discourse Theory', *Crítica*, **20**, 43 ff.
22 Compare R. Alexy, *Theorie der Grundrechte*, 42 ff., 63 ff.
23 See early section entitled 'Reasons for Rights'.
24 There is a need to differentiate between particular cases. With respect to ownership, for example, private ownership as a legal institution must be distinguished from particular individual positions of ownership. As a legal institution, ownership is constituted by a system of rules which regulates its acquisition, possession, and loss. Were this system of rules no longer considered necessary to secure economic effectiveness or even to become an impediment to it, then an exclusive justification of ownership with reference to economic effectiveness would leave no reason to preserve the system of rules in question. There is a problem of transition for the positions of ownership created under that system. Matters stand differently where, although it is recognized that the legal institution of private ownership is an appropriate and necessary means to securing economic effectiveness, it is nevertheless established that this does not hold true for specific individual positions of ownership. From a moral perspective this leads to the problems of act and rule utilitarianism (compare J. Rawls (1967), 'Two Concepts of Rules' in Ph. Foot (ed.), *Theories of Ethics*, Oxford, 144 ff.). It would be quite natural within the context of a legal system by legislator or judge to reorganize the legal institution of ownership – that is, the system of rules which defines ownership – in such a way that protection would only be afforded to those positions of ownership which promoted economic effectiveness. On this model, a position which did not fulfil or no longer fulfilled the criterion of effectiveness would only be protected by the existence of the legal institution until the time of any legislative or judicial reorganization. All in all it can be said that where ownership is exclusively a means to a collective good, the existence of particular positions of ownership depends either directly or indirectly on the existence of the means/end relation. Where it does not exist, moral rights have, at most, strength grounded in rule utilitarianism, while legal rights have, at most, strength grounded in the inertia of the legal system.

25 On this compare J.L. Mackie (1984), 'Can There be a Right-Based Moral Theory?' in J. Waldron (ed.), *Theories of Rights*, Oxford, 170.
26 This opens up the possibility of distinguishing two concepts of the collective good – a simple one and a fully elaborated one. Starting from the simple concept, it can be said that both governments pursue the same collective good. According to the more fully elaborated concept, what constitutes a collective good is basically determined by the role played by the good in question in the actual system of goods, norms, and rights. According to this concept, the two governments are pursuing different goods.
27 On this compare J. Habermas (1983), 'Diskursethik – Notizen zu einem Begründungsprogramm', in his *Moralbewußtsein und kommunikatives Handeln*, Frankfurt-on-Main, 53 ff.; also R. Alexy, *A Theory of Legal Argumentation*, 124 ff., 185 ff.
28 Compare A.J. Watt (1975), 'Transcendental Arguments and Moral Principles', *Philosophical Quarterly*, **25**, 40 f.
29 On the distinction between conviction and persuasion underlying this argument, compare I. Kant (1904), *Kritik der reinen Vernunft*, ed. Königlich Preußische Akademie der Wissenschaften, Kants gesammelte Schriften, Vol. III, Berlin, 531 (A820, B848).
30 On the view that the direct inference from rules of discourse to rules of action is wrong, compare J. Habermas, 'Diskursethik – Notizen zu einem Begründungsprogramm', 96.
31 On this concept, compare R. Alexy (1981), 'Die Idee einer prozeduralen Theorie der juristischen Argumentation', *Rechtstheorie*, suppl. 2, 182 ff.
32 See section above entitled 'Collective Goods as Means to Individual Rights'.
33 Compare R. Alexy, *Theorie der Grundrechte*, 77 ff.
34 *BVerfGE* (Decisions of the Federal Constitutional Court), **51**, 324.
35 See sections 'Theory of Principles' and 'The Normative Status of Collective Goods' above.
36 Further discussion in R. Alexy, *Theorie der Grundrechte*, 81 ff.
37 Compare, among others, E. Forsthoff (1968), 'Zur heutigen Situation einer Verfassungslehre' in H. Barion, E.-W. Böckenförde, E. Forsthoff, and W. Weber (eds), *Epirrhosis*, Festgabe for Carl Schmitt, Berlin, 190 ff.
38 On this and on what follows, see R. Alexy, *Theorie der Grundrechte*, 100 ff.
39 For the application of this rule in adjudication, see BVerfGE, **7**, 377 (404 f.); **17**, 306 (314); **20**, 150 (159); **35**, 202 (226); **41**, 251 (264); **72**, 26 (30).
40 Compare R. Alexy, *Theorie der Grundrechte*, 146 ff.
41 Compare A. Keller (1960), *Die Kritik, Korrektur und Interpretation des Gesetzeswortlauts*, Winterthur, 279; see also H. Ehmke (1963), 'Prinzipien der Verfassungsinterpretation', *VVDStRL*, **20**, 87.

Part III
The Place of Rights in Moral Theory

[9]

JOEL FEINBERG

The Nature and Value of Rights

1

I WOULD LIKE to begin by conducting a thought experiment. Try to imagine Nowheresville—a world very much like our own except that no one, or hardly any one (the qualification is not important), has *rights*. If this flaw makes Nowheresville too ugly to hold very long in contemplation, we can make it as pretty as we wish in other moral respects. We can, for example, make the human beings in it as attractive and virtuous as possible without taxing our conceptions of the limits of human nature. In particular, let the virtues of moral sensibility flourish. Fill this imagined world with as much benevolence, compassion, sympathy, and pity as it will conveniently hold without strain. Now we can imagine men helping one another from compassionate motives merely, quite as much or even more than they do in our actual world from a variety of more complicated motives.

This picture, pleasant as it is in some respects, would hardly have satisfied Immanuel Kant. Benevolently motivated actions do good, Kant admitted, and therefore are better, *ceteris paribus*, than malevolently motivated actions; but no action can have supreme kind of worth—what Kant called "moral worth"—unless its whole motivating power derives from the thought that it is *required by duty*. Accordingly, let us try to make Nowheresville more appealing to Kant by introducing the idea of duty into it, and letting the sense of duty be a sufficient motive for many beneficent and honorable actions. But doesn't this bring our original thought experiment to an abortive conclusion? If duties are permitted entry into Nowheresville, are not rights necessarily smuggled in along with them?

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The question is well-asked, and requires here a brief digression so that we might consider the so-called "doctrine of the logical correlativity of rights and duties." This is the doctrine that (i) all duties entail other people's rights and (ii) all rights entail other people's duties. Only the first part of the doctrine, the alleged entailment from duties to rights, need concern us here. Is this part of the doctrine correct? It should not be surprising that my answer is: "In a sense yes and in a sense no." Etymologically, the word "duty" is associated with actions that are *due* someone else, the payments of debts *to* creditors, the keeping of agreements with promisees, the payment of club dues, or legal fees, or tariff levies to appropriate authorities or their representatives. In this original sense of "duty," all duties are correlated with the rights of those *to* whom the duty is owed. On the other hand, there seem to be numerous classes of duties, both of a legal and non-legal kind, that are *not* logically correlated with the rights of other persons. This seems to be a consequence of the fact that the word "duty" has come to be used for *any* action understood to be *required*, whether by the rights of others, or by law, or by higher authority, or by conscience, or whatever. When the notion of requirement is in clear focus it is likely to seem the only element in the idea of duty that is essential, and the other component notion — that a duty is something *due* someone else — drops off. Thus, in this widespread but derivative usage, "duty" tends to be used for any action we feel we *must* (for whatever reason) do. It comes, in short, to be a term of moral modality merely; and it is no wonder that the first thesis of the logical correlativity doctrine often fails.

Let us then introduce duties into Nowheresville, but only in the sense of actions that are, or are believed to be, morally mandatory, but not in the older sense of actions that are due others and can be claimed by others as their right. Nowheresville now can have duties of the sort imposed by positive law. A legal duty is not something we are implored or advised to do merely; it is something the law, or an authority under the law, *requires* us to do whether we want to or not, under pain of penalty. When traffic lights turn red, however, there is no determinate person who can plausibly be said to claim our stopping as his due, so that the motorist owes it to *him* to stop, in the way a debtor owes it to his creditor to pay. In our own actual world, of course, we sometimes owe it to our *fellow motorists* to stop; but that kind of right-correlated duty does not exist in Nowheresville. There, motorists "owe" obedience to the Law, but they owe nothing to one another. When they collide, no matter who is at fault, no one is morally accountable to anyone else, and no one has any sound grievance or "right to complain."

When we leave legal contexts to consider moral obligations and other extra-legal duties, a greater variety of duties-without-correlative-rights

present themselves. Duties of charity, for example, require us to contribute to one or another of a large number of eligible recipients, no one of whom can claim our contribution from us as his due. Charitable contributions are more like gratuitous services, favors, and gifts than like repayments of debts or reparations; and yet we do have duties to be charitable. Many persons, moreover, in our actual world believe that they are required by their own consciences to do more than that "duty" that *can* be demanded of them by their prospective beneficiaries. I have quoted elsewhere the citation from H. B. Acton of a character in a Malraux novel who "gave all his supply of poison to his fellow prisoners to enable them by suicide to escape the burning alive which was to be their fate and his." This man, Acton adds, "probably did not think that [the others] had more of a right to the poison than he had, though he thought it his duty to give it to them."[1] I am sure that there are many actual examples, less dramatically heroic than this fictitious one, of persons who believe, rightly or wrongly, that they *must do* something (hence the word "duty") for another person in excess of what that person can appropriately demand of him (hence the absence of "right").

Now the digression is over and we can return to Nowheresville and summarize what we have put in it thus far. We now find spontaneous benevolence in somewhat larger degree than in our actual world, and also the acknowledged existence of duties of obedience, duties of charity, and duties imposed by exacting private consciences, and also, let us suppose, a degree of conscientiousness in respect to those duties somewhat in excess of what is to be found in our actual world. I doubt that Kant would be fully satisfied with Nowheresville even now that duty and respect for law and authority have been added to it; but I feel certain that he would regard their addition at least as an improvement. I will now introduce two further moral practices into Nowheresville that will make that world very little more appealing to Kant, but will make it appear more familiar to us. These are the practices connected with the notions of *personal desert* and what I call a *sovereign monopoly of rights*.

When a person is said to deserve something good from us what is meant in part is that there would be a certain propriety in our giving that good thing to him in virtue of the kind of person he is, perhaps, or more likely, in virtue of some specific thing he has done. The propriety involved here is a much weaker kind than that which derives from our having promised him the good thing or from his having qualified for it by satisfying the well-advertised conditions of some public rule. In the latter case he could be said not merely to deserve the good thing but

[1] H. B. Acton, "Symposium on 'Rights'," *Proceedings of the Aristotelian Society*, Supplementary Volume 24 (1950), pp. 107–8.

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also to have a *right* to it, that is to be in a position to demand it as his due; and of course we will not have that sort of thing in Nowheresville. That weaker kind of propriety which is mere desert is simply a kind of *fittingness* between one party's character or action and another party's favorable response, much like that between human and laughter, or good performance and applause.

The following seems to be the origin of the idea of deserving good or bad treatment from others: A master or lord was under no obligation to reward his servant for especially good service; still a master might naturally feel that there would be a special fittingness in giving a gratuitous reward as a grateful response to the good service (or conversely imposing a penalty for bad service). Such an act while surely fitting and proper was entirely supererogatory. The fitting response in turn from the rewarded servant should be gratitude. If the deserved reward had not been given him he should have had no complaint, since he only *deserved* the reward, as opposed to having a *right* to it, or a ground for claiming it as his due.

The idea of desert has evolved a good bit away from its beginnings by now, but nevertheless, it seems clearly to be one of those words J. L. Austin said "never entirely forget their pasts."[2] Today servants qualify for their wages by doing their agreed upon chores, no more and no less. If their wages are not forthcoming, their contractual rights have been violated and they can make legal claim to the money that is their due. If they do less than they agreed to do, however, their employers may "dock" them, by paying them proportionately less than the agreed upon fee. This is all a matter of right. But if the servant does a splendid job, above and beyond his minimal contractual duties, the employer is under no further obligation to reward him, for this was not agreed upon, even tacitly, in advance. The additional service was all the servant's idea and done entirely on his own. Nevertheless, the morally sensitive employer may feel that it would be exceptionally appropriate for him to respond, freely on *his* own, to the servant's meritorious service, with a reward. The employee cannot demand it as his due, but he will happily accept it, with gratitude, as a fitting response to his desert.

In our age of organized labor, even this picture is now archaic; for almost every kind of exchange of service is governed by hard bargained contracts so that even bonuses can sometimes be demanded as a matter of right, and nothing is given for nothing on either side of the bargaining table. And perhaps that is a good thing; for consider an anachronistic instance of the earlier kind of practice that survives, at least as a matter of form, in the quaint old practice of "tipping." The tip was

[2] J. L. Austin, "A Plea for Excuses," *Proceedings of the Aristotelian Society*, Vol. 57 (1956–57).

originally conceived as a reward that has to be earned by "zealous service." It is not something to be taken for granted as a standard response to *any* service. That is to say that its payment is a "*gratuity*," not a discharge of obligation, but something given apart from, or in addition to, anything the recipient can expect as a matter of right. That is what tipping originally meant at any rate, and tips are still referred to as "gratuities" in the tax forms. But try to explain all that to a New York cab driver! If he has *earned* his gratuity, by God, he has it coming, and there had better be sufficient acknowledgment of his desert or he'll give you a piece of his mind! I'm not generally prone to defend New York cab drivers, but they do have a point here. There is the making of a paradox in the queerly unstable concept of an "earned gratuity." One can understand how "desert" in the weak sense of "propriety" or "mere fittingness" tends to generate a stronger sense in which desert is itself the ground for a claim of right.

In Nowheresville, nevertheless, we will have only the original weak kind of desert. Indeed, it will be impossible to keep this idea out if we allow such practices as teachers grading students, judges awarding prizes, and servants serving benevolent but class-conscious masters. Nowheresville is a reasonably good world in many ways, and its teachers, judges, and masters will generally try to give students, contestants, and servants the grades, prizes, and rewards they deserve. For this the recipients will be grateful; but they will never think to complain, or even feel aggrieved, when expected responses to desert fail. The masters, judges, and teachers don't *have* to do good things, after all, for *anyone*. One should be happy that they *ever* treat us well, and not grumble over their occasional lapses. Their hoped for responses, after all, are *gratuities*, and there is no wrong in the omission of what is merely gratuitous. Such is the response of persons who have no concept of *rights*, even persons who are proud of their own deserts.[3]

Surely, one might ask, rights have to come in somewhere, if we are to have even moderately complex forms of social organization. Without rules that confer rights and impose obligations, how can we have ownership of property, bargains and deals, promises and contracts, appointments and loans, marriages and partnerships? Very well, let us introduce all of these social and economic practices into Nowheresville, but *with one big twist*. With them I should like to introduce the curious notion of a "sovereign right-monopoly." You will recall that the subjects in Hobbes's *Leviathan* had no rights whatever against their sovereign. He could do as he liked with them, even gratuitously harm them, but this gave them no valid grievance against him. The sovereign, to be

[3]For a fuller discussion of the concept of personal desert see my "Justice and Personal Desert," *Nomos VI, Justice*, ed. by C. J. Friedrich and J. Chapman (New York: Atherton Press, 1963), pp. 69–97.

sure, had a certain duty to treat his subjects well, but this duty was owed not to the subjects directly, but to God, just as we might have a duty to a person to treat his property well, but of course no duty to the property itself but only to its owner. Thus, while the sovereign was quite capable of *harming* his subjects, he could commit no wrong against them that they could complain about, since they had no prior claims against his conduct. The only party *wronged* by the sovereign's mistreatment of his subjects was God, the supreme lawmaker. Thus, in repenting cruelty to his subjects, the sovereign might say to God, as David did after killing Uriah, "to Thee only have I sinned."[4]

Even in the *Leviathan*, however, ordinary people had ordinary rights *against one another*. They played roles, occupied offices, made agreements, and signed contracts. In a genuine "sovereign right-monopoly," as I shall be using that phrase, they will do all those things too, and thus incur genuine obligations toward one another; but the obligations (here is the twist) will not be owed directly *to* promisees, creditors, parents, and the like, but rather to God alone, or to the members of some elite, or to a single sovereign under God. Hence, the rights correlative to the obligations that derive from these transactions are all owned by some "outside" authority.

As far as I know, no philosopher has ever suggested that even our role and contract obligations (in this, our actual world) are all owed directly to a divine intermediary; but some theologians have approached such extreme moral occasionalism. I have in mind the familiar phrase in certain widely distributed religious tracts that "it takes three to marry," which suggests that marital vows are not made between bride and groom directly but between each spouse and God, so that if one breaks his vow, the other cannot rightly complain of being wronged, since only God could have claimed performance of the marital duties as his *own* due; and hence God alone had a claim-right violated by nonperformance. If John breaks his vow to God, he might then properly repent in the words of David: "To Thee only have I sinned."

In our actual world, very few spouses conceive of their mutual obligations in this way; but their small children, at a certain stage in their moral upbringing, are likely to feel precisely this way toward *their* mutual obligations. If Billy kicks Bobby and is punished by Daddy, he may come to feel contrition for his naughtiness induced by his painful estrangement from the loved parent. He may then be happy to make amends and sincere apology *to Daddy*; but when Daddy insists that he apologize to his wronged brother, that is another story. A direct apology to Billy would be a tacit recognition of Billy's status as a right-

[4]II Sam. 11. Cited with approval by Thomas Hobbes in *The Leviathan*, Part II, Chap. 21.

holder against him, some one he can wrong as well as harm, and someone to whom he is directly accountable for his wrongs. This is a status Bobby will happily accord Daddy; but it would imply a respect for Billy that he does not presently feel, so he bitterly resents according it to him. On the "three-to-marry" model, the relations between each spouse and God would be like those between Bobby and Daddy; respect for the other spouse as an independent claimant would not even be necessary; and where present, of course, never sufficient.

The advocates of the "three to marry" model who conceive it either as a description of our actual institution of marriage or a recommendation of what marriage ought to be, may wish to escape this embarrassment by granting rights to spouses in capacities other than as promisees. They may wish to say, for example, that when John promises God that he will be faithful to Mary, a right is thus conferred not only on God as promisee but also on Mary herself as third-party beneficiary, just as when John contracts with an insurance company and names Mary as his intended beneficiary, she has a right to the accumulated funds after John's death, even though the insurance company made no promise to her. But this seems to be an unnecessarily cumbersome complication contributing nothing to our understanding of the marriage bond. The life insurance transaction is necessarily a three party relation, involving occupants of three distinct offices, no two of whom alone could do the whole job. The transaction, after all, is defined as the purchase by the customer (first office) from the vendor (second office) of protection for a beneficiary (third office) against the customer's untimely death. Marriage, on the other hand, in this our actual world, appears to be a binary relation between a husband and wife, and even though third parties such as children, neighbors, psychiatrists, and priests may sometimes be helpful and even causally necessary for the survival of the relation, they are not logically necessary to our *conception* of the relation, and indeed many married couples do quite well without them. Still, I am not now purporting to describe our actual world, but rather trying to contrast it with a counterpart world of the imagination. In *that* world, it takes three to make almost *any* moral relation and all rights are owned by God or some sovereign under God.

There will, of course, be delegated authorities in the imaginary world, empowered to give commands to their underlings and to punish them for their disobedience. But the commands are all given in the name of the right-monopoly who in turn are the only persons to whom obligations are owed. Hence, even intermediate superiors do not have claim-rights against their subordinates but only legal *powers* to create obligations in the subordinates *to* the monopolistic right-holders, and also the legal *privilege* to impose penalties in the name of that monopoly.

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So much for the imaginary "world without rights." If some of the moral concepts and practices I have allowed into that world do not sit well with one another, no matter. Imagine Nowheresville with all of these practices if you can, or with any harmonious subset of them, if you prefer. The important thing is not what I've let into it, but what I have kept out. The remainder of this paper will be devoted to an analysis of what precisely a world is missing when it does not contain rights and why that absence is morally important.

The most conspicuous difference, I think, between the Nowheresvillians and ourselves has something to do with the activity of *claiming*. Nowheresvillians, even when they are discriminated against invidiously, or left without the things they need, or otherwise badly treated, do not think to leap to their feet and make righteous demands against one another, though they may not hesitate to resort to force and trickery to get what they want. They have no notion of rights, so they do not have a notion of what is their due; hence they do not claim before they take. The conceptual linkage between personal rights and claiming has long been noticed by legal writers and is reflected in the standard usage in which "claim-rights" are distinguished from the mere liberties, immunities, and powers, also sometimes called "rights," with which they are easily confused. When a person has a legal claim-right to *X*, it must be the case (i) that he is at liberty in respect to *X*. i.e., that he has no duty to refrain from or relinquish *X*, and also (ii) that his liberty is the ground of other people's *duties* to grant him *X* or not to interfere with him in respect to *X*. Thus, in the sense of claim-rights, it is true by definition that rights logically entail other people's duties. The paradigmatic examples of such rights are the creditor's right to be paid a debt by his debtor, and the landowner's right not to be interfered with by anyone in the exclusive occupancy of his land. The creditor's right against his debtor, for example, and the debtor's duty to his creditor, are precisely the same relation seen from two different vantage points, as inextricably linked as the two sides of the same coin.

And yet, this is not quite an accurate account of the matter, for it fails to do justice to the way claim-rights are somehow prior to, or more basic than, the duties with which they are necessarily correlated. If Nip has a claim-right against Tuck, it is because of this fact that Tuck has a duty to Nip. It is only because something from Tuck is *due* Nip (directional element) that there is something Tuck *must do* (modal element). This is a relation, moreover, in which Tuck is bound and Nip is free. Nip not only *has* a right, but he can choose whether or not to exercise it, whether to claim it, whether to register complaints upon its infringement, even whether to release Tuck from his duty, and forget the whole thing. If the personal claim-right is also backed up by criminal sanctions, however, Tuck may yet have a duty of obedience to the law

from which no one, not even Nip, may release him. He would even have such duties if he lived in Nowheresville; but duties subject to acts of claiming, duties derivative from and contingent upon the personal rights of others, are unknown and undreamed of in Nowheresville.

Many philosophical writers have simply identified rights with claims. The dictionaries tend to define "claims," in turn, as "assertions of right," a dizzying piece of circularity that led one philosopher to complain — "We go in search of rights and are directed to claims, and then back again to rights in bureaucratic futility."[5] What then is the relation between a claim and a right?

As we shall see, a right *is* a kind of claim, and a claim is "an assertion of right," so that a formal definition of either notion in terms of the other will not get us very far. Thus if a "formal definition" of the usual philosophical sort is what we are after, the game is over before it has begun, and we can say that the concept of a right is a "simple, undefinable, unanalysable primitive." Here as elsewhere in philosophy this will have the effect of making the commonplace seem unnecessarily mysterious. We would be better advised, I think, not to attempt a formal definition of either "right" or "claim," but rather to use the idea of a claim in informal elucidation of the idea of a right. This is made possible by the fact that *claiming* is an elaborate sort of rule-governed *activity*. A claim is that which is claimed, the object of the act of claiming. There is, after all, a verb "to claim," but no verb "to right." If we concentrate on the whole activity of claiming, which is public, familiar, and open to our observation, rather than on its upshot alone, we may learn more about the generic nature of rights than we could ever hope to learn from a formal definition, even if one were possible. Moreover, certain facts about rights more easily, if not solely, expressible in the language of claims and claiming are essential to a full understanding not only of what rights are, but also why they are so vitally important.

Let us begin then by distinguishing between: (i) making claim to . . . , (ii) claiming that . . . , and (iii) having a claim. One sort of thing we may be doing when we claim is to *make claim to something*. This is "to petition or seek by virtue of supposed right; to demand as due." Sometimes this is done by an acknowledged right-holder when he serves notice that he now wants turned over to him that which has already been acknowledged to be his, something borrowed, say, or improperly taken from him. This is often done by turning in a chit, a receipt, an I.O.U., a check, an insurance policy, or a deed, that is, a *title* to something currently in the possession of someone else. On other occasions, making claim is making application for titles or rights themselves, as when a mining prospector stakes a claim to mineral rights, or

[5]H. B. Acton, *Op. cit.*

a householder to a tract of land in the public domain, or an inventor to his patent rights. In the one kind of case, to make claim is to exercize rights one already has by presenting title; in the other kind of case it is to apply for the title itself, by showing that one has satisfied the conditions specified by a rule for the ownership of title and therefore that one can demand it as one's due.

Generally speaking, only the person who has a title or who has qualified for it, or someone speaking in his name, can make claim to something as a matter of right. It is an important fact about rights (or claims), then, that they can be claimed only by those who have them. Anyone can claim, of course, *that* this umbrella is yours, but only you or your representative can actually claim the umbrella. If Smith owes Jones five dollars, only Jones can claim the five dollars as his own, though any bystander can *claim that* it belongs to Jones. One important difference then between *making legal claim to* and *claiming that* is that the former is a legal performance with direct legal consequences whereas the latter is often a mere piece of descriptive commentary with no legal force. Legally speaking, *making claim to* can itself make things happen. This sense of "claiming," then, might well be called "the performative sense." The legal power to claim (performatively) one's right or the things to which one has a right seems to be essential to the very notion of a right. A right to which one could not make claim (i.e. not even for recognition) would be a very "imperfect" right indeed!

Claiming that one has a right (what we can call "propositional claiming" as opposed to "performative claiming") is another sort of thing one can do with language, but it is not the sort of doing that characteristically has legal consequences. To claim that one has rights is to make an assertion that one has them, and to make it in such a manner as to demand or insist that they be recognized. In this sense of "claim" many things in addition to rights can be claimed, that is, many other kinds of proposition can be asserted in the claiming way. I can claim, for example, that you, he, or she has certain rights, or that Julius Caesar once had certain rights; or I can claim that certain statements are true, or that I have certain skills, or accomplishments, or virtually anything at all. I can claim that the earth is flat. What is essential to *claiming that* is the manner of assertion. One can assert without even caring very much whether any one is listening, but part of the point of propositional claiming is to *make sure* people listen. When I claim to others that I know something, for example, I am not merely asserting it, but rather "obtruding my putative knowledge upon their attention, demanding that it be recognized, that appropriate notice be taken of it by those

[6]G. J. Warnock, "Claims to Knowledge," *Proceedings of the Aristotelian Society*, Supplementary Volume 36 (1962), p. 21.

concerned . . . "[7] Not every truth is properly assertable, much less claimable, in every context. To claim that something is the case in circumstances that justify no more than calm assertion is to behave like a boor. (This kind of boorishness, I might add, is probably less common in Nowheresville.) But not to claim in the appropriate circumstances that one has a right is to be spiritless or foolish. A list of "appropriate circumstances" would include occasions when one is challenged, when one's possession is denied, or seems insufficiently acknowledged or appreciated; and of course even in these circumstances, the claiming should be done only with an appropriate degree of vehemence.

Even if there are conceivable circumstances in which one would admit rights diffidently, there is no doubt that their characteristic use and that for which they are distinctively well suited, is to be claimed, demanded, affirmed, insisted upon. They are especially sturdy objects to "stand upon," a most useful sort of moral furniture. Having rights, of course, makes claiming possible; but it is claiming that gives rights their special moral significance. This feature of rights is connected in a way with the customary rhetoric about what it is to be a human being. Having rights enables us to "stand up like men," to look others in the eye, and to feel in some fundamental way the equal of anyone. To think of oneself as the holder of rights is not to be unduly but properly proud, to have that minimal self-respect that is necessary to be worthy of the love and esteem of others. Indeed, respect for persons (this is an intriguing idea) may simply be respect for their rights, so that there cannot be the one without the other; and what is called "human dignity" may simply be the recognizable capacity to assert claims. To respect a person then, or to think of him as possessed of human dignity, simply *is* to think of him as a potential maker of claims. Not all of this can be packed into a definition of "rights;" but these are *facts* about the possession of rights that argue well their supreme moral importance. More than anything else I am going to say, these facts explain what is wrong with Nowheresville.

We come now to the third interesting employment of the claiming vocabulary,that involving not the verb "to claim" but the substantive "a claim." What is it to *have a claim* and how is this related to rights? I would like to suggest that *having a claim consists in being in a position to claim, that is, to make claim to* or *claim that*. If this suggestion is correct it shows the primacy of the verbal over the nominative forms. It links

[7]This is the important difference between rights and mere claims. It is analogous to the difference between *evidence* of guilt (subject to degrees of cogency) and conviction of guilt (which is all or nothing). One can "have evidence" that is not conclusive just as one can "have a claim" that is not valid. "Prima-facieness" is built into the sense of "claim," but the notion of a "prima-facie right" makes little sense. On the latter point see A. I. Melden, *Rights and Right Conduct* (Oxford: Basil Blackwell, 1959), pp. 18–20, and Herbert Morris, "Persons and Punishment," *The Monist*, Vol. 52 (1968), pp. 498–499.

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claims to a kind of activity and obviates the temptation to think of claims as *things*, on the model of coins, pencils, and other material possessions which we can carry in our hip pockets. To be sure, we often make or establish our claims by presenting titles, and these typically have the form of receipts, tickets, certificates, and other pieces of paper or parchment. The title, however, is not the same thing as the claim; rather it is the evidence that establishes the claim as valid. On this analysis, one might have a claim without ever claiming that to which one is entitled, or without even knowing that one has the claim; for one might simply be ignorant of the fact that one is in a position to claim; or one might be unwilling to exploit that position for one reason or another, including fear that the legal machinery is broken down or corrupt and will not enforce one's claim despite its validity.

Nearly all writers maintain that there is some intimate connection between having a claim and having a right. Some identify right and claim without qualification; some define "right" as justified or justifiable claim, others as recognized claim, still others as valid claim. My own preference is for the latter definition. Some writers, however, reject the identification of rights with valid claims on the ground that all claims as such are valid, so that the expression "valid claim" is redundant. These writers, therefore, would identify rights with claims *simpliciter*. But this is a very simple confusion. All claims, to be sure, are *put forward* as justified, whether they are justified in fact or not. A claim conceded even by its maker to have no validity is not a claim at all, but a mere demand. The highwayman, for example, *demands* his victim's money; but he hardly makes claim to it as rightfully his own.

But it does not follow from this sound point that it is redundant to qualify claims as justified (or as I prefer, valid) in the definition of a right; for it remains true that not all claims put forward as valid really are valid; and only the valid ones can be acknowledged as rights.

If having a valid claim is not redundant, i.e., if it is not redundant to pronounce *another's* claim valid, there must be such a thing as having a claim that is not valid. What would this be like? One might accumulate just enough evidence to argue with relevance and cogency that one has a right (or ought to be granted a right), although one's case might not be overwhelmingly conclusive. In such a case, one might have strong enough argument to be entitled to a hearing and given fair consideration. When one is in this position, it might be said that one "has a claim" that deserves to be weighed carefully. Nevertheless, the balance of reasons may turn out to militate against recognition of the claim, so that the claim, which one admittedly had, and perhaps still does, is not a valid claim or right. "Having a claim" in this sense is an expression very much like the legal phrase "having a *prima facie* case." A plaintiff establishes a *prima facie* case for the defendant's liability when he establishes grounds that will be sufficient for liability unless

outweighed by reasons of a different sort that may be offered by the defendant. Similarly, in the criminal law, a grand jury returns an indictment when it thinks that the prosecution has sufficient evidence to be taken seriously and given a fair hearing, whatever countervailing reasons may eventually be offered on the other side. That initial evidence, serious but not conclusive, is also sometimes called a *prima facie* case. In a parallel "*prima facie* sense" of "claim," having a claim to *X* is not (yet) the same as having a right to *X*, but is rather having a case of at least minimal plausibility that one has a right to *X*, a case that does establish a right, not to *X*, but to a fair hearing and consideration. Claims, so conceived, differ in degree: some are stronger than others. Rights, on the other hand, do not differ in degree: no one right is more of a right than another.[8]

Another reason for not identifying rights with claims *simply* is that there is a well-established usage in international law that makes a theoretically interesting distinction between claims and rights. Statesmen are sometimes led to speak of "claims" when they are concerned with the natural needs of deprived human beings in conditions of scarcity. Young orphans *need* good upbringings, balanced diets, education, and technical training everywhere in the world; but unfortunately there are many places where these goods are in such short supply that it is impossible to provision all who need them. If we persist, nevertheless, in speaking of these needs as constituting rights and not merely claims, we are committed to the conception of a right which is an entitlement *to* some good, but not a valid claim *against* any particular individual; for in conditions of scarcity there may be no determinate individuals who can plausibly be said to have a duty to provide the missing goods to those in need. J. E. S. Fawcett therefore prefers to keep the distinction between claims and rights firmly in mind. "Claims," he writes, "are needs and demands in movement, and there is a continuous transformation, as a society advances [toward greater abundance] of economic and social claims into civil and political rights . . . and not all countries or all claims are by any means at the same stage in the process."[8] The manifesto writers on the other side who seem to identify needs, or at least basic needs, with what they call "human rights," are more properly described, I think, as urging upon the world community the moral principle that *all* basic human needs ought to be recognized as *claims* (in the customary *prima facie* sense) worthy of sympathy and serious consideration right now, even though, in many cases, they cannot yet plausibly be treated as *valid* claims, that is, as grounds of any other people's duties. This way of talking avoids

[8]J. E. S. Fawcett, "The International Protection of Human Rights," in *Political Theory and the Rights of Man*, ed. by D. D. Raphael (Bloomington: Indiana University Press, 1967), pp. 125 and 128.

the anomaly of ascribing to all human beings now, even those in pre-industrial societies, such "economic and social rights" as "periodic holidays with pay."[9]

Still, for all of that, I have a certain sympathy with the manifesto writers, and I am even willing to speak of a special "manifesto sense" of "right," in which a right need not be correlated with another's duty. Natural needs are real claims if only upon hypothetical future beings not yet in existence. I accept the moral principle that to have an unfulfilled need is to have a kind of claim against the world, even if against no one in particular. A natural need for some good as such, like a natural desert, is always a reason in support of a claim to that good. A person in need, then, is always "in a position" to make a claim, even when there is no one in the corresponding position to do anything about it. Such claims, based on need alone, are "permanent possibilities of rights," the natural seed from which rights grow. When manifesto writers speak of them as if already actual rights, they are easily forgiven, for this is but a powerful way of expressing the conviction that they ought to be recognized by states here and now as potential rights and consequently as determinants of *present* aspirations and guides to *present* policies. That usage, I think, is a valid exercise of rhetorical licence.

I prefer to characterize rights as valid claims rather than justified ones, because I suspect that justification is rather too broad a qualification. "Validity," as I understand it, is justification of a peculiar and narrow kind, namely justification within a system of rules. A man has a legal right when the official recognition of his claim (as valid) is called for by the governing rules. This definition, of course, hardly applies to moral rights, but that is not because the genus of which moral rights are a species is something other than *claims*. A man has a moral right when he has a claim the recognition of which is called for — not (necessarily) by legal rules — but by moral principles, or the principles of an enlightened conscience.

There is one final kind of attack on the generic identification of rights with claims, and it has been launched with great spirit in a recent article by H. J. McCloskey, who holds that rights are not essentially claims at all, but rather entitlements. The springboard of his argument is his insistence that rights in their essential character are always *rights to*, not *rights against*:

> My right to life is not a right against anyone. It is my right and by virtue of it, it is normally permissible for me to sustain my life in the face of obstacles. It does give rise to rights against others *in the sense* that others have or may come to have duties to refrain from killing me,

[9]As declared in Article 24 of *The Universal Declaration of Human Rights* adopted on December 10, 1948, by the General Assembly of the United Nations.

> but it is essentially a right of mine, not an infinite list of claims, hypothetical and actual, against an infinite number of actual, potential, and as yet nonexistent human beings . . . Similarly, the right of the tennis club member to play on the club courts is a right to play, not a right against some vague group of potential or possible obstructors.[10]

The argument seems to be that since rights are essentially rights *to*, whereas claims are essentially claims *against*, rights cannot be claims, though they can be grounds for claims. The argument is doubly defective though. First of all, contrary to McCloskey, rights (at least legal claim-rights) *are* held *against* others. McCloskey admits this in the case of *in personam* rights (what he calls "special rights") but denies it in the case of *in rem* rights (which he calls "general rights"):

> Special rights are sometimes against specific individuals or institutions —e.g. rights created by promises, contracts, etc. . . . but these differ from . . . characteristic . . . general rights where the right is simply a right to . . . [11]

As far as I can tell, the only reason McCloskey gives for denying that *in rem* rights are against others is that those against whom they would have to hold make up an enormously multitudinous and "vague" group, including hypothetical people not yet even in existence. Many others have found this a paradoxical consequence of the notion of *in rem* rights, but I see nothing troublesome in it. If a general rule gives me a right of noninterference in a certain respect against everybody, then there are literally hundreds of millions of people who have a duty toward me in that respect; and if the same general rule gives the same right to everyone else, then it imposes on me literally hundreds of millions of duties—or duties towards hundreds of millions of people. I see nothing paradoxical about this, however. The duties, after all, are negative; and I can discharge all of them at a stroke simply by minding my own business. And if all human beings make up one moral community and there are hundreds of millions of human beings, we should expect there to be hundreds of millions of moral relations holding between them.

McCloskey's other premise is even more obviously defective. There is no good reason to think that all *claims* are "essentially" *against*, rather than *to*. Indeed most of the discussion of claims above has been of claims *to*, and as we have seen, the law finds it useful to recognize claims *to* (or "mere claims") that are not yet qualified to be claims *against*, or rights (except in a "manifesto sense" of "rights").

Whether we are speaking of claims or rights, however, we must notice that they seem to have two dimensions, as indicated by the

[10] H. J. McCloskey, "Rights," *Philosophical Quarterly*, Vol. 15 (1965), p. 118.
[11] *Loc. cit.*

prepositions "to" and "against," and it is quite natural to wonder whether either of these dimensions is somehow more fundamental or essential than the other. All rights seem to merge *entitlements to* do, have, omit, or be something with *claims against* others to act or refrain from acting in certain ways. In some statements of rights the entitlement is perfectly determinate (e.g., *to* play tennis) and the claim vague (e.g., *against* "some vague group of potential or possible obstructors"); but in other cases the object of the claim is clear and determinate (e.g., *against* one's parents), and the entitlement general and indeterminate (e.g., to be given a proper upbringing). If we mean by "entitlement" that *to* which one has a right and by "claim" something directed at those *against* whom the right holds (as McCloskey apparently does), then we can say that all claim-rights necessarily involve both, though in individual cases the one element or the other may be in sharper focus.

In brief conclusion: To have a right is to have a claim against someone whose recognition as valid is called for by some set of governing rules or moral principles. To have a *claim* in turn, is to have a case meriting consideration, that is, to have reasons or grounds that put one in a position to engage in performative and propositional claiming. The activity of claiming, finally, as much as any other thing, makes for self-respect and respect for others, gives a sense to the notion of personal dignity, and distinguishes this otherwise morally flawed world from the even worse world of Nowheresville.

[10]

Rights and Autonomy*

David A. J. Richards

H. L. A. Hart has recently taken note of and applauded a discernible paradigm shift in political and legal theory from the "widely accepted old faith that some form of utilitarianism . . . *must* capture the essence of political morality" to one of "basic human rights . . . , if only we could find some sufficiently firm foundations for such rights."[1] Hart argues that recent exponents of this paradigm shift, whether associated with libertarian conservatism (Nozick) or the liberal welfare state (Dworkin), powerfully make their negative point against utilitarianism, but fail to lay adequate foundations for their constructive alternatives.[2] Such theorists are, in the terms of Hart's paper, "between utility and rights": they have begun to develop the long overdue transition from one paradigm to another, but they are too much in thrall to the utilitarianism they reject clearly to justify a constructive alternative.

In this essay, I take Hart's argument as both premise of and challenge to my own inquiry; his arguments, with characteristic brilliance and incision, reveal our needs for fundamental conceptual work in the concept of human rights in a spirit which puts behind it the obsession with the inadequacies of utilitarianism and freshly faces the task of clarifying the deontological alternative. In order to do so, we must, in the spirit of the recent works of John Rawls[3] and Alan Gewirth,[4] articulate in defensibly contemporary terms the perspective on human rights of its greatest classical philosophers, in particular, Rousseau and Kant. The idea of human rights represents a major departure in civilized moral thought. When Rousseau and Kant gave the idea its first articulate and profound theoretical statements, they defined a way of thinking about the moral attitude to personality that was, in ways I must explain, radically new. The practical

* This essay profited from the essential critical advice of Professor Donald Levy, Department of Philosophy, Brooklyn College.

1. H. L. A. Hart, "Between Utility and Rights," in *The Idea of Freedom*, ed. Alan Ryan (Oxford: Oxford University Press, 1979), p. 77.

2. For the examination of Nozick, see ibid., pp. 80–86; for the examination of Dworkin, see ibid., pp. 86–97.

3. John Rawls, *A Theory of Justice* (Cambridge, Mass.: Harvard University Press, 1971); see also "Kantian Constructivism in Moral Theory," *Journal of Philosophy* 77 (1980): 515–72.

4. Alan Gewirth, *Reason and Morality* (Chicago: University of Chicago Press, 1978).

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political implications of this way of thinking are a matter of history. The idea of human rights was one among the central moral concepts in terms of which a number of great political revolutions conceived and justified their demands.[5] Once introduced, the idea of human rights could not be cabined. In American institutional history, the idea of human rights lay behind the American innovation of judicial review: since human rights are not the just subject of political bargaining and compromise, countermajoritarian courts with the American power of judicial review are a natural institutional way to secure such rights from the incursions of the institutions based on majority rule.[6] In our own time, the language and thought of human rights has been elaborated to articulate a number of social and economic rights (anticipated, strikingly, by Tom Paine),[7] and has, in the international sphere, been the central moral idea in terms of which colonial independence and postcolonial interdependence have been conceived and discussed.[8] An adequate theory of human rights would cast light on why the notion of human rights has naturally been put to such uses in the history of human institutions and how it should continue to be elaborated and extended.

My aim in this essay is to clarify the human rights perspective (i.e., the underlying structure of the language and thought of human rights). I take this structure to include certain fundamental attitudes to human personality which find expression in the weight which considerations of human rights have in practical reasoning; often claims of such rights override other considerations, and sometimes they justify revolution, rebellion, and ultimate resistance. I characterize and explicate this structure in terms of the autonomy-based interpretation of treating persons as equals.

I. TREATING PERSONS AS EQUALS

The notion of treating persons in the way one would oneself want to be treated is a conception of the nature of ethics or morality familiar to many moral traditions. Ethical conduct, on this view, treats persons as equals, for the ultimate moral imperative to treat others in the way one

5. The political revolutions of the seventeenth and eighteenth centuries witnessed such landmarks as the English Petition of Rights (1627), the Habeas Corpus Act (1679), the American Declaration of Independence (1776), the United States Constitution (1787), the American Bill of Rights (1791), and the French Declaration of the Rights of Man and Citizen (1789).

6. For a general discussion of the form of these rights in American constitutional law, see David A. J. Richards, *The Moral Criticism of Law* (Encino, Calif.: Dickenson-Wadsworth Publishing Co., 1977); Ronald Dworkin, *Taking Rights Seriously* (Cambridge, Mass.: Harvard University Press, 1977), chaps. 5–8.

7. See Thomas Paine, *Rights of Man*, ed. Henry Collins (Harmondsworth: Penguin Books, 1969), pt. 2, chap. 5, pp. 232–95. For commentary, see D. D. Raphael, *Political Theory and the Rights of Man* (Bloomington: Indiana University Press, 1967), p. 62.

8. For a useful discussion and critique, see Charles R. Beitz, *Political Theory and International Relations* (Princeton, N.J.: Princeton University Press, 1979), pp. 68–123.

would oneself want to be treated presupposes that we are, in some sense, equals. However, the notion of treating persons as equals is ambiguous. A fundamental way to distinguish among moral theories is in terms of how they resolve this ambiguity. For example, John Stuart Mill, following Bentham, argued that utilitarianism treated people as equals in the important sense that everyone's pleasures and pains were impartially registered by the utilitarian calculus; thus, utilitarianism satisfies, Mill argued,[9] the moral imperative of treating persons as equals, where the criterion of equality is pleasure and pain. The great attraction of utilitarianism to humane and liberal reformers like Mill was, I believe, this: its capacity to interpret the basic moral imperative of treating people as equals in a way that enabled reformers concretely to assess institutions in the world in terms of human interests.[10] Any alternative moral theory must provide a coherent interpretation of the notion of treating people as equals which also enables critical moral intelligence concretely to assess and humanely criticize institutions in terms of relevant consequences.

From the perspective of neo-Kantian moral theory, utilitarianism fails to treat persons as equals in the morally relevant sense. To treat persons in the way required by utilitarianism is to focus obsessionally on pleasure alone as the *only* ethically significant fact and to aggregate it as such.[11] Pleasure is treated as a kind of impersonal and elemental fact, and no weight is given to its location in the separate creatures who experience it. This flatly ignores that the only *ethically* crucial fact can be that *persons* experience pleasure, and that pleasure has moral significance only in the context of the life that a person chooses to lead[12] and the evaluative weight, if any, that a person gives to it. Utilitarianism, thus, fails to treat persons as equals in that it literally dissolves moral personality into utilitarian aggregates.

But what is this alternative conception of human personality in terms of which the moral imperative of treating persons as equals should be interpreted? Why has it been supposed from Kant to Rawls and Gewirth to justify human rights that are not merely nonutilitarian but antiutilitarian? Certainly, theorists otherwise sympathetic to Kant's analysis of ethics have not consistently drawn antiutilitarian conclusions; R. M. Hare, for example, whose universalistic prescriptivism clearly is rooted in Kant, has recently defended utilitarianism as a substantive normative conception.[13] In order to explicate the form of Kantian theory which is anti-

9. John Stuart Mill, *Utilitarianism*, ed. Oskar Piest (Indianapolis: Library of Liberal Arts, 1957), chap. 5, pp. 76-79.

10. See, in general, J. S. Mill, *Utilitarianism*, where Mill makes this argument quite clearly.

11. See Hart, pp. 78-80.

12. See Bernard Williams, "A Critique of Utilitarianism," in J. J. C. Smart and Bernard Williams, *Utilitarianism For and Against* (Cambridge: Cambridge University Press, 1973), p. 77.

13. See R. M. Hare, "Ethical Theory and Utilitarianism," in *Contemporary British Philosophy*, ed. H. D. Lewis (London: Allen & Unwin, 1976), pp. 113-31.

utilitarian and fundamental to the idea of human rights, we must investigate the autonomy-based interpretation of treating persons as equals.

II. AUTONOMY

Autonomy, in the sense fundamental to the idea of human rights, is a complex assumption about the capacities, developed or undeveloped, of persons, which enable them to develop, want to act on, and act on higher-order plans of action which take as their self-critical object one's life and the way it is lived.[14] As Frankfurt put it, persons "are capable of wanting to be different, in their preferences and purposes, from what they are. Many animals appear to have the capacity for . . . 'first-order desires' or 'desires of the first order,' which are simple desires to do or not to do one thing or another. No animal other than man, however, appears to have the capacity for reflective self-evaluation that is manifested in the formation of second-order desires."[15] These capacities enable persons to establish various kinds of priorities and schedules for the satisfaction of first-order desires. The satisfaction of some desires (hunger) is regularized; the satisfaction of others is sometimes postponed. Indeed, persons sometimes gradually eliminate certain self-criticized desires (smoking) or over time encourage the development of others (cultivating one's still undeveloped capacities for love and tender mutual response).[16] Such capacities of self-criticism explain the personal emotions (regret or shame or guilt, or, on the other hand, self-respect or pride or a sense of integrity).

One way to bring out the nature of these complex capacities is to consider forms of their absence. I once described such cases in terms of our being prepared to say or think that a person is not in or not fully in her or his body.[17] Stanley Benn has recently categorized them as defects of practical rationality, or epistemic rationality, or of psychic continuity whether as believer or agent.[18] Defects in practical rationality occur, for example, in young children who cannot act now on the basis of future probable desires (conserving water for later thirst); or in a psychosis like kleptomania, in which a present compulsion (to steal) cannot be resisted though it conflicts with other desires of the agent, both now and in the future, which the agent deems more important. Paranoid fantasy exemplifies defects in epistemic rationality: the person's beliefs are systematically immune to argument or evidence, so that the person's experience is one of devouring fantasy with no external check of reality. Forms of schizophrenic disassociation evince defects of psychic continuity: the person is a

14. See David A. J. Richards, *A Theory of Reasons for Action* (Oxford: Clarendon Press, 1971), pp. 65–68.

15. Harry Frankfurt, "Freedom of the Will and the Concept of a Person," *Journal of Philosophy* 68 (1971): 5–20, esp. 7.

16. On the relation of the person to rational choice, including choices of these kinds, see Richards, *A Theory of Reasons for Action*, chap. 3.

17. Ibid., pp. 65–68.

18. See Stanley I. Benn, "Freedom, Autonomy and the Concept of a Person," *Proceedings of the Aristotelian Society* 66 (1976): 109–30, esp. 112–17.

kind of impassive observer of the body which may not be regarded as hers or his, or the person cannot identify the self as the same person over time.

Among the complex capacities, constitutive of autonomy, are language and self-consciousness, memory, logical relations, empirical reasoning about beliefs and their validity (intelligence), and the capacity to use normative principles in terms of which plans of action can be assessed, including principles of rational choice in terms of which ends may be more effectively and coherently realized. Such capacities enable persons to call their life their own, self-critically reflecting on and revising, in terms of arguments and evidence to which rational assent is given, which desires will be pursued and which disowned, which capacities cultivated and which left unexplored, with what or with whom in one's history one will identify, or in what theory of ends or aspirations one will center one's self-esteem, one's integrity, in a life well lived. The development of these capacities for individual self-definition is, from the earliest life of the infant, the central developmental task of the becoming of a person.[19]

Autonomy, as a theory of the person, was, I believe, historically a relatively late development. We may distinguish two stages in its development: first, the emergence of certain forms of language and the self-consciousness this made possible, brilliantly suggested in Julian Jaynes's *The Origin of Consciousness in the Breakdown of the Bicameral Mind*,[20] second, the further elaboration of the idea of autonomy as a capacity of all persons. This latter conception, probably first suggested in the late Middle Ages[21] and emerging into secular political practice in the English Civil War,[22] flowered into a self-consciously powerful political and social ideal in the works of Milton[23] and Locke[24] and was given its deepest philosophical expression in the works of Rousseau[25] and Kant.[26] The

19. See Margaret S. Mahler et al., *The Psychological Birth of the Human Infant: Symbiosis and Individuation* (New York: Basic Books, 1967). See also Louis J. Kaplan, *Oneness and Separateness: From Infant to Individual* (New York: Simon & Schuster, 1978).

20. Julian Jaynes, *The Origin of Consciousness in the Breakdown of the Bicameral Mind* (Boston: Houghton Mifflin Co., 1976).

21. The crucial figure, who develops a radical theory of free will as the predicate of ideas of inalienable human rights, appears to be William of Ockham. See Paul Edwards, ed., *The Encyclopedia of Philosophy* (New York: Macmillan Co., 1967), 8:315–17. But see Richard Tuck, *Natural Rights Theories* (Cambridge: Cambridge University Press, 1979).

22. For a remarkable collection of political tracts from this period which invoke these idea, see A. S. P. Woodhouse, ed., *Puritanism and Liberty: Being the Army Debates (1647–9) from the Clarke Manuscripts* (London: J. M. Dent & Sons, 1974).

23. John Milton, *Areopagitica*, in *The Prose of John Milton*, ed. J. Max Patrick (Garden City, N.Y.: Doubleday Anchor Books, 1967), pp. 265–334.

24. John Locke, *Second Treatise*, in *Locke's Treatises of Government*, ed. Peter Laslett (Cambridge: Cambridge University Press, 1967), pp. 285–446.

25. See Jean Jacques Rousseau, *The Social Contract and Discourses*, trans. G. D. H. Cole (New York: E. P. Dutton & Co., 1950).

26. Immanuel Kant, *Foundations of the Metaphysics of Morals*, trans. L. W. Beck (New York: Liberal Arts Press, 1959), *The Metaphysical Elements of Justice*, trans. John Ladd (Indianapolis: Library of Liberal Arts, 1965), *The Metaphysical Principles of Virtue*, trans. James Ellington (Indianapolis: Library of Liberal Arts, 1964).

thinkers and artists of ancient Greece, or at least the ones whose works remain extant, apparently lacked the concept at least in the form of a conception of the capacities of all persons.[27] Correlatively, the Greeks lacked the idea that people, in view of their capacity for autonomy, are entitled to equal concern and respect as persons. As a corollary, Greek political theory does not invoke the language and thought of human rights.[28]

Of course, the artists and philosophers of ancient Greece cultivate with genius human capacities of critical self-consciousness[29] and thus lay the foundations for later moral ideals which build on these foundations. For example, one of Plato's seminal contributions to philosophical psychology was to formulate and explicate in *The Republic* a conception of the capacity of the philosophical soul for rational self-rule which is the first philosophical investigation anywhere of what I have called autonomy.

However, it was, I believe, the common sense of ancient Greece, which Plato and Aristotle understandably shared, that humans do not, in general, have what contemporary ego psychology denominates a developed ego (i.e., the executive capacity to formulate an integrated plan of life and pursue it as an independent person).[30] The general view of personal competence of the ancient Greeks suggests the fragmented ego, the "divided self"[31]—generally passive, with appetites, emotions, and intellect isolated as independent agencies on the battleground of the body, unintegrated by any coherent higher-order planner within the self. Rather than integration from within, the Greeks supposed that each person, internally divided and vulnerable, depended for the order of his life on his *agathos*, the noble man, on whom the *kakos* depended to provide the order of his life that the *kakos* was constitutionally unable to afford from internal resources of the self.[32] Certain exceptional people might achieve something close to the contemporary concept of developed ego strength (i.e., Plato's philosophical souls), but they were rare, exceptional, godlike—the natural rulers of society. Correlatively, Greek political theory understandably focuses on rule by the best.[33] The fundamental Greek vision is that of Plato's *Republic*: the ruler, a benevolent physician who

27. See A. W. H. Adkins, *From the Many to the One* (Ithaca, N.Y.: Cornell University Press, 1970).

28. See A. W. H. Adkins, *Moral Values and Political Behavior in Ancient Greece* (New York: W. W. Norton & Co., 1972). It is, I believe, a distinct point that the ancient Greeks had the idea of legal rights, that the legal system, imposing legal obligations, correlatively defines rights. The claim here made is that they had no idea of moral or human rights of persons, as such. Alan Gewirth has, I believe, failed to give proper emphasis to the important distinction between legal and moral rights. See Gewirth, pp. 98–102.

29. See Jaynes, pp. 255–92; see also pp. 67–83.

30. See Adkins, *From the Many to the One*; cf. Jaynes.

31. See R. D. Laing, *The Divided Self* (Harmondsworth: Penguin Books, 1965)

32. For a summary of the Greek view, see Adkins, *From the Many to the One*, chap. 10.

33. See Plato, *The Republic*; Aristotle, *Politics*.

alone understands the health of the balanced human organism, has unlimited power to realize the desirable health which humans cannot realize on their own. Such a benevolent physician may quite completely control the life of the disabled patient, as in chattel slavery and the institutionalized subjection of woman, both of which Aristotle justifies,[34] for such intrusive control is the indispensible means to the health desired.

In contrast, when the notions of equal concern and respect for autonomy appear as powerful political and social ideals in Rousseau and Kant,[35] they radically repudiate the vision of the Platonic therapeutic state on the basis of emerging conceptions of human rights whereby persons are now conceived as having final authority to control their own lives. The scope of legitimate paternalistic concern among mature adults, even for putatively benevolent motives, is subject now to moral constraints which were, for Plato and Aristotle, unthinkable. The idea of human rights expresses a normative attitude of respect for the capacity of ordinary persons for rational autonomy—to be, in Kant's memorable phrase, free and rational sovereigns in the kingdom of ends,[36] that is, to take ultimate, self-critical responsibility for one's ends and the way they cohere in a life. Kant characterized this ultimate respect for the choice of ends as the dignity of autonomy,[37] in contrast to the heteronomous, lower-order ends (pleasure, talent) among which the person may choose. Kant thus expressed the liberal imperative of moral neutrality among many disparate visions of the good life:[38] the concern is not with maximizing the agent's pursuit of any particular lower-order end, but rather with respecting the higher-order capacity of the agent to choose her or his ends, whatever they are.

Understandably, Rousseau's and Kant's articulation of the notion of autonomy is limited by the undeveloped state of the psychology and social theory of the period, and is confused by even so profound a thinker as

34. See Ernest Barker, ed., *The Politics of Aristotle* (New York: Oxford University Press, 1962), bk. 1, chaps. 2-7, 12-13.

35. See Rousseau; and Kant, *Foundations*, *Metaphysical Elements*, and *Metaphysical Principles*.

36. See Kant, *Foundations*, pp. 51-52. When Freud developed a therapeutic method intended to deepen our capacities for autonomy (see the discussion of Freud in Section I above), he naturally insisted, consistent with the moral vision of autonomy, that the free assent of the patient was the only acceptable or legitimate criterion for the validity of the therapist's analytic efforts. See S. Freud, "Constructions in Analysis" (1937), *Standard Edition* (London: Hogarth Press, 1964), 23:257-69. Since persons have a unique capacity to understand and change their lives, Freud rules out ab initio the Platonic forms of intrusive control, for only the person can have the final say in unraveling the mysteries of the self. Freud, like Rousseau and Kant, thus places the integrity of the self at the core of social theory. Of course, Freud applies his therapeutic methods only to neurotics who were, typically, absent neurotic symptoms, reasonable and mature people. Psychotics raise different kinds of problems in terms of the legitimacy of paternalistic interference. See Richards, *The Moral Criticism of Law*, pp. 216-20.

37. See Kant, *Foundations*, p. 53.

38. See Ronald Dworkin, "Liberalism," in *Public and Private Morality*, ed. Stuart Hampshire (Cambridge: Cambridge University Press, 1978), pp. 113-43.

Kant with certain ideas from which that of autonomy is in fact quite distinct. The consequence is a view of autonomy which in some ways underestimates its depth and in others overestimates its force. In order to clarify the sense of autonomy, it is useful to distinguish the idea from a number of theses with which it has been and continues, sometimes disastrously, to be confused. I shall discuss these points seriatim as (1) changes in psychological theory which deepen, and do not contradict, the idea of autonomy; (2) autonomy not a thesis of causal indeterminism and thus broadly consistent with many social theories; (3) autonomy not willfulness; and (4) autonomy not egoism.

Psychological Theory and Autonomy

The concept of autonomy, being in part a view of psychological capacities of persons, obviously may be deepened as psychological theory expands our understanding of these capacities. The most striking development, which differentiates the modern conception of autonomy from that found in Rousseau and Kant, is the profounder understanding of the self achieved by Freud's theory of the defenses and subsequent developments in ego psychology.[39] The idea of autonomy has, I believe, been deepened in the precise way that Freud, in his best moments, argued that knowledge of the unconscious mind and its processes increased the range and strength of the ego in controlling id and superego impulses: "Where id was, there shall ego be."[40] Through our self-conscious retrieval and investigation of the fantasy data of the unconscious (dreams, free association, slips, and the like), we may achieve a remarkable capacity to deepen and control our understanding of mental processes which are otherwise inexplicable and often stupidly, rigidly, and self-destructively repetitive. Surely such insights enable us to increase autonomy; through our knowl-

39. Freud's conception of the ego was classically formulated in his "The Ego and the Id" (1923), *Standard Edition* 19:12–66, wherein the ego appears as the passive mediator between id and superego impulses. This passive battleground conception was expressly disapproved by Freud in his important later work, "Inhibitions, Symptoms and Anxiety" (1926), *Standard Edition* 20:87–172, wherein he seeks to characterize the independent power of the ego to deal with internal and external dangers (both realistic and intrapsychic id and superego impulses) by triggering the protective system of defenses. Freud's theory of the defenses was elaborated in Anna Freud's *The Ego and the Mechanisms of Defence* (1936) (New York: International Universities Press, 1946). Later ego psychology has sought to characterize further the reality functions of the ego in addition to its unconscious defensive mechanisms, on which Freud focused. Heinz Hartmann developed accordingly his conception of ego autonomy, focusing on the capacities of the person to engage in adaptive reality testing in a conflict-free zone, that is, a zone free of the warring id and superego impulses; see Hartmann, *Ego Psychology and the Problem of Adaptation* (1939) (New York: International Universities Press, 1958). In the light of the subsequent works of Piaget, Erikson, and studies of animal and child behavior, these notions of ego functions have been developed into a theory of the competent exercise of the capacities of persons as such with independent desires to exercise these capacities competently. See R. W. White, *Ego and Reality in Psychoanalytic Theory* (New York: International Universities Press, 1963).

40. See S. Freud, "New Introductory Lectures on Psycho-Analysis" (1933), *Standard Edition* 22:5–182, p. 80

edge of the unconscious defenses and their form in our lives, we are able to assess consciously the work of the unconscious, deciding whether desires disowned by the unconscious (repression) should be reclaimed or desires promoted by the unconscious (sublimation and projection)[41] should be cut back. We may, in addition, thus render ourselves self-conscious and independent of our earliest, most intense emotional identifications, achieving an understanding of our life history so that we may see our lives and what we want from them individually as our own and not as the unconscious and unexamined derivative of the wishes of significant others; with this kind of understanding, we strengthen our autonomy to decide with what or with whom in our life history we will or will not identify or continue to identify.[42]

In contrast, Rousseau, the greatest introspective thinker among early proponents of autonomy and the theory of rights, is notoriously superficial about the depth-psychological influences on his thought. Such unconscious influences on his thought may explain the totalitarian strains in Rousseau which are foreign to the spirit of his theory of autonomy and rights.[43] In any event, it is a mistake to suppose that autonomy, as an ingredient of the concept of human rights, is frozen in the psychology of the period of its intellectual birth.

Autonomy Not Causal Indeterminism, But Consistent with Social Theory

A salient confusion in the tradition of autonomy, found from Kant[44] to Sartre,[45] is the idea that autonomy *requires* the truth of causal indeterminism. The idea appears to be that in exercising capacities of rational choice and deliberation regarding the form of our lives, we exercise a spontaneous freedom from causal determination in any form. But this conception may overestimate the force of autonomy, investing it with connotations which confuse and distort the *moral* import which the idea does properly have.

The relevant sense of independence, on which the use of the term "autonomy" here used depends, is twofold. First, the evaluations of one's life that autonomy makes possible enable persons not to be bound to immediate present desires, but to give weight to their desires and projects over time. Second, the standards of self-critical evaluation are determined not by the will of others but by arguments and evidence which one has oneself rationally examined and assented to. I cannot, of course, deal here with all the complex issues of free will and determinism.[46] Rather, a more

41. See A. Freud, chap. 4.

42. For an example of a possibly self-destructive identification which might possibly be undone, see the discussion of identification with the aggressor, in ibid., chap. 9.

43. For a plausible defense of this position, see F. Weinstein and G. M. Platt, *The Wish to Be Free* (Berkeley and Los Angeles: University of California Press, 1969), chap. 3.

44. See Kant, *Foundations*, *Metaphysical Elements*, and *Metaphysical Principles*.

45. See Jean-Paul Sartre, *Being and Nothingness*, trans. H. E. Barnes (New York: Philosophical Library, 1956).

46. For a more extended examination of these issues, see Richards, *A Theory of Reasons for Action*, pp. 54-59.

limited point seems in order: neither form of independence establishes that the exercise of autonomy is inconsistent with causal explanation in general. It seems possible that a human life may be autonomous in both senses (desires over time are given weight, and the standards of evaluation are personally assented to), and yet forms of causal explanation thereof may be true. Perhaps some forms of causal explanation are clearly incompatible with autonomy;[47] perhaps there is some general argument which shows them to be inconsistent in general. But nothing in the analysis of autonomy so far supports this view.

Let me assume, briefly, what I have not shown, that causal explanation and the exercise of autonomy are consistent. On this view, autonomy is a cluster of capacities which a society, depending on its normative purposes, may foster or stunt. The idea of human rights embodies a normative perspective of respect for such capacities. Accordingly, the putative consistency of our moral concern for autonomy and causal explanation enables us lucidly to address what should, on this conception, be a central undertaking of social justice: how causally we may promote, in ourselves and others, the development and exercise of autonomy. In this way, we may fruitfully integrate moral theory with the insights of social theory. Autonomy may be perceived, not as asocial isolation, but in terms of a supportive social environment of critical dialogue and reciprocity. Society may accept responsibility for defects in autonomy which it has unjustly fostered and to which, in the balance of considerations of justice (for example, in punishment),[48] it must give appropriate weight. And larger decisions of alternative forms of basic institutions (e.g., democratic socialism vs. democratic capitalism)[49] may be assessed in terms of which institutions better foster moral aims of autonomy.

Autonomy Not Willfulness

From Kant to Hare, moral theorists have interpreted autonomy as a kind of continual willing or willfulness. To be autonomous is construed as the willing of rules to which one consistently adheres. In Hare, for example, the idea of morality is analyzed as a kind of consistency in one's willing of rules of conduct no matter what the substantive content of the rules willed.[50] There is, I believe, no good reason to accept this interpretation of

47. See, e.g., B. F. Skinner, *Beyond Freedom and Dignity* (New York: Alfred A. Knopf Inc., 1971), which appears and certainly intends to deny the capacities we have called autonomy.

48. For a suggestion of how such a consideration may be relevant to the injustice in contemporary America of the death penalty, see David A. J. Richards, "Human Rights and the Moral Foundations of the Substantive Criminal Law," *Georgia Law Review* 13 (1979): 1395–1446, esp. 1442–45. Cf. ibid., 1432–33.

49. For an example of the scope of investigation that may be called for, see Charles E. Lindblom, *Politics and Markets* (New York: Basic Books, 1977).

50. See R. M. Hare, *The Language of Morals* (New York: Oxford University Press, 1964), and *Freedom and Reason* (Oxford: Clarendon Press, 1963). For a forceful critique, see G. J. Warnock, *Comtemporary Moral Philosophy* (London: Macmillan Co., 1967), pp. 30–47. Cf. Richards, *A Theory of Reasons for Actions*, pp. 215–16.

autonomy; and there is enough to be said against it to suffice for repudiating it.

Autonomy, as here described, is a capacity for second-order, rationally self-critical evaluations and wants and plans. This is, in part, a description of the human will and its force in our lives. But the exercise of autonomy is not the same thing as the consistent willing of something, no matter what it is. To so construe autonomy as a definitional matter invites tendentious confusion of all exercises of autonomy with willfulness. But, surely, persons often exercise their autonomy in invoking self-critical evaluations which subject forms of consistent willing to various forms of criticism; we think, for example, that such actions are unreasonable because they are inhumanely rigid and inflexible, or stupidly masochistic, or simply arbitrarily willful. Autonomy includes the will, but it also includes a substantive component of rational goods which persons reasonably want whatever else they want. Our self-critical evaluations often assess our lives in terms of these goods and cannot be sensibly interpreted without reference to them.

Indeed, by forcing autonomy into the Procrustean model of willfulness, we blind ourselves to those rational goods which we cannot willfully compel, but which we must receptively develop and foster—for example, the imagination, emotional spontaneity and depth of feeling, creativity, insight, and the like. If we take seriously the rational goods in terms of which we self-critically reflect on our lives, we must take seriously those forms of self-criticism and change, surely not uncommon, which invoke our emotional and imaginative failures and which call for deeper insight into what emotionally we are and want to become. We must, in this connection, note Leslie Farber's cautionary warnings,[51] garnered from years of perceptive therapeutic practice, about the psychopathology of the will, which destructively makes the will, in Yeats's phrase, do the work of the imagination.[52] Such willfullness is evidently a familiar form of contemporary neurotic distortion, one which has, I submit, not uncommonly been indulged by moral philosophers, who are as prone to the Faustian myth as anyone. Thus, autonomy is construed as a form of willful exertion *simpliciter*, when it invokes other kinds of consideration as well.

Autonomy Not Egoism

The classical opposition of autonomy-based conceptions of ethics to the morality of love and benevolence, utilitarianism, has sometimes been misinterpreted in the form of the claim that autonomy is a kind of unobstructed egoism. In fact, the confusion of autonomy and egoism derives not from the natural rights tradition of Rousseau and Kant but from the

51. See Leslie H. Farber, *The Ways of the Will: Essays toward a Psychology and Psychopathology of Will* (New York: Basic Books, 1966); see esp. pp. 105, 205 for discussions of willfulness; see also Leslie H. Farber, *Lying, Despair, Jealousy, Envy, Sex, Suicide, Drugs, and the Good Life* (New York: Basic Books, 1976).

52. See Farber, *Ways of the Will*, p. 32.

traditions of utilitarian economics (i.e., Adam Smith and Hume)[53] who interpret autonomy as egoistic consumer sovereignty. The liberalism of civil and political rights is thus analogized to classical economic liberalism: equal voting allows people to establish and foster their ends, as sovereigns in the kingdom of ends, in the same way, allegedly, that consumer sovereignty in economic markets allows individuals to make choices as they please.[54] Accordingly, the ideal of autonomy underlying both is alleged (e.g., by Nozick and others)[55] to be a form of egoistic consumer sovereignty. But the liberal conception of autonomy, including the idea of neutrality about individual ends, is not the same idea as egoism. Such an assimilation invites natural attack from the left, familiar from Marx[56] to Unger,[57] to the effect that the liberal tradition of rights rests on a shrunken and decrepit view of Hobbesian egoistic human nature. If autonomy were egoism, these critics would be correct. But it is not.

The idea of autonomy, as we have discussed it and as classically articulated in Rousseau and Kant, has nothing to do with egoism or with an egoistic view of human nature.[58] It identifies capacities of persons to entertain and act on second-order desires and plans self-critically to have and revise a form of life. The conception is neutral regarding the particular ends, egoistic or altruistic, that the person adopts. Presumably, the exercise of autonomy will at least sometimes result in repudiation of the

53. See, in general, Adam Smith, *The Wealth of Nations* (New York: Modern Library, 1937). The deeper normative theory underlying Smith's seminal economic theory appears to be a form of benevolent impartial spectator theory leading to utilitarianism. See Adam Smith, *The Theory of Moral Sentiments* (Indianapolis: Liberty Classics, 1976). The central philosophical statement of this normative theory was made by David Hume. See Hume, *A Treatise of Human Nature*, ed. L. A. Selby-Bigge (Oxford: Clarendon Press, 1964), bk. 3; see also Hume, *An Enquiry concerning the Principles of Morals*, in *Enquiries*, ed. L. A. Selby-Bigge (Oxford: Clarendon Press, 1902).

54. For an extended development of this kind of analogy, see F. A. Hayek, *The Constitution of Liberty* (Chicago: University of Chicago Press, 1960).

55. See Robert Nozick, *Anarchy, State and Utopia* (New York: Basic Books, 1974). For critical commentary, see a review by D. A. J. Richards in *Detroit College Law Review* 3 (1976): 675–85; T. Nagel, "Libertarianism without Foundations," *Yale Law Journal* 85 (1975): 136–49; Hart, pp. 80–86. See also Ronald Dworkin, *Taking Rights Seriously*, p. 259, and "Liberty and Liberalism," chap. 11. For an example of a related form of argument in the legal literature, see Richard A. Epstein, "A Theory of Strict Liability," *Journal of Legal Studies* 2 (1973): 151–204, who argues, inter alia, that autonomy as egoism justifies the lack of a good samaritan doctrine in the law of torts (see pp. 189–204). In fact, Epstein, I believe, quite misconstrues and therefore misapplies the Kantian doctrine of autonomy to the problem of the good samaritan. See Richards, *The Moral Criticism of Law*, pp. 221–25, for the suggestion of an alternative view. See also Richards, "Human Rights," pp. 1429–30.

56. See, e.g., Karl Marx, *The Economic and Philosophic Manuscripts of 1844*, ed. Dirk J. Struik (New York: International Publishers, 1964).

57. See R. M. Unger, *Knowledge and Politics* (New York: Free Press, 1975); and my review of Unger's book in *Fordham Law Review* 44 (1976): 873–876. For a recent form of this critique of autonomy in the legal literature, see Duncan Kennedy, "Legal Formality," *Journal of Legal Studies* 2 (1973): 351–98.

58. Indeed, Kant expressly distinguishes the value of autonomy as a form of inestimable dignity from any notion of pricing, market or otherwise; see *Foundations*, p. 53.

egoistic meanness and narcissism of one's previous life, acting on the higher-order want that one's wants be more generously and abundantly human.

It *is* true that the tradition of autonomy, from its beginnings in the works of Kant, insisted that autonomy, the root of ethics and human rights, has nothing to do with benevolence or love (or Love).[59] But the contrast Kant has in mind is not between egoism and altruism, but between mutual respect and sympathetic benevolence. Kant perceived the malign failure of utilitarianism to take seriously the separateness of persons as at one with its being the morality of love.[60] Utilitarianism's absorption in the aggregate of pleasure derives from its focus on the loving benevolence of the ideal observer who sympathetically conflates the pleasures or pains experienced by other persons into a net aggregate of pleasure over pain in himself. In contrast, Kant insisted that the separateness of autonomy is the root of ethics and defined ethical principles as expressive of this separateness—as expressing, not love, but respect. This conception has nothing whatsoever to do with egoism, which, in fact, it sharply constrains.

The idea that Kantian autonomy is meanly antagonistic to the proper claims of love has been argued by Bernard Williams in criticism of my own and others' attempts to develop a Kantian theory of personal relationships.[61] Williams argues that the Kantian approach cannot be the whole truth, for it conflicts with our judgment that the claims of lovers override moral claims of a more universalistic, autonomy-based kind and requires, pro tanto, that we deracinate that part of the concept of the self which turns on the freedom to develop personal relationships. Neither claim can be sustained. As for the former, Kantian moral theory makes only the modest claim that obligations to friends and lovers arise in a moral context: we are, only within limits, bound to advance the interests of our lovers over others. Williams suggests there are no such limits, but in this he accedes, I believe, to the narcissistic romance that personal love releases us from moral relations to others. This form of personal love, however, is only one among others,[62] and is often circumscribed and

59. See the discussion of the acting from moral duty as opposed to benevolent or other motives in ibid., pp. 14–22.

60. Cf. Kant's contrasts of sympathy with the rights of man, ibid., pp. 41, 53, 60.

61. See Bernard Williams, "Persons, Character and Morality," in *The Identities of Persons*, ed. Amélie O. Rorty (Berkeley and Los Angeles: University of California Press, 1976), pp. 197–216. Much more needs to be said in reply to Williams. I would, for example, not now defend everything in my early views on the relations of love and morality that Williams labels "righteous absurdity" (p. 212). But his general argument is, for reasons sketched in the text, wrong. For my more recent reflections on the relations of sex, love, and morality, see David A. J. Richards, "Commercial Sex and the Rights of the Person: A Moral Argument for the Decriminalization of Prostitution," *University of Pennsylvania Law Review* 127 (1979): 1195–1287.

62 Cf., for example, the psychoanalytic distinctions between narcissistic primary love (derived from early parental attachments) and the development of the capacity for the mutualities of reciprocal genital love. For a brilliant set of investigations of these data, see Michael

regulated in the process of developing capacities for mature reciprocal love that is not isolable from the rest of our ordinary moral nature. On the other hand, Williams's suggestion that Kantian morality causes us to deracinate interests fundamental to the concept of ourselves is equally illegitimate. The accusation would only be plausible if Kantian principles required us to forgo altogether the pursuit of personal love. So far from this being true, Kantian principles can be shown to justify a fundamental right to autonomy in deciding whom and how to love in order to preserve underlying values of personal emotional integrity and self-expression in intimate relations.[63] In short, such arguments precisely justify a moral right to love on the grounds of personal integrity that Williams, mistakenly, believes Kantian theory would sacrifice. In short, the claims of personal love and autonomy-based morality are congruent and indeed mutually supporting over a wide range.

* * *

In summary, the idea of autonomy has been confused with a number of distinguishable ideas and theses, so that putative attacks on autonomy have often been attacks, not on the idea itself, but on perverse and sometimes disastrous misinterpretations of it. The truth in the concept is in Kant's moral ideal that persons are free and rational sovereigns in the kingdom of ends. The contemporary neo-Kantians Rawls and Gewirth formulate this idea in different though related ways. Rawls deploys the idea of the veil of ignorance[64] which has the consequence that the rational choices of persons, by which Rawls defines the concept of morality, cannot take account of their particular ends, but must ask what things enable rational persons to choose their ends, whatever they are. Gewirth follows Kant more literally in arguing that the central normative concept is human action in general,[65] versus any particular ends of human actions, which, on analysis, turns out to be rational autonomy. Rawls and Gewirth articulate the same Kantian intuition. The central mark of ethics is not respect for what people currently are or for particular ends. Rather, respect is expressed for an idealized capacity which, if appropriately treated, people can realize, namely, the capacity to take responsibility as a free and rational agent for one's system of ends.

If Rawls and Gewirth in these ways correctly give expression to the fundamental idea of moral personality, Nozick clearly does not. For Nozick, the interpretation of autonomy is not in terms of higher-order, self-critical capacities, but a kind of capitalistic reductio thereof, namely,

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Balint, *Primary Love and Psycho-analytic Technique* (New York: Liveright Publishing Corp., 1965), chaps. 5, 6, and 7.

63. See David A. J. Richards, "Unnatural Acts and the Constitutional Right to Privacy: A Moral Theory," *Fordham Law Review* 45 (1977): 1281–1348; "Sexual Autonomy and the Constitutional Right to Privacy: A Case Study in Human Rights and the Unwritten Constitution," *Hastings Law Journal* 30 (1979): 957–1018; "Commercial Sex."

64. See Rawls, pp. 136–42.

65. See Gewirth, pp. 48–128.

natural property in one's body, sentiments, and labor.[66] This account confuses, as earlier suggested, moral personality with privatized egoism. Basic ethical theory must explicate the most general features of moral personality, which is correctly supplied by Kant, Rawls, and Gewirth in terms of an idealized description of capacities for self-critical choice of one's ends, as a free and rational being. Nozick, in contrast, identifies the person with certain inalienable assets,which are neither necessarily nor naturally associated with the morally fundamental idea of free and rational choice of one's ends.

III. THE AUTONOMY-BASED INTERPRETATION OF TREATING PERSONS AS EQUALS

We must now connect these investigations into the nature of autonomy with what I earlier called the autonomy-based interpretation of treating persons as equals, a conception alleged to yield strongly antiutilitarian ideas of human rights. Let us contrast the utilitarian with the deontological interpretation of treating persons as equals.

Utilitarianism, we noted, interprets equality in terms of pleasure or pain: all such experiences are equal before the utilitarian calculus. The consequence of this perspective is to treat pleasure as a kind of impersonal fact, and no weight is given to the separateness of the creatures who experience it. The familiar inadequacies of utilitarianism derive from this fact.

In contrast, neo-Kantian deontological moral theory interprets treating persons as equals not in terms of lower-order ends persons may pursue (pleasure or pain, or talent, or whatever) but in terms of the capacity of each person self-critically to evaluate and give order and personal integrity to one's system of ends in light of a point of view of how to live one's life. Treating persons as equals in this sense expresses equal respect for the capacities of each person to take ultimate responsibility, as free and rational beings, for adopting and revising a point of view on how to live their lives. It is no accident that this perspective justifies human rights that are not merely nonutilitarian, but antiutilitarian. Thus to express equal respect for personal autonomy is to guarantee, on fair terms to all, the conditions requisite for the exercise of such capacities (e.g., the development and cultivation of critical rationality); ethical principles of obligation and duty insure that this is so, and correlatively define human rights.[67] Without such rights, persons would lack, inter alia, the basic opportunity to develop a secure sense of an independent self, instead being simply the locus of impersonal pleasures which may be manipulated and rearranged in whatever ways would aggregate maximum utility overall, for all individual projects must, in principle, give way before utilitarian aggregates. Rights insure that this not be so, and thus have the

66. See critical commentaries cited in n. 55, above.

67. For a fuller exploration of the conceptual links among these concepts, see Richards, *A Theory of Reasons for Action*, pp. 92–106.

characteristic force in our normative vocabulary which Dworkin describes in terms of rights as trumps over countervailing utilitarian calculations.[68]

It is important to see that this deontological moral perspective, while it rejects as an ultimate moral principle the utilitarian maximization of the aggregate of pleasure over pain, is not incompatible with forms of assessment of consequences in thinking about ethical issues.[69] The assumption that the Kantian interpretation of treating persons as equals is incompatible with assessing consequences is a blundering mistake.[70] Certain kinds of consequences (those of utilitarian aggregation) are ruled out, but other forms of consequences, relevant to the assessment of what the autonomy-based interpretation of treating persons as equals requires in certain circumstances, are crucially invoked. Both the neo-Kantian theories of Rawls and Gewirth illustrate this truth. Rawls interprets treating persons as equals in terms of principles of conduct which rational persons would unanimously agree to, while under a veil of ignorance as to who they are, as the general critical standards in terms of which personal relations would be governed;[71] and Gewirth interprets the Kantian moral imperative in terms of the general requirements for rational autonomy that an agent would demand for the self on the condition that the requirement be consistently extended to all other agents alike.[72] Both these theories appeal to consequences in arguing that certain substantive principles would be agreed to (Rawls) or universalized (Gewirth). Rawls imputes to his contractors the maximin strategy of deciding in terms of which alternative possible principles secure the highest lowest prospect of rational goods,[73] and thus assesses different kinds of principles and their formulation in terms of their consequences in securing this aim. Correspondingly, Gewirth argues that the universalizing agent would assess the necessary material conditions for rational autonomy (roughly, what any rational agent would want, whatever his lower-order ends). The consequences of universalization thus determine what would be universalized.

Such autonomy-based interpretations of treating persons as equals analyze the demands of ethics and ethical reflection in a way strikingly different from that called for by utilitarianism. Since the sympathetic

68. See Dworkin, pp. 90–94, 188–92.

69. It is crucial to distinguish the ideas of teleological and consequentialist moral theories. Kantian moral theory is deontological, which means that it is nonteleological. Cf. Rawls, pp. 30, 40. But, both teleological and deontological moral theories may be consequentialist, in the sense of what conduct conforms to ethical principles crucially turns on the assessment of the consequences of acting on the principle.

70. See, e.g., R. A. Posner, "Utilitarianism, Economics, and Legal Theory," *Journal of Legal Studies* 8 (1979): 103–40, esp. 104, n. 4. See also Bruce A. Ackerman, *Private Property and the Constitution* (New Haven, Conn.: Yale University Press, 1977), pp. 71–72.

71. Rawls, chap. 3. See also Richards, *A Theory of Reasons for Actions*, chap. 6.

72. Gewirth, chaps. 2–3.

73. See Rawls, pp. 150–61. Of course, Gewirth and Rawls do not agree in all substantive particulars; Gewirth, for example, resists Rawls's thoroughgoing invocation of the maximin strategy. But, their theories share a broad consensus on many substantive moral questions, so that we may, for present purposes, highlight their Kantian common ground.

benevolence central to utilitarian reasoning focuses only on the greatest net aggregate of pleasure over pain, the utilitarian moralist must, in principle, ignore and disassociate himself from any fundamental frustration of the basic interests of the person (in oneself or others) which may be required in order to realize the utilitarian aggregate. Since the point of view of the person has no basic significance for the utilitarian theory of ethics (which, in its most profound exponents like Sidgwick, looks only to the point of view of the universe),[74] such sacrifices of personal interests may fairly commonly be required by the pursuit of aggregates. In contrast, the burdens of deontological ethics are not the impossible ones of the self-sacrificing alienation of self in the interest of universal benevolence. Rather, since the interests of the person define the basic point of view from which ethical reasoning starts, there is no more basic or elemental unit of moral analysis (e.g., the pleasure of utilitarianism) into which this point of view may be dissolved. The person is the ultimate unit of ethical analysis. Correspondingly, ethical reasoning expresses the moral capacities of moral personality. We start, for example, from higher-order capacities to self-critically evaluate and revise one's ends in terms of arguments and evidence to which one rationally assents; we assess the basic demands of such personal autonomy for the goods which express basic respect for its development, exercise, and realization; and we universalize such demands to other persons who, by definition, share these capacities. Such moral capacities are not the extraordinary demands of utilitarian personal dissolution, for no such sacrifice of the person could, on this analysis, be justified. On the other hand, the exercise of such capacities often will call for critical constraints on one's egoistic pursuits justified in terms of the minimum moral decency that we expect all persons to extend to other persons. Consider a racist who claims incapacity to think of himself as a black, or a sexist man as a woman, or a homophobe as a homosexual. We blame the egoism of such people, not for lack of extraordinary capacities of sympathy or self-sacrifice, but for something much more minimal and inhuman: the moral indecency of perverse willfulness in failing to exercise humane capacities incumbent on moral agents, as such—to think of people as persons and to regulate their conduct by principles persons would accept whether they were on the giving or receiving end. Deontological ethics thus requires the moral decency of people of good will: neither the sacrifice of self for impersonal utilitarian aggregates nor egoism, but the deeper insight into the foundations of one's own demands for personal integrity which one extends to others on fair terms.

An important advantage of this Kantian model is that it illuminates what the utilitarian model obscures: that the kinds of capacities on which

74. In one striking passage, Sidgwick concludes: "I obtain the self-evident principle that the good of any individual is of no more importance, from the point of view (if I may say so) of the Universe, than the good of any other" (Henry Sidgwick, *The Methods of Ethics*, 7th ed. [London: Macmillan Co., 1963], p. 382).

ethical deliberation depends do not call for any form of impersonality or radical denial of the personal attitudes of the self, but a kind of impartiality in weighing reasonably moral claims of persons, which is quite a different matter. Moral impartiality, properly understood, must by definition give intense expression to deep emotional and intellectual capacities of one's person for self-knowledge about the demands of one's self for dignity, but they are capacities which are sensitive to and engaged by reasonableness in weighing the equal demands of other persons. Far from requiring impersonal detachment, such impartiality in the articulation of rights requires a person's most responsible engagement in the search within one's self for the foundations of one's integrity as a person which, as a person, one extends to all persons alike.

The urgent, demanding, and intransigent character of human rights is explained by their roots in the basic demands of moral personality—in those rational goods which alone secure to the person rational autonomy, the foundation of living a life with the only thing Kant claimed to be of unconditional worth, personal dignity.[75] Thus, rights are fought for in revolutions, are intransigently demanded, and are not compromised.

* * *

I began this discussion on the premise of H. L. A. Hart's critique of the inadequate foundations of recent antiutilitarian theories of rights, theories which, in the end, are too much in thrall to their utilitarian opposition. I have argued that, in order to lay the foundation of a sound deontological paradigm of rights, we must focus on the analysis of the autonomy-based interpretation of treating persons as equals. If we see the depth of these ideas and learn to use them to render moral thinking determinate, we will, I believe, in time achieve the desideratum of a general theory of rights which explicates the complex ways in which rights are invoked and weighed. Correspondingly, we may critically disenthrall ourselves of the fiction that rights are tied to ethnocentrism or capitalist ideology, and afford a critical organon for assessing just demands for personal dignity—political, social, economic. We are, I believe, now in a position to articulate a form of critical casuistry of human rights which may inspirit contemporary moral and legal theory with its ancient origins as practical wisdom. I can think of no philosophical achievement, if we could meet it, of greater importance.

75. See Kant, *Foundations*, p. 53.

[11]

JOHN RAWLS

The Priority of Right and Ideas of the Good

The idea of the priority of right is an essential element in what I have called political liberalism, and it has a central role in justice as fairness as a form of that view. That priority may give rise to misunderstandings: it may be thought, for example, to imply that a liberal political conception of justice cannot use any ideas of the good except those that are purely instrumental; or that if it uses noninstrumental ideas of the good, they must be viewed as a matter of individual choice, in which case the political conception as a whole is arbitrarily biased in favor of individualism. I shall try to remove these and other misunderstandings of what the priority of right means by sketching its connection with five ideas of the good found in justice as fairness: (1) the idea of goodness as rationality, (2) the idea of primary goods, (3) the idea of permissible comprehensive conceptions of the good, (4) the idea of the political virtues, and (5) the idea of the good of a well-ordered (political) society.

By way of preface, the following general remark: in justice as fairness the priority of right implies that the principles of (political) justice set limits to permissible ways of life; hence the claims citizens make to pursue ends that transgress those limits have no weight (as judged by that political conception). But just institutions and the political virtues expected of citizens would serve no purpose—would have no point—unless those in-

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stitutions and virtues not only permitted but also sustained ways of life that citizens can affirm as worthy of their full allegiance. A conception of political justice must contain within itself sufficient space, as it were, for ways of life that can gain devoted support. In a phrase: justice draws the limit, the good shows the point. Thus, the right and the good are complementary, and the priority of right does not deny this. Its general meaning is that although to be acceptable a political conception of justice must leave adequate room for forms of life citizens can affirm, the ideas of the good it draws upon must fit within the limits drawn—the space allowed—by that political conception itself.

I

I begin by stating a distinction basic for my discussion—namely, the distinction between a political conception of justice and a comprehensive religious, philosophical, or moral doctrine.[1] The distinguishing features of a political conception of justice are, first, that it is a moral conception worked out for a specific subject, namely, the basic structure of a constitutional democratic regime; second, that accepting the political conception does not presuppose accepting any particular comprehensive religious, philosophical, or moral doctrine; rather, the political conception presents itself as a reasonable conception for the basic structure alone; and third, that it is formulated not in terms of any comprehensive doctrine but in terms of certain fundamental intuitive ideas viewed as latent in the public political culture of a democratic society.

Thus the difference between political conceptions of justice and other moral conceptions is a matter of scope—that is, the range of subjects to which a conception applies, and the wider content a wider range requires. A conception is said to be general when it applies to a wide range of subjects (in the limit to all subjects); it is comprehensive when it includes conceptions of what is of value in human life, ideals of personal virtue and character, and the like, that are to inform much of our nonpolitical conduct (in the limit our life as a whole). There is a tendency for religious and philosophical conceptions to be general and fully comprehensive; indeed,

1. This distinction is discussed more fully in "Justice as Fairness: Political not Metaphysical," *Philosophy & Public Affairs* 14, no. 3 (Summer 1985), sec. I.

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their being so is sometimes regarded as an ideal to be realized. A doctrine is fully comprehensive when it covers all recognized values and virtues within one rather precisely articulated scheme of thought, whereas a doctrine is only partially comprehensive when it comprises certain (but not all) nonpolitical values and virtues and is rather loosely articulated. Note that by definition for a conception to be even partially comprehensive it must extend beyond the political and include nonpolitical values and virtues.

Political liberalism elaborates a political conception of justice in the sense specified above. It consists in a conception of politics, not of the whole of life. Of course, it must have the kind of content we associate with liberalism historically: for example, it must affirm certain basic rights and liberties, assign them a certain priority, and so on. Now, as I have said, the right and the good are complementary: a political conception *must* draw upon various ideas of the good. The question is: subject to what restriction may political liberalism do so?

The main restriction would seem to be this: the ideas included must be political ideas. That is, they must belong to a reasonable political conception of justice so that we may assume (1) that they are, or can be, shared by citizens regarded as free and equal; and (2) that they do not presuppose any particular fully (or partially) comprehensive doctrine.

In justice as fairness this restriction is expressed by the priority of right. In its general form, this priority means that admissible ideas of the good must respect the limits of, and serve a role within, the political conception of justice.

II

To spell out the meaning of the priority of right stated in this general form, I consider in turn how five ideas of the good found in justice as fairness (listed at the outset) meet these conditions.

The first idea—that of goodness as rationality—is, in some variant, taken for granted by any political conception of justice.[2] This idea sup-

2. This idea of the good is set out most fully in *A Theory of Justice* (Cambridge: Harvard University Press, 1971), chap. 7. I do not want to take up its details here and only state in the text the most basic points relevant for the present discussion. But I might mention that there are several ways in which I would now revise the presentation of goodness as rationality; per-

poses that the members of a democratic society have, at least in an intuitive way, a rational plan of life in the light of which they schedule their more important endeavors and allocate their various resources (including those of mind and body) so as to pursue their conceptions of the good over a complete life, if not in the most rational, then at least in a sensible (or satisfactory), way. In drawing up these plans people are assumed, of course, to take into account their reasonable expectations concerning their needs and requirements in their future circumstances in all stages of life, so far as they can ascertain them from their present position in society and the normal conditions of human existence. Given these suppositions, any workable political conception of justice that is to serve as a public basis of justification that citizens may reasonably be expected to acknowledge must count human life and the fulfillment of basic human needs and purposes as in general good, and endorse rationality as a basic principle of political and social organization. A political doctrine for a democratic society may safely assume, then, that all participants in political discussion of questions of right and justice accept these values, when understood in a suitably general way. Indeed, if the members of society did not do so, the problems of political justice, in the form in which we are familiar with them, would seem not to arise.

It should be emphasized that these basic values do not, of course, suffice by themselves to specify any particular political view. As used in *A Theory of Justice*, goodness as rationality is a basic idea from which, in conjunction with other ideas (for example, the political idea of the person, explained in the following section), other ideas of the good may be elaborated when needed. As what I referred to there as the thin theory of the good, goodness as rationality provides part of a framework serving two main roles: first, it helps us to identify a workable list of primary goods; and second, relying on an index of these goods, it enables us both to spec-

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haps the most important would be to make sure that it is understood as part of a political conception of justice viewed as a form of political liberalism, and not as part of a comprehensive moral doctrine. The distinction between a comprehensive doctrine and a political conception is absent from *Theory*, and while I believe nearly all the structure and substantive content of justice as fairness (including goodness as rationality) is unchanged when it is seen as a political conception, the understanding of the view as a whole is very significantly shifted. Charles Larmore in his *Patterns of Moral Complexity* (Cambridge: Cambridge University Press, 1987), pp. 118–30, is quite correct in vigorously criticizing the ambiguity of *Theory* on this fundamental matter.

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ify the motivation of the parties in the original position and to explain why that motivation is rational. I leave aside the second role and begin below with the first.

III

One aim of the idea of goodness as rationality is to provide part of a framework for an account of primary goods. But to complete that framework that idea must be combined with a political conception of citizens as free and equal. With this done, we then work out what citizens need and require when they are regarded as free and equal persons and as normal and fully cooperating members of society over a complete life. It is crucial here that the conception of citizens as persons be seen as a political conception and not as one belonging to a comprehensive doctrine. It is this political conception of persons, with its account of their moral powers and higher-order interests, together with the framework of goodness as rationality and the basic facts of social life and the conditions of human growth and nurture, that provides the requisite background for specifying citizens' needs and requirements. All this enables us to arrive at a workable list of primary goods.[3]

The role of the idea of primary goods is as follows.[4] A basic feature of a well-ordered political society is that there is a public understanding not only about the kinds of claims it is appropriate for citizens to make when questions of political justice arise, but also about how such claims are to be supported. This understanding is required in order to reach agreement as to how citizens' various claims are to be assessed and their relative weight determined. The fulfillment of these appropriate claims is publicly accepted as advantageous and thus counted as improving citizens' situation for the purposes of political justice. An effective public conception of justice involves, then, a political understanding of what is to be mutually recognized as advantageous in this sense. In political liberalism the problem of interpersonal comparisons of citizens' well-being becomes: given

3. On the idea of a political conception of the person, see "Justice as Fairness: Political not Metaphysical," sec. V.

4. Here and in the next two sections I draw on my essay "Social Unity and Primary Goods," in *Utilitarianism and Beyond*, ed. A. Sen and B. Williams (Cambridge: Cambridge University Press, 1982).

the conflicting comprehensive conceptions of the good, how is it possible to reach a political understanding of what is to count as appropriate claims?

The difficulty is that the state can no more act to maximize the fulfillment of citizens' rational preferences, or wants (as in utilitarianism),[5] or to advance human excellence, or the values of perfection (as in perfectionism), than it can act to advance Catholicism or Protestantism, or any other religion. None of these views of the meaning, value, and purpose of human life, as specified by the corresponding comprehensive religious or philosophical conceptions of the good, are affirmed by citizens generally, and so the pursuit of any one of them through basic institutions gives the state a sectarian character. To find a shared idea of citizens' good that is appropriate for political purposes, political liberalism looks for an idea of rational advantage within a political conception that is independent of any particular comprehensive doctrine and hence may be the focus of an overlapping consensus.

In justice as fairness the conception of primary goods addresses this practical political problem. The answer proposed rests on identifying a partial similarity in the structure of citizens' permissible conceptions of the good once they are regarded as free and equal persons. Here permissible conceptions are comprehensive doctrines the pursuit of which is not excluded by the principles of political justice. Even though citizens do not affirm the same (permissible) comprehensive conception, complete in all its final ends and loyalties, two things suffice for a shared idea of rational advantage: first, that citizens affirm the same political conception of themselves as free and equal persons; and second, that their (permissible)

5. In the case of a utilitarianism such as that of Henry Sidgwick in *The Methods of Ethics*, 7th ed. (London, 1907), or of R. B. Brandt in *A Theory of the Good and the Right* (Oxford: Clarendon Press, 1979), which aims to be an account of the good of individuals as they must understand it when they are rational, and in which the good is characterized hedonistically, or in terms of satisfaction of desire or interests, the claim in the text is, I think, correct. But as T. M. Scanlon has maintained, another idea of utility, often found in welfare economics, has a quite different point: the aim is not to give an account of individuals' good as they should understand it from a moral point of view; rather, it is to find a general characterization of individuals' good that abstracts from how they more specifically understand it and is appropriately impartial (or neutral) between persons and hence may be used in normative economic theory in considering questions of public policy. See Scanlon, "The Moral Basis of Interpersonal Comparisons," presented at the Conference on Interpersonal Comparisons, University of California at Davis, April 1987. The view stated in the text may need to be restated to deal with this use of the idea of utility.

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comprehensive conceptions of the good, however distinct their content and their related religious and philosophical doctrines, require for their advancement roughly the same primary goods, that is, the same basic rights, liberties, and opportunities, as well as the same all-purpose means such as income and wealth, all of which are secured by the same social bases of self-respect. These goods, we say, are things that citizens need as free and equal persons, and claims to these goods are counted as appropriate claims.[6]

The basic list of primary goods (to which we may add should it prove necessary) has five headings: (i) basic rights and liberties, of which a list may also be given; (ii) freedom of movement and free choice of occupation against a background of diverse opportunities; (iii) powers and prerogatives of offices and positions of responsibility in the political and economic institutions of the basic structure; (iv) income and wealth; and finally, (v) the social bases of self-respect. This list includes mainly features of institutions, that is, basic rights and liberties, institutional opportunities, and prerogatives of office and position, along with income and wealth. The social bases of self-respect are explained in institutional terms supplemented by features of the public political culture such as the public recognition and acceptance of the principles of justice.

Thus the idea is to find a practicable public basis of interpersonal comparisons in terms of objective features of citizens' social circumstances open to view. Provided due precautions are taken, however, we can in principle expand the list to include other goods, for example, leisure time,[7] and even certain mental states such as the absence of physical pain.[8]

6. Expressed in terms of goodness as rationality, we suppose all citizens have a rational plan of life that requires for its fulfillment roughly the same kinds of primary goods. As indicated in Section II, in saying this we rely on various common-sense psychological facts about human needs, their phases of development, and so on. See *Theory*, chap. 7, pp. 433–34, 447.

7. The question of how to handle leisure time was raised by R. A. Musgrave in "Maximin, Uncertainty, and the Leisure Trade-off," *Quarterly Journal of Economics* 88 (1974). See my "Reply to Alexander and Musgrave," ibid. I shall only comment here that twenty-four hours less a standard working day might be included in the index as leisure. Those who are unwilling to work would have a standard working day of extra leisure, and this extra leisure itself would be stipulated as equivalent to the index of primary goods of the least advantaged. So those who surf all day off Malibu must find a way to support themselves and would not be entitled to public funds. This merely indicates, as do the comments in the text, that if necessary the list of primary goods can in principle be expanded.

8. Here I adopt a suggestion of Scanlon's in "The Moral Basis of Interpersonal Comparisons."

These matters I shall not pursue here. What is crucial is that in introducing these further goods we recognize the limits of the political and practicable: first, we must stay within the limits of justice as fairness as a political conception of justice that can serve as the focus of an overlapping consensus; and second, we must respect the constraints of simplicity and availability of information to which any practicable political conception (as opposed to a comprehensive moral doctrine) is subject.

IV

We can now answer our earlier question as to how, given the fact of pluralism, a political understanding of what is to be counted as advantageous in questions of political justice is possible. We start from the practical nature of primary goods. By this I mean that we can actually present a scheme of equal basic liberties and fair opportunities, which, when guaranteed by the basic structure, ensures for all citizens the adequate development and full exercise of their two moral powers and a fair share of the all-purpose means essential for the advancement of their conceptions of the good. While it is neither possible nor just to allow all conceptions of the good to be pursued (as some involve the violation of basic rights and liberties), a basic structure satisfying the principles of justice does permit a wide range of conceptions fully worthy of human life (which is not to say, as we shall see below in Section VI, that it can achieve a social world without loss).

To avoid misunderstanding, observe that fair shares of primary goods are not intended as a measure of citizens' expected overall psychological well-being, or of their utility, as economists might say. Justice as fairness rejects the idea of comparing and maximizing overall well-being in matters of political justice. Nor does it try to estimate the extent to which individuals succeed in advancing their way of life—their overall scheme of final ends—or to judge the intrinsic worth (or the perfectionist value) of those ends (so long as they are compatible with the principles of justice).

Now, one may easily suppose that the idea of primary goods must be mistaken. For they are not what, from within anyone's comprehensive doctrine, can be taken as ultimately important: they are not, in general, anyone's idea of the basic values of human life. Therefore, to focus on primary goods, one may object, is to work for the most part in the wrong space—in the space of institutional features and material things and not

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in the space of basic moral values.[9] In reply, an index of primary goods is not intended as an approximation to what is ultimately important as specified by any particular comprehensive doctrine with its account of moral values. Indeed, it must not be so understood in view of its role in a political conception. From the point of view of such a conception, there exists no other space of values to which the index of primary goods is to approximate, for if there were, this would make the view at least partially comprehensive and hence defeat the aim of achieving an overlapping consensus given the fact of pluralism.[10] The objection, then, may be to the idea of a political conception of justice as such. Of course, citizens must decide for themselves whether, in light of their comprehensive views, and taking into account the great political values realized by the political conception, they can endorse that conception with its idea of society as a fair system of cooperation.[11]

To conclude: given the political conception of citizens as free and equal, primary goods specify what their needs are—or if you like, what their good is as citizens—when questions of justice arise. It is this political conception (supplemented by the framework of goodness as rationality) that enables us to work out what primary goods are needed. While an index of these goods may be made more specific at the constitutional and legislative stages, and interpreted even more specifically at the judicial stage,[12] the index is not intended to approximate to an idea of rational advantage, or good, specified by a nonpolitical (comprehensive) conception. This last

9. Amartya Sen has forcefully stated this objection in various publications. See, for example, his "Equality of What?" (1979), reprinted in *Choice, Welfare and Measurement* (Cambridge: MIT Press, 1982), pp. 353–69.

10. Of course, any list of primary goods and any particular index of these will have to be acceptable in the light of the principles and standards of the political conception itself and the various ideas of the good it uses. The selection of primary goods is guided by that conception's political values and by the ends articulated in its political conceptions of person and society, as well as by the aims basic institutions are to achieve. But these matters are already taken care of if primary goods are specified correctly and suitably related to the political conception as a whole. It helps to meet these aims if the ideas of the good contained in the political conception allow us to say that political life is in various ways intrinsically good, and hence that with those ideas the political conception is complete in the sense explained in Section VIII below. I cannot discuss here how primary goods are related to what Sen calls basic capabilities, nor can I discuss the question (which his objections raise) whether an index of these goods can be made sufficiently flexible to be fully satisfactory.

11. On this point, see "The Idea of an Overlapping Consensus," *Oxford Journal for Legal Studies* 1 (1987), sec. V.

12. For these stages, see *Theory*, sec. 32.

in particular is what political liberalism tries to avoid. Rather, that more specific index specifies for more concrete cases what is to count as citizens' needs as seen by the political conception.

Alternatively, the specification of these needs is a construct worked out from within a political conception and not from within any comprehensive doctrine. The thought is that this construct provides, given the fact of pluralism, the best available standard of justification of competing claims that is mutually acceptable to citizens generally.[13] In most cases the index will not approximate very accurately to what many people most want and value as judged by their comprehensive views. Nevertheless, they can endorse the political conception and hold that what is really important in questions of political justice is the fulfillment of citizens' needs by the institutions of the basic structure in ways the principles of justice, acknowledged by an overlapping consensus, specify as fair.

V

Historically one common theme of liberal thought is that the state must try to be neutral, as it is said, with respect to comprehensive doctrines and their associated conceptions of the good. But it is equally a common theme of critics of liberalism that it fails to be neutral and is, in fact, arbitrarily biased in favor of one or another form of individualism. As I noted at the outset, the assertion of the priority of right may seem to leave justice as fairness (as a form of political liberalism) open to a similar objection.

Thus, in discussing the next two ideas—the idea of permissible conceptions of the good (those permitted by the principles of justice) and that of the political virtues—I shall use the familiar idea of neutrality as a way of introducing the main problems. I believe, however, that the term "neutrality" is unfortunate; some of its connotations are highly misleading, while others suggest altogether impracticable principles. For this reason I have avoided it (and did so in *Theory*). But with due precautions taken, and using it only as a stage piece, as it were, we may clarify how the priority of right connects with the above two ideas of the good.

Neutrality can be defined in quite different ways.[14] One way is proce-

13. This idea of citizens' needs as a construct parallels what Scanlon calls the "conventionalist" interpretation of his concept of urgency. See his "Preference and Urgency," *Journal of Philosophy* 72 (1975): 668.

14. A number of these I discuss in the text. One I do not take up is William Galston's view

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dural, for example, by reference to a procedure that can be legitimated, or justified, without appeal to any moral values at all. Or if this seems impossible, since showing something justified appears to involve an appeal to some values, a neutral procedure may be said to be one justified by an appeal to neutral values, that is, values such as impartiality, consistency in application of general principles to all reasonably related cases (compare the judicial principle that cases similar in relevant respects are to be treated similarly),[15] equal opportunity for the contending parties to present their cases, and the like. These are values that regulate fair procedures for adjudicating between conflicting claims. The specification of a neutral procedure may also draw on values that underlie the principles of free rational discussion between reasonable persons fully capable of thought and judgment, and concerned to find the truth or to reach reasonable agreement based on the best available information.[16]

Justice as fairness is not, without important qualifications, procedurally neutral. Clearly its principles of justice are substantive and express far more than procedural values, and so do its political conceptions of person and society. If we do apply to it the idea of procedural neutrality, we must do so in virtue of its being a political conception that aims to be the focus of an overlapping consensus. That is, the view as a whole hopes to articulate a public basis of justification for the basic structure of a constitutional

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that some forms of liberalism are neutral in the sense that they use no ideas of the good except ones that are purely instrumental (neutral means, as it were). See his "Defending Liberalism," *American Political Science Review* 76 (1982): 622a. Contrary to his suggestion, justice as fairness is not neutral in this way, as will become clear, if it is not clear already.

15. Thus Herbert Wechsler, in his well-known discussion of principled judicial decisions (he is concerned mainly with decisions of the Supreme Court), thinks of neutral principles as those general principles that we are persuaded apply not only to the present case but to all reasonably foreseeable related cases likely to arise given the constitution and the existing political structure. Neutral principles transcend the case at hand and must be defensible as widely applicable. Wechsler says little about the derivation of such principles from the constitution itself or from precedent. See his "Towards Neutral Principles of Constitutional Law," in *Principles, Politics, and Fundamental Law* (Cambridge: Harvard University Press, 1961).

16. For this kind of view, see the instructive discussion of Larmore in *Patterns of Moral Complexity*, pp. 53–59. He speaks of the "neutral justification of political neutrality as one based on a universal norm of rational dialogue" (p. 53), and draws on (while modifying) the important ideas of Jürgen Habermas. See the latter's *Legitimation Crisis*, trans. Thomas McCarthy (Boston: Beacon Press, 1975), pt. III, and "Discursethik—Notizen zu einem Begründungsprogramm," in *Moralbewusstsein und kommunikatives Handeln* (Frankfurt: Suhrkamp, 1983), pp. 53–125.

regime working from fundamental intuitive ideas implicit in the public political culture and abstracting from comprehensive religious, philosophical, and moral doctrines. It seeks common ground—or if one prefers, neutral ground—given the fact of pluralism. This common, or neutral, ground is the political conception itself as the focus of an overlapping consensus.

A very different way of defining neutrality is in terms of the aims of basic institutions and public policy with respect to comprehensive doctrines and their associated conceptions of the good. Here neutrality of aim as opposed to neutrality of procedure means that those institutions and policies are neutral in the sense that they can be endorsed by citizens generally as within the scope of a public political conception. Thus, neutrality might mean, for example, (1) that the state is to ensure for all citizens equal opportunity to advance any conception of the good they freely affirm; (2) that the state is not to do anything intended to favor or promote any particular comprehensive doctrine rather than another, or to give greater assistance to those who pursue it;[17] (3) that the state is not to do anything that makes it more likely that individuals will accept any particular conception rather than another unless steps are taken to cancel, or to compensate for, the effects of policies that do this.[18]

The priority of right excludes the first meaning of neutrality of aim, for it allows only permissible conceptions (those that respect the principles of justice) to be pursued. But that meaning can be amended to allow for this; as thus amended, the state is to secure equal opportunity to advance any permissible conception. In this case, depending on the meaning of equal opportunity, justice as fairness may be neutral in aim. As for the second meaning, it is satisfied in virtue of the features of a political conception: so long as the basic structure is regulated by such a view, its institutions are not intended to favor any comprehensive doctrine. But in regard to the third meaning (considered further in Section VI below), it is surely impossible for the basic structure of a just constitutional regime not to have important effects and influences on which comprehensive doctrines endure and gain adherents over time, and it is futile to try to counteract these effects and influences, or even to ascertain for political purposes how deep and pervasive they are. We must accept the facts of common-sense political sociology.

17. This is the meaning of neutrality in Ronald Dworkin's essay "Liberalism," reprinted in *A Matter of Principle* (Cambridge: Harvard University Press, 1985), pp. 191ff.

18. This statement of the three versions of neutrality draws on Joseph Raz's formulations in *The Morality of Freedom* (Oxford: Oxford University Press, 1986), pp. 114–15.

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To summarize: we may distinguish procedural neutrality from neutrality of aim, but the latter is not to be confused with neutrality of effect or influence. As a political conception for the basic structure justice as fairness as a whole can be seen as exemplifying a kind of procedural neutrality, and it also hopes to satisfy neutrality of aim in the sense that the basic institutions and public policy are not to be designed to favor any particular comprehensive doctrine.[19] Neutrality of effect or influence political liberalism abandons as impracticable, and since this idea is strongly suggested by the term itself, this is a reason for avoiding it.

But even if political liberalism can be seen as neutral in procedure and in aim, it is important to emphasize that it may still affirm the superiority of certain forms of moral character and encourage certain moral virtues. Thus, justice as fairness includes an account of certain political virtues—the virtues of fair social cooperation such as civility and tolerance, reasonableness and the sense of fairness.[20] The crucial point here is that admitting these virtues into a political conception does not lead to the perfectionist state of a comprehensive doctrine.

We can see this once we are clear about the idea of a political conception of justice. As I said in Section I, ideas of the good may be freely introduced as needed to complement the political conception of justice, so long as they are political ideas, that is, so long as they belong to a reasonable political conception of justice for a constitutional regime. This allows us to assume that they are shared by citizens and do not depend on any particular comprehensive doctrine. Since the ideals connected with the political virtues are tied to the principles of political justice and to the forms of judgment and conduct essential to sustain fair social cooperation over time, those ideals and virtues are compatible with political liberalism. They characterize the ideal of a good citizen of a democratic state—a role specified by its political institutions. In this way the political virtues must be distinguished from the virtues that characterize ways of life belonging to comprehensive religious and philosophical doctrines, as well as from the virtues falling under various associational ideals (the ideals of churches and universities, occupations and vocations, clubs and teams) and those appropriate to roles in family life and to the relations between individuals. If a constitutional regime takes steps to strengthen the virtues of toleration

19. This distinction between neutrality of procedure and neutrality of outcome is adapted from Larmore's instructive discussion in *Patterns of Moral Complexity*, pp. 42–47.

20. See "The Idea of an Overlapping Consensus," sec. V, for a discussion of the central importance of these virtues.

and mutual trust, say by discouraging various kinds of religious and racial discrimination (in ways consistent with liberty of conscience and freedom of speech), it does not thereby become a perfectionist state of the kind found in Plato or Aristotle, nor does it establish a particular religion as in the Catholic and Protestant states of the early modern period. Rather, it is taking reasonable measures to strengthen the forms of thought and feeling that sustain fair social cooperation between its citizens regarded as free and equal. This is very different from the state's advancing a particular comprehensive doctrine in its own name.[21]

VI

We have seen that neutrality of effect or influence is an impracticable aim. The principles of any reasonable political conception must impose restrictions on permissible comprehensive views, and the basic institutions those principles enjoin inevitably encourage some ways of life and discourage others, or even exclude them altogether. Thus, the substantive question concerns how the basic structure required by a political conception encourages and discourages certain comprehensive doctrines and whether the way it does so is just. Considering this question will explain the sense in which the state, at least as concerns constitutional essentials, is not to do anything intended to favor any particular comprehensive view.[22] At this point the contrast between political and comprehensive liberalism becomes clear and fundamental.[23]

21. Keep in mind here that the political virtues are identified and justified by the need for certain qualities of character in the citizens of a just and stable constitutional regime. This does not mean that these same characteristics, or similar ones, might not also be nonpolitical virtues insofar as they are valued for other reasons within various particular comprehensive views.

22. This was the second meaning of neutrality of aim noted in the previous section; it is satisfied by a political conception.

23. The next several paragraphs are adapted from my reply in "Fairness to Goodness," *Philosophical Review* 74 (1975): 548–51, to an objection raised by Thomas Nagel in his review of *Theory*, ibid. 72 (1973): 226–29. In an instructive discussion that I shall not attempt to summarize here, Nagel argues that the setup of the original position in *Theory*, although ostensibly neutral between different conceptions of the good, is not actually so. He thinks this is because the suppression of knowledge (by the veil of ignorance) required to bring about unanimity is not equally fair to all parties. The reason is that primary goods, on which the parties base their selection of principles of justice, are not equally valuable in pursuit of all conceptions of the good. Moreover, he says that the well-ordered society of justice as fairness has a strong individualistic bias, and one that is arbitrary because objectivity between

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Now, the encouraging or discouraging of comprehensive doctrines comes about in at least two ways: those doctrines may be in direct conflict with the principles of justice; or else they may be admissible but fail to gain adherents under the political and social conditions of a just constitutional regime. The first case is illustrated by a conception of the good requiring the repression or degradation of certain persons on, say, racial, ethnic, or perfectionist grounds, for example, slavery in ancient Athens or in the antebellum South. Examples of the second case may be certain forms of religion. Suppose that a particular religion, and the conception of the good belonging to it, can survive only if it controls the machinery of state and is able to practice effective intolerance. This religion will cease to exist in the well-ordered society of political liberalism. Let us assume there are such cases, and that some other comprehensive doctrines may endure but always among relatively small segments of society.

The question is this: if some conceptions will die out and others only barely survive in a just constitutional regime, does this by itself imply that its political conception of justice fails to be neutral between them? Given the connotations of "neutral," perhaps it does fail, and this is a difficulty with that term. But the important question surely is whether the political conception is arbitrarily biased against these views, or better, whether it is just or unjust to the persons whose conceptions they are, or might be. Without further explanation, it would not appear to be unjust to them, for social influences favoring some doctrines over others cannot be avoided on any view of political justice. No society can include within itself all forms of life. We may indeed lament the limited space, as it were, of social worlds, and of ours in particular, and we may regret some of the inevitable effects of our culture and social structure. As Sir Isaiah Berlin has long maintained (it is one of his fundamental themes), there is no social world without loss—that is, no social world that does not exclude some ways of life that realize in special ways certain fundamental values. By virtue of its culture and institutions, any society will prove uncongenial to some ways

conceptions of the good is not established. The reply below in the text supplements that in "Fairness to Goodness" in two ways. It makes clear, first, that the conception of the person used in arriving at a workable list of primary goods is a political conception; and second, that justice as fairness itself is a political conception of justice. Once we understand justice as fairness and the conceptions that belong to it in this way, we can make a more forceful reply to Nagel's objection, provided of course it is accepted that neutrality of influence is impracticable.

of life.[24] But these social necessities are not to be mistaken for arbitrary bias or for injustice.

The objection must go further and hold that the well-ordered society of political liberalism fails to establish, in ways that existing circumstances (including the fact of pluralism) allow, a just basic structure within which permissible forms of life have a fair opportunity to maintain themselves and to gain adherents over generations. But if a comprehensive conception of the good is unable to endure in a society securing the familiar equal basic liberties and mutual toleration, there is no way to preserve it consistent with democratic values as articulated by the idea of society as a fair system of cooperation among citizens viewed as free and equal. This raises, but does not of course settle, the question of whether the corresponding form of life would be viable under other historical conditions, and whether its passing is to be regretted.[25]

24. For an instructive discussion of Berlin's view, see Bernard Williams's introduction to *Concepts and Categories* (Oxford: Oxford University Press, 1980), a collection of some of Berlin's important philosophical essays. A similar view is often attributed to Max Weber; see, for example, the essays "Politics as a Vocation" (1918), in *From Max Weber: Essays in Sociology*, ed. H. H. Gerth and C. W. Mills (New York: Oxford University Press, 1958), and "The Meaning of 'Ethical Neutrality' in Sociology and Economics," in *On the Methodology of the Social Sciences*, ed. and trans. E. A. Shils and H. A. Finch (New York: Free Press, 1949). However, the differences between Berlin's and Weber's views are marked. I cannot go into this here except to say I believe that Weber's view rests on a form of value skepticism and voluntarism; political tragedy arises from the conflict of subjective commitments and resolute wills. For Berlin, on the other hand, the realm of values may be fully objective; the point is rather that the full range of values is too extensive to fit into any one social world: not only are they incompatible with one another, imposing conflicting requirements on institutions, but there exists no family of workable institutions with sufficient space for them all. That there is no social world without loss is rooted in the nature of values and the world, and much human tragedy reflects that; a just liberal society may have far more space than other social worlds, but it can never be without loss.

25. In the passage from "Fairness to Goodness" which Galston criticizes in "Defending Liberalism," p. 627a, I should have mentioned and endorsed Berlin's view as indicated in the text. Indeed we may often want to say that the passing of certain forms of life is to be lamented. What is said in that passage is not, I think, inconsistent with political liberalism, but it is seriously lacking by not also emphasizing Berlin's view. I should have gone on explicitly to reject the idea, rightly rejected by Galston, that only unworthy forms of life lose out in a just constitutional regime. That optimistic view is mistaken. It may still be objected by those who affirm the conceptions that cannot flourish that political liberalism does not allow sufficient space for them. But there is no criterion for what counts as sufficient space except that of a reasonable and defensible political conception of justice itself. The idea of sufficient space is metaphorical and has no meaning beyond that shown in the range of comprehensive doctrines which the principles of such a conception permit and which citizens can affirm as worthy of their full allegiance. The objection might still be that the political conception fails to identify the right space, but this is simply a question of which is the most reasonable political conception.

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Historical experience shows that many ways of life pass the test of enduring and gaining adherents over time in a democratic society; and if numbers are not the measure of success—and why should they be?—many pass that test with equal success: different groups with distinctive traditions and ways of life find different comprehensive views fully worthy of their allegiance. Thus, whether political liberalism is arbitrarily biased against certain conceptions and in favor of others turns on whether, given the fact of pluralism and the other historical conditions of the modern world, realizing its principles in institutions specifies fair background conditions for different and even antagonistic conceptions of the good to be affirmed and pursued. Political liberalism is unjustly biased against certain comprehensive conceptions only if, say, individualistic ones alone can endure in a liberal society, or they so predominate that associations affirming values of religion or community cannot flourish, and further, if the conditions leading to this outcome are themselves unjust, in view of present and foreseeable circumstances.

An example may clarify this point: various religious sects oppose the culture of the modern world and wish to lead their common life apart from its foreign influences. A problem then arises about their children's education and the requirements the state can impose. The liberalisms of Kant and Mill may lead to requirements designed to foster the values of autonomy and individuality as ideals to govern much if not all of life. But political liberalism has a different aim and requires far less. It will ask that children's education include such things as knowledge of their constitutional and civic rights, so that, for example, they know that liberty of conscience exists in their society and that apostasy is not a legal crime, all this to ensure that their continued membership in a religious sect when they come of age is not based simply on ignorance of their basic rights or fear of punishment for offenses that do not exist. Moreover, their education should also prepare them to be fully cooperating members of society and enable them to be self-supporting; it should also encourage the political virtues so that they want to honor the fair terms of social cooperation in their relations with the rest of society.

Here it may be objected that requiring children to understand the political conception in these ways is in effect, though not in intention, to educate them to a comprehensive liberal conception. Doing the one may lead to the other, if only because once we know the one we may of our own accord go on to the other. It must be granted that this may indeed happen in the case of some. And certainly there is some resemblance between the

values of political liberalism and the values of the comprehensive liberalisms of Kant and Mill.[26] But the only way this objection can be answered is to set out carefully the great differences in both scope and generality between political and comprehensive liberalism (as specified in Section I). The unavoidable consequences of reasonable requirements for children's education may have to be accepted, often with regret. A full account of political liberalism itself must provide a sufficient reply to the objection.

But beyond the requirements already described, justice as fairness does not seek to cultivate the distinctive virtues and values of the liberalisms of autonomy and individuality, or indeed of any other comprehensive doctrine. For in that case it would cease to be a form of political liberalism. Justice as fairness honors, as far as it can, the claims of those who wish to withdraw from the modern world in accordance with the injunctions of their religion, provided only that they acknowledge the principles of the political conception of justice and appreciate its political ideals of person and society. Observe here that we try to answer the question of children's education entirely within the political conception. The state's concern with their education lies in their role as future citizens, and so in such essential things as their acquiring the capacity to understand the public culture and to participate in its institutions, in their being economically independent and self-supporting members of society over a complete life, and in their developing the political virtues, all this from within a political point of view.

VII

A fifth idea of the good in justice as fairness is that of the good of political society—more specifically, the good that citizens realize both as persons and as a corporate body in maintaining a just constitutional regime and in conducting its affairs. As before we try to explain this good entirely within the political conception.

Let us begin by considering the objection that by not basing itself on a comprehensive religious, philosophical, or moral doctrine, justice as fairness abandons the ideal of a political community and views society as so many distinct individuals, or distinct associations, cooperating solely to

26. And that of Raz in *The Morality of Freedom* (see esp. chaps. 14 and 15), to mention a contemporary example.

pursue their own personal, or associational, advantage without having any final ends in common. (Here a final end is understood as an end valued or wanted for its own sake and not solely as a means to something else.) As a form of political liberalism, justice as fairness is said to regard political institutions as purely instrumental to individual or associational ends, as the institutions of what we may call a "private society." As such, political society itself is not a good at all, but at best a means to individual or associational good.

In reply, justice as fairness does indeed abandon the ideal of political community if by that ideal is meant a political society united on one (partially or fully) comprehensive religious, philosophical, or moral doctrine. That conception of social unity is excluded by the fact of pluralism; it is no longer a political possibility for those who accept the constraints of liberty and toleration embodied in democratic institutions. As we have seen, political liberalism conceives of social unity in a different way—namely, as deriving from an overlapping consensus on a political conception of justice. In such a consensus this political conception is affirmed by citizens holding different and conflicting comprehensive doctrines. This they do from within their own distinct views.

Now, to say a society is well ordered by a conception of justice means three things: (1) that it is a society in which all citizens accept, and acknowledge before one another that they accept, the same principles of justice; (2) that its basic structure—its main political and social institutions and the way they hang together as one system of cooperation—is publicly known, or with good reason believed, to satisfy those principles; and (3) that citizens have a normally effective sense of justice, that is, one that enables them to understand and to apply the principles of justice, and for the most part to act from them as their circumstances require. I believe that social unity so understood is the most desirable conception of unity available to us; it is the limit of the practical best.

A well-ordered society, as thus specified, is not, then, a private society; for in the well-ordered society of justice as fairness citizens do have final ends in common. While it is true that they do not affirm the same comprehensive doctrine, they do affirm the same political conception of justice, and this means that they share one very basic political end, and one that has high priority—namely, the end of supporting just institutions and of giving one another justice accordingly, not to mention many other ends they must also share and realize through their political arrangements.

Moreover, the end of political justice may be among citizens' most basic aims by reference to which they express the kind of persons they want to be.

Together with other assumptions made, these shared final ends provide the basis for the good of a well-ordered society. We have seen that citizens are regarded as having the two moral powers, and the basic rights and liberties of a constitutional regime are to assure that everyone can adequately develop these powers and exercise them fully over the course of a complete life as they so decide. Such a society also provides its citizens with adequate all-purpose means (the primary goods, say, of income and wealth) to do this. Under normal circumstances, then, we may suppose those moral powers to be developed and exercised within institutions of political freedom and liberty of conscience, and their exercise to be supported and sustained by the social bases of mutual self-respect.

These matters assumed, the well-ordered society of justice as fairness is a good in two ways. First, it is a good for persons individually, for two reasons. One is that the exercise of the two moral powers is experienced as good. This is a consequence of the moral psychology used in justice as fairness.[27] And that their exercise may be an important good, and will be one for many people, is clear from the central role of these powers in the political conception of citizens as persons. For the purposes of political justice, we view citizens as normal and fully cooperating members of society over a complete life, and thus as having the moral powers that enable them to assume this role. In this context we might say that part of the essential nature of citizens (within the political conception) is their having the two moral powers that enable them to participate in fair social cooperation. A second reason political society is a good for citizens individually is that it secures for them the good of justice and the social bases of their mutual self-respect. Thus, in securing the equal basic rights and liberties, fair equality of opportunity, and the like, political society guarantees the essentials of persons' public recognition as free and equal members, of their status as citizens. In securing these things political society secures citizens' fundamental needs.

Now, the good involved in the exercise of the moral powers and in the public recognition of persons' status as citizens belongs to the political good of a well-ordered society and not that of a comprehensive religious,

27. In *Theory* this psychology uses what I call the Aristotelian Principle (see sec. 65); other views might adopt different principles to reach much the same conclusion.

philosophical, or moral doctrine. Repeatedly we must insist on this distinction, even though such a doctrine may endorse this good from within its own point of view. Otherwise we lose sight of the path justice as fairness must follow if it is to gain the support of an overlapping consensus. As I have emphasized throughout, the priority of right does not mean that ideas of the good must be avoided; that is impossible. Rather, it means that the ideas used must be political ideas: they must be tailored to meet the restrictions imposed by the political conception of justice and fit into the space it allows.

A well-ordered political society is also good in a second way. For whenever there is a shared final end, an end that calls on the cooperation of many to achieve it, the good realized is social: it is realized through citizens' joint activity in mutual dependence on the appropriate actions being taken by others. Thus, establishing and successfully maintaining reasonably just (though of course always imperfect) democratic institutions over a long period of time, perhaps gradually reforming them over generations, though not to be sure without lapses, is a great social good and appreciated as such. This is shown by the fact that a people refer to it as one of the significant achievements of their history.

That there should be such political and social goods is no more mysterious than that members of an orchestra, or players on a team, or even both teams in a game, should take pleasure and a certain (proper) pride in a good performance, or in a good play of the game, one that they will want to remember. No doubt the requisite conditions become more difficult to satisfy as societies become larger and the social distance between citizens becomes greater, but these differences, as great and inhibiting as they may be, do not affect the psychological principle involved in realizing the good of justice in a well-ordered political society. Moreover, this good can be significant even when the conditions for realizing it are quite imperfect; and the sense of its loss can also be quite significant, as is made clear when a democratic people distinguish different periods in their history, as well as when they take pride in distinguishing themselves from nondemocratic peoples. But I shall not pursue these reflections. We need not establish the absolute importance of political good, only that it is a significant good within a political conception of justice. With this our account of the five ideas of the good is done.[28]

28. It may be asked, however, how far the good of political society is strictly speaking a political good. It is granted that political institutions encourage the development of and pro-

It may, however, be helpful to supplement this discussion of the good of political society with a few remarks about classical republicanism and civic humanism. Classical republicanism I take to be the view that if the citizens of a democratic society are to preserve their basic rights and liberties, including the civil liberties which secure the freedoms of private life, they must also have to a sufficient degree the political virtues (as I have called them) and be willing to take part in public life.[29] The idea is that without widespread participation in democratic politics by a vigorous and informed citizen body, and certainly with a general retreat into private life, even the most well-designed political institutions will fall into the hands of those who seek to dominate and impose their will through the state apparatus either for the sake of power and military glory or for reasons of class and economic interest, not to mention expansionist religious fervor and nationalist fanaticism. The safety of democratic liberties requires the active participation of citizens who possess the political virtues needed to maintain a constitutional regime.

With classical republicanism so understood justice as fairness as a form of political liberalism has no fundamental opposition. At most there can be certain differences on matters of institutional design and the political sociology of democratic regimes. These differences are by no means trivial; they can be extremely important. But there is no fundamental opposition because classical republicanism does not presuppose a comprehensive religious, philosophical, or moral doctrine. Nothing in classical republicanism, as characterized above, is incompatible with political liberalism as I have described it.

But with civic humanism, as I understand it, there is indeed fundamental opposition. For as a form of Aristotelianism, it is sometimes stated as the view that man is a social, even a political, animal whose essential na-

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vide scope for the exercise of the two moral powers and that this is a good. But these powers are also exercised in many other parts of life for many purposes, and surely this wider exercise is not a political good; rather political institutions protect and secure this good. In reply, the point is that in political good strictly speaking we suppose that the moral powers are exercised in political life and in basic institutions as citizens endeavor to maintain them and to use them to conduct public business. Of course, it is true that the moral powers are also exercised far more generally, and one hopes that the political and the nonpolitical sides of life are mutually supporting. This can be granted without denying that as defined political good exists.

29. Machiavelli's *Discourses* is sometimes taken as illustrating classical republicanism. See Quentin Skinner, *Machiavelli* (Oxford: Oxford University Press, 1981), esp. chap. 3. A more appropriate example for our purposes might be Tocqueville's *Democracy in America*.

ture is most fully achieved in a democratic society in which there is widespread and vigorous participation in political life. Here political life is encouraged not as necessary for the protection of the basic liberties of democratic citizenship, and as itself one form of good among others, however important for many persons, but rather because political participation in democratic politics is viewed as the privileged locus of the good life.[30]

From the standpoint of political liberalism, the objection to this comprehensive doctrine is the same as to all other such doctrines, so I need not elaborate. It remains to say only that justice as fairness does not of course deny that some will find their most important good in political life, and therefore that political life is central to their comprehensive good. Indeed, in a well-framed polity it is generally to the good of society as a whole that this be so, in the same way as it is generally beneficial that people develop their different and complementary talents and skills, and engage in mutually advantageous schemes of social cooperation. This leads to a further idea of the good, that of a well-ordered society as a social union of social unions. But this idea is too involved even to sketch at this point and unnecessary for our purposes here.[31]

VIII

I conclude by observing the significance of the fact that justice as fairness is complete as a political conception. Recall that at the outset I said that the right and the good are complementary and that the priority of right does not deny this. The just institutions it requires and the political virtues it encourages would serve no purpose unless they not only permitted but also sustained forms of life that are fully worthy of allegiance. But in addition it is highly desirable that the political conception express ways in which a political society can itself be an intrinsic good—specified within the political conception—for citizens both as individuals and as a corporate body. We have seen in Section VII that this is indeed the case for the well-ordered society of justice as fairness, in contrast to what was there referred to as private society, in which political institutions are viewed by citizens as purely instrumental and all intrinsic good is nonpolitical. The forms of intrinsic good specified within justice as fairness make it com-

30. This interpretation of civic humanism I borrow from Charles Taylor, *Philosophical Papers* (Cambridge: Cambridge University Press, 1985), vol. 2, pp. 334–35. Taylor is discussing Kant and attributes this view to Rousseau, but notes that Kant does not accept it.

31. See *Theory*, sec. 79.

plete: that conception characterizes the right and the good so that they perform their complementary roles within its framework.

Now, one reason this completeness is desirable is that it brings out, in a way we could not express before, why an overlapping consensus is not a mere *modus vivendi*. In a society well ordered by the principles mutually recognized in an overlapping consensus, not only do citizens have many final ends in common, but among them is mutual political justice. Drawing on all five ideas of the good we have surveyed, we can even speak of the mutual good of mutual justice, for surely political justice is something it is rational for each citizen to want from every other.[32] This deepens the idea that a political conception supported by an overlapping consensus is a moral conception affirmed on moral grounds.

A second reason why completeness is desirable is that it strengthens the account of how a *modus vivendi* with the content of a liberal conception of justice might gradually develop over time into an overlapping consensus. Here much depends on the fact that most people's political conceptions are no more than partially comprehensive. Normally we do not have anything like a fully comprehensive religious, philosophical, or moral view, much less have we attempted to study those that do exist, or to work one out for ourselves. This means that the goods internal to political life, the intrinsic good its institutions and activities involve and yield (as discussed in Section VII), are more likely to win an initial allegiance that is independent of our comprehensive views and prior to conflicts with them. Thus when conflicts do arise, the political conception has a better chance of sustaining itself and shaping those views to accord with its require-

32. Here I am relying on how the different ideas of the good are built up in a sequence starting with goodness as rationality. Looking back on what has been said, it is evident that starting with that idea, we next get the primary goods; once we have these, the argument from the original position can proceed, so we arrive next at the two principles of justice, which we then use to specify permissible (comprehensive) conceptions of the good. Once we have the two principles, we are ready to identify the political virtues essential to sustain a just basic structure. And finally, by drawing on the Aristotelian Principle and other elements in justice as fairness, we can specify ways in which the well-ordered political society of justice as fairness is intrinsically good. The remark in the text is simply a further application of these ideas. Goodness as rationality allows us to say that things are good (within the political conception) if they have the properties it is rational for us (as free and equal persons as specified by the political conception) to want, given our rational plan of life. From the point of view of the parties in the original position, mutual justice meets this condition for those they represent; and as citizens in society we normally want justice from everyone else. And the same holds for the political virtues. Of course, to show this convincingly would require a rather long story.

ments. We do not say, of course, that the stronger the initial allegiance the better; but it is desirable, politically speaking, that it be strong enough to make an overlapping consensus stable.[33]

Political liberalism can be understood as the view that under the reasonably favorable conditions that make constitutional democracy possible, political institutions satisfying the principles of a liberal conception of justice realize political values and ideals that normally outweigh whatever other values oppose them. The two desiderata of a political conception that follow from completeness strengthen its stability: allegiance to it tends to go deeper, and so the likelihood that its values and ideals will outweigh those against it is that much greater.

Of course, there can be no guarantee of stability. Political good, no matter how important, can never in general outweigh the transcendent values—certain religious, philosophical, and moral values—that may possibly come into conflict with it. That idea is not being suggested. Rather, we start with the conviction that a constitutional democratic regime is reasonably just and workable, and worth defending. But given the fact of pluralism—the fact that a plurality of conflicting comprehensive religious, philosophical, and moral doctrines are affirmed by citizens in a modern democratic society—how can we design our defense so as to achieve a sufficiently wide support for such a regime?

We do not look to the comprehensive doctrines that in fact exist and then draw up a political conception that strikes some kind of balance between them. To illustrate: in specifying a list of primary goods, or any measure of advantage for a political conception, we can proceed in two ways. One is to look at the various comprehensive doctrines found in society and specify an index of such goods so as to be near to those doctrines' center of gravity, so to speak—that is, so as to find a kind of average of what those who affirmed those different conceptions would need by way of institutional claims and protections and all-purpose means. Doing this might seem the best way to ensure that the index provides the basic elements necessary to advance the conceptions of the good associated with those doctrines and thus increase the likelihood of securing an overlapping consensus. But this is not how justice as fairness proceeds. Instead it elaborates a political conception working from the fundamental intuitive idea of society as a fair system of cooperation. The hope is that the index

33. See "The Idea of an Overlapping Consensus," secs. VI–VII, for a fuller account of the contents of this paragraph.

arrived at from within this idea can be part of an overlapping consensus. We leave aside those comprehensive doctrines that now exist, or that have existed, or that might exist. The thought is not that primary goods are fair to comprehensive conceptions of the good associated with such doctrines, by striking a fair balance among them, but rather that they are fair to free and equal citizens as persons affirming such conceptions.

Thus, we ask how best to frame a conception of justice for a constitutional regime such that those who support, or who might be brought to support, that kind of regime might also endorse the political conception, for all we know in advance about their comprehensive views. This leads to the idea of a political conception of justice that presupposes no such particular view, and encourages the hope that this conception can be supported, given good fortune and enough time to win allegiance to itself, by an enduring overlapping consensus.

[12]

5 *Rights, Goals, and Fairness**

T. M. SCANLON

Critics of utilitarianism frequently call attention to the abhorrent policies that unrestricted aggregative reasoning might justify under certain possible, or even actual, circumstances. They invite the conclusion that to do justice to the firm intuition that such horrors are clearly unjustifiable one must adopt a deontological moral framework that places limits on what appeals to maximum aggregate well-being can justify. As one who has often argued in this way, however, I am compelled to recognize that this position has its own weaknesses. In attacking utilitarianism one is inclined to appeal to individual rights, which mere considerations of social utility cannot justify us in overriding. But rights themselves need to be justified somehow, and how other than by appeal to the human interests their recognition promotes and protects? This seems to be the uncontrovertible insight of the classical utilitarians. Further, unless rights are to be taken as defined by rather implausible rigid formulae, it seems that we must invoke what looks very much like the consideration of consequences in order to determine what they rule out and what they allow. Thus, for example, in order to determine whether a given policy violates the right of freedom of expression it is not enough to know merely that it restricts speech. We may need to consider also its effects: how it would affect access to the means of expression and what the consequences would be of granting to government the kind of regulatory powers it confers.

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I am thus drawn toward a two-tier view: one that gives an important role to consequences in the justification and interpretation of rights but which takes rights seriously as placing limits on consequentialist reasoning at the level of casuistry. Such a view looks like what has been called rule utilitarianism, a theory subject to a number of very serious objections. First, rule utilitarians are hard pressed to explain why, if at base they are convinced utilitarians, they are not thoroughgoing ones. How can they square their utilitarianism with the acceptance of individual actions that are not in accord with the utilitarian formula? Second, rule utilitarianism seems to be open to some of the same objections leveled against utilitarianism in its pure form; in particular it seems no more able than act utilitarianism is to give a satisfactory place to considerations of distributive justice. Third, in attempting to specify which rules it is that are to be applied in the appraisal of acts and policies rule utilitarians of the usual sort are faced with an acute dilemma. If it is some set of ideal rules that are to be applied – those rules general conformity to which would have the best consequences – then the utilitarian case for a concern with rules, rather than merely with the consequences of isolated acts, appears lost. For this case must rest on benefits that flow from the general observance of rules but not from each individual act, and such benefits can be gained only if the rules are in fact generally observed. But if, on the other hand, the rules that are to be applied must be ones that are generally observed, the critical force of the theory seems to be greatly weakened.

The problem, then, is to explain how a theory can have, at least in part, a two-tier structure; how it can retain the basic appeal of utilitarianism, at least as it applies to the foundation of rights, and yet avoid the problems that have plagued traditional rule utilitarianism. As a start towards describing such a theory I will consider three questions. (1) What consequences are to be considered, and how is their value to be determined? (2) How do considerations of distributive justice enter the theory? (3) How does one justify taking rights (or various moral rules) as constraints on the production of valued consequences?

1. Consequences and their values

Here I have two remarks, one of foundation, the other of content. First, as I have argued elsewhere[1] but can here only assert, I depart from the classical utilitarians and many of their modern followers in rejecting subjective preferences as the basis for the valuation of outcomes. This role is to be played instead by an ethically significant, objective notion of the relative importance of various benefits and burdens.

Second, as to content, the benefits and burdens with which the theory is concerned must include not only the things that may happen to people but also factors affecting the ability of individuals to determine what will happen. Some of these factors are the concern of what are generally called rights, commonly[2] distinguished into (claim-) rights to command particular things, where others have a correlative duty to comply; liberties to do or refrain from certain things, where others have no such correlative duties; powers to change people's rights or status; and immunities from powers exercised by others. I take it to be the case that the familiar civil rights, as well as such things as rights of privacy and 'the right to life', are complexes of such elements. The de facto ability effectively to choose among certain options and the de facto absence of interference by others with one's choices are not the same thing as rights, although if it is generally believed that a person has a particular right, say a claim-right, this may contribute to his having such de facto ability or lack of interference. But, however they are created, such abilities and protections are important goods with which any moral theory must be concerned, and the allocation of rights is one way in which this importance receives theoretical recognition.

Any theory of right, since it deals with what agents should and may do, is in a broad sense concerned with the assignment of rights

[1] In 'Preference and Urgency', *The Journal of Philosophy* 72 (1975), pp. 655–70.

[2] Following Hohfeld and others. See W. N. Hohfeld, *Fundamental Legal Conceptions* (New Haven, 1923), and also Stig Kanger, 'New Foundations for Ethical Theory' in Risto Hilpinen, ed., *Deontic Logic: Introductory and Systematic Readings* (Dordrecht, 1971), pp. 36–58. On the distinction between concern with outcomes and concern with the allocation of competences to determine outcomes see Charles Fried, 'Two Concepts of Interests: Some Reflections of the Supreme Court's Balancing Test', *The Harvard Law Review* 76 (1963), p. 755–78.

and liberties. It is relevant to ask, concerning such a theory, how much latitude it gives a person in satisfying moral requirements and how much protection it gives a person through the constraints it places on the actions of others. Traditional utilitarianism has been seen as extreme on both these counts. It is maximally specific in the requirements it imposes on an agent, and, since there are no limits to what it may require to be done, it provides a minimum of reliable protection from interference by others. Objections to utilitarianism have often focused on its demanding and intrusive character,[3] and other theories of right may grant individuals both greater discretion and better protection. But these are goods with costs. When one individual is given a claim-right or liberty with respect to a certain option, the control that others are able to exercise over their own options is to some degree diminished. Further, if we take the assignment of rights to various individuals as, in at least some cases, an end-point of justification, then we must be prepared to accept the situation resulting from their exercise of these rights even if, considered in itself, it may be unattractive or at least not optimal. Both these points have been urged by Robert Nozick,[4] the latter especially in his attack on 'end-state' and 'patterned' theories. What follows from these observations, however, is not Nozick's particular theory of entitlements but rather a general moral about the kind of comparison and balancing that a justification of rights requires: the abilities and protections that rights confer must be assigned values that are comparable not only with competing values of the same kind but also with the values attached to the production of particular end-results.

The same moral is to be drawn from some of Bernard Williams' objections to utilitarianism.[5] Williams objects that utilitarianism, in demanding total devotion to the inclusive goal of maximum happiness, fails to give adequate recognition to the importance, for each individual, of the particular projects which give his life content. The problem with such an objection is that taken alone

[3] See Bernard Williams, 'A Critique of Utilitarianism', in J. J. C. Smart and B. Williams, *Utilitarianism: For and Against* (Cambridge, 1973).

[4] In *Anarchy, State and Utopia* (New York, 1974), esp. pp. 32–35 and Chapter 7.

[5] In Sec. 5 of 'A Critique of Utilitarisnism'.

it may be made to sound like pure self-indulgence. Simply to demand freedom from moral requirements in the name of freedom to pursue one's individual projects is unconvincing. It neglects the fact that these requirements may protect interests of others that are at least as important as one's own. To rise clearly above the level of special pleading these objections must be made general. They must base themselves on a general claim about how important the interests they seek to protect are for any person as compared with the interests served by conflicting claims.

The two preceding remarks – of foundation and of content – are related in the following way. Since the ability to influence outcomes and protection from interference or control by others are things people care about, they will be taken into account in any subjective utilitarian theory. I will later raise doubts as to whether such a theory can take account of them in the right way, but my present concern is with the question what value is to be assigned to these concerns. On a subjective theory these values will be determined by the existing individual preferences in the society in question. I would maintain, however, that prevailing preferences are not an adequate basis for the justification of rights. It is not relevant, for example, to the determination of rights of religious freedom that the majority group in a society is feverishly committed to the goal of making its practices universal while the minority is quite tepid about all matters of religion. This is of course just an instance of the general objection to subjective theories stated above. The equally general response is that one has no basis on which to 'impose' values that run contrary to individual preferences. This objection draws its force from the idea that individual autonomy ought to be respected and that it is offensive to frustrate an individual's considered preferences in the name of serving his 'true interests'. This idea does not itself rest on preferences. Rather, it functions as the objective moral basis for giving preferences a fundamental role as the ground of ethically relevant valuations. But one may question whether this theoretical move is an adequate response to the intuitive idea from which it springs. To be concerned with individual autonomy is to be concerned with the rights, liberties and other conditions necessary for individuals to develop their own aims and interests and to make their preferences effective in shaping their own lives and

contributing to the formation of social policy. Among these will be rights protecting people against various forms of paternalistic intervention. A theory that respects autonomy will be one that assigns all of these factors their proper weight. There is no reason to think that this will be accomplished merely by allowing these weights, and all others, to be determined by the existing configuration of preferences.

2. *Fairness and equality*

Rather than speaking generally of 'distributive justice', which can encompass a great variety of considerations, I will speak instead of fairness, as a property of processes (e.g. of competitions), and equality, as a property of resultant distributions. The question is how these considerations enter a theory of the kind I am describing. One way in which a notion of equality can be built into a consequentialist theory is through the requirement that, in evaluating states of affairs to be promoted, we give equal consideration to the interests of every person. This principle of equal consideration of interests has minimal egalitarian content. As stated, it is compatible with classical utilitarianism which, after all, 'counts each for one and none for more than one'. Yet many have felt, with justification, that utilitarianism gives insufficient weight to distributive considerations. How might this weight be increased? Let me distinguish two ways. The first would be to strengthen the principle of equal consideration of interests in such a way as to make it incompatible with pure utilitarianism. 'Equal consideration' could, for example, be held to mean that in any justification by appeal to consequences we must give priority to those individual interests that are 'most urgent'. To neglect such interests in order to serve instead less urgent interests even of a greater number of people would, on this interpretation, violate 'equality of consideration'. Adoption of this interpretation would ward off some objections to utilitarianism based on its insensitivity to distributive considerations but would at the same time preserve other characteristic features of the doctrine, e.g. some of its radically redistributive implications. Such a 'lexical interpretation' has, of course, its own problems. Its strength (and plausibility)

is obviously dependent on the ranking we choose for determining the urgency of various interests.

The nature of such a ranking is an important problem, but one I cannot pursue here. Whatever the degree of distributive content that is built into the way individual interests are reckoned in moral argument, however, there is a second way in which distributive considerations enter a theory of the kind I wish to propose: equality of distributions and fairness of processes are among the properties that make states of affairs worth promoting. Equality in the distribution of particular classes of goods is at least sometimes of value as a means to the attainment of other valued ends, and in other cases fairness and equality are valuable in their own right.

Classical utilitarianism, of course, already counts equality as a means, namely as a means to maximum aggregate utility. Taken alone, this seems inadequate – too instrumental to account for the moral importance equality has for us. Yet I do think that in many of the cases in which we are most concerned with the promotion of equality we desire greater equality as a means to the attainment of some further end. In many cases, for example, the desire to eliminate great inequalities is motivated primarily by humanitarian concern for the plight of those who have least. Redistribution is desirable in large part because it is a means of alleviating their suffering (without giving rise to comparable suffering elsewhere). A second source of moral concern with redistribution in the contemporary world lies in the fact that great inequalities in wealth give to those who have more an unacceptable degree of control over the lives of others. Here again the case for greater equality is instrumental. Were these two grounds for redistribution to be eliminated (by, say, greatly increasing the standard of living of all concerned and preventing the gap between rich and poor, which remains unchanged, from allowing the rich to dominate) the moral case for equality would not be eliminated, but I believe that it would seem less pressing.

Beyond these and other instrumental arguments, fairness and equality often figure in moral argument as independently valuable states of affairs. So considered, they differ from the ends promoted in standard utilitarian theories in that their value does not rest on their being good things *for* particular individuals: fairness and

equality do not represent ways in which individuals may be *better off*.[6] They are, rather, special morally desirable features of states of affairs or of social institutions. In admitting such moral features into the evaluation of consequences, the theory I am describing departs from standard consequentialist theories, which generally resist the introduction of explicitly moral considerations into the maximand. It diverges also from recent deontological theories, which bring in fairness and equality as specific moral requirements rather than as moral goals. I am inclined to pursue this 'third way' for several reasons.

First, it is not easy to come up with a moral argument for substantive equality (as distinct from mere formal equality or equal consideration of interests) which makes it look like an absolute moral requirement. Second, considerations of fairness and equality are multiple. There are many different processes that may be more or less fair, and we are concerned with equality in the distribution of many different and separable benefits and burdens. These are not all of equal importance; the strength of claims of equality and fairness depends on the goods whose distribution is at issue. Third, these claims do not seem to be absolute. Attempts to achieve equality or fairness in one area may conflict with the pursuit of these goals in other areas. In order to achieve greater equality we may, for example, change our processes in ways that involve unfairness in the handling of some individual cases. Perhaps the various forms of fairness and equality can be brought together under one all-encompassing notion of distributive justice which is always to be increased, but it is not obvious that this is so. In any event, it would remain the case that attempts to increase fairness and equality can have costs in other terms; they may interfere with processes whose efficiency is important to us, or involve unwelcome intrusions into individuals' lives. In such cases of conflict it does not seem that considerations of fairness and equality, as such, are always dominant. An increase in equality may in some cases not be worth its cost; whether it is will depend in part on what it is equality *of*.

[6] Here I am indebted to Kurt Baier. Defending the claim that fairness and equality are intrinsically valuable is of course a further difficult task. Perhaps all convincing appeals to these notions can be reduced to instrumental arguments, but I do not at present see how. Such a reduction would move my theory even closer to traditional utilitarianism.

Economists often speak of 'trade-offs' between equality and other concerns (usually efficiency). I have in the past been inclined, perhaps intolerantly, to regard this as crassness, but I am no longer certain that it is in principle mistaken. The suggestion that equality can be 'traded-off' against other goods arouses suspicion because it seems to pave the way for defenses of the status quo. Measures designed to decrease inequality in present societies are often opposed on the ground that they involve too great a sacrifice in efficiency or in individual liberty, and one way to head off such objections is to hold that equality is to be pursued whatever the cost. But one can hold that appeals to liberty and efficiency do not justify maintaining the status quo – and in fact that considerations of individual liberty provide some of the strongest arguments in favor of increased equality of income and wealth – without holding that considerations of equality are, as such, absolute and take priority over all other values.

3. *Rights*

Why give rights a special place in a basically consequentialist theory? How can a two-tier theory be justified? One common view of the place of rights, and moral rules generally, within utilitarianism holds that they are useful as means to the coordination of action. The need for such aids does not depend on imperfect motivation; it might exist even in a society of perfect altruists. A standard example is a rule regulating water consumption during a drought. A restriction to one bucket a day per household might be a useful norm for a society of utilitarians even though their reasons for taking more water than this would be entirely altruistic. Its usefulness does not depend on self-interest. But the value of such a rule does depend on the fact that the agents are assumed to act independently of one another in partial ignorance of what the others have done or will do. If Dudley knows what others will do, and knows that this will leave some water in the well, then there is no utilitarian reason why he should not violate the rule and take more than his share for some suitable purpose – as the story goes, to water the flowers in the public garden.

I am of two minds about such examples. On the one hand, I can feel the force of the utilitarian's insistence that if the water is not going to be used how can we object to Dudley's taking it? On the other hand, I do not find this line of reply wholly satisfying. Why should *he* be entitled to do what others were not? Well, because he knows and they didn't; he alone has the opportunity. But just because he has it does that mean he can exercise it unilaterally? Perhaps, to be unbearably priggish, he should call the surplus to the attention of the others so that they can all decide how to use it. If this alternative is available is it all right for him to pass it up and act on his own? A utilitarian might respond here that he is not saying that Dudley is entitled to do whatever he wishes with the surplus water; he is entitled to do with it what the principle of utility requires and nothing else.

Here a difference of view is shown. Permission to act outside the rule is seen by the non-utilitarian as a kind of freedom for the agent, an exemption, but it is seen by a utilitarian as a specific moral requirement. Dudley is required to do something that is different from what the others do because his situation is different, but he has no greater latitude for the exercise of discretion or personal preference than anyone else does. This suggests that one can look at an assignment of rights in either of two ways: as a way of constraining individual decisions in order to promote some desired further effect (as in the case of a system of rules defining a division of labor between co-workers) or as a way of parceling out valued forms of discretion over which individuals are in conflict. To be avoided, I think, is a narrow utilitarianism that construes all rights on the first model, e.g. as mechanisms of coordination or as hedges against individual errors in judgment. So construed, rights have no weight against deviant actions that can be shown to be the most effective way of advancing the shared goal.

If, however, the possibility of construing some rights on the second model is kept open, then rights can be given a more substantial role within a theory that is still broadly utilitarian. When, as seems plausible on one view of the water-shortage example, the purpose of an assignment of rights is to ensure an equitable distribution of a form of control over outcomes, then these rights are supported by considerations which persist even

when contrary actions would promote optimum results. This could remain true for a society of conscientious (though perhaps not single-minded) consequentialists, provided that they are concerned with 'consequences' of the sort I have described above. But to say that a rule or a right is not in general subject to exceptions justified on act-utilitarian grounds is not to say that it is absolute. One can ask how important it is to preserve an equitable distribution of control of the kind in question, and there will undoubtedly be some things that outweigh this value. There is no point in observing the one-bucket restriction when the pump-house is on fire. Further, the intent of an assignment of rights on the second model is apt to be to forestall certain particularly tempting or likely patterns of behavior. If this is so, there may be some acts which are literally contrary to the formula in which the right is usually stated but which do not strike us as actual violations of the right. We are inclined to allow them even though the purposes they serve may be less important than the values the right is intended to secure. Restrictions on speech which nonetheless are not violations of freedom of expression are a good example of such 'apparent exceptions'.

Reflections of this kind suggest to me that the view that there is a moral right of a certain sort is generally backed by something like the following:

(i) An empirical claim about how individuals would behave or how institutions would work in the absence of this particular assignment of rights (claim-rights, liberties, etc.).

(ii) A claim that this result would be unacceptable. This claim will be based on valuation of consequences of the sort described in section 1 above, taking into account also considerations of fairness and equality.

(iii) A further empirical claim about how the envisaged assignment of rights will produce a different outcome.

The empirical parts of this schema play a larger or at least more conspicuous role in some rights than in others. In the case of the right to freedom of expression this role is a large one and fairly well recognized. Neglecting this empirical element leads rights to degenerate into implausible rigid formulae. The impossibility of taking such a formula literally, as defining an absolute moral bar, lends plausibility to a 'balancing' view, according to which such

a right merely represents one important value among others, and decisions must be reached by striking the proper balance between them. Keeping in mind the empirical basis of a right counters this tendency and provides a ground (1) for seeing that 'apparent exceptions' of the kind mentioned above are not justified simply by balancing one right against another; (2) for seeing where genuine balancing of interests is called for and what its proper terms are; and (3) for seeing how the content of a right must change as conditions change. These remarks hold, I think, not only for freedom of expression but also for other rights, for example, rights of due process and rights of privacy. In each of these cases a fairly complex set of institutional arrangements and assumptions about how these arrangements operate stands, so to speak, between the formula through which the right is identified and the goals to which it is addressed. This dependence on empirical considerations is less evident in the case of rights, like the right to life, that lie more in the domain of individual morality. I will argue below, however, that this right too can profitably be seen as a system of authorizations and limitations of discretion justified on the basis of an argument of the form just described.

This view of rights is in a broad sense consequentialist in that it holds rights to be justified by appeal to the states of affairs they promote. It seems to differ from the usual forms of rule utilitarianism, however, in that it does not appear to be a maximizing doctrine. The case for most familiar rights – freedom of expression, due process, religious toleration – seems to be more concerned with the avoidance of particular bad consequences than with promoting maximum benefit. But this difference is in part only apparent. The dangers that these rights are supposed to ward off are major ones, not likely to be overshadowed by everyday considerations. Where they are overshadowed, the theory I have described allows for the rights in question to be set aside. Further, the justification for the particular form that such a right takes allows for the consideration of costs. If a revised form of some right would do the intended job as well as the standard form at clearly reduced costs to peripheral interests, then this form would obviously be preferred. It should be noted, however, that if something is being maximized here it can not, in view of the role that the goals of fairness and equality play in the theory, be simply

the sum of individual benefits. Moreover, this recognition of an element of maximization does not mean that just any possible improvement in the way people generally behave will become the subject of a right. Rights concern the alleviation of certain major problems, and incremental gains in other goods become relevant to rights in the way just mentioned only when they flow from improvements in our ways of dealing with such problems.

I have suggested that the case for rights derives in large part from the goal of promoting an acceptable distribution of control over important factors in our lives. This general goal is one that would be of importance to people in a wide range of societies. But the particular rights it calls for may vary from society to society. Thus, in particular, the rights we have on the view I have proposed are probably not identical with the rights that would be recognized under the system of rules, general conformity to which in our society would have the best consequences. The problems to which our rights are addressed are ones that arise given the distribution of power and the prevailing patterns of motivation in the societies in which we live. These problems may not be ones that would arise were an ideal code of behaviour to prevail.[7] (And they might not be the same either as those we would face in a 'state of nature'.) Concern with rights does not involve accepting these background conditions as desirable or as morally unimpeachable; it only involves seeing them as relatively fixed features of the environment with which we must deal.

[7] How much this separates my view of rights from an ideal rule utilitarian theory will depend on how that theory construes the notion of an ideal system of rules being 'in force' in a society. In Brandt's sophisticated version, for example, what is required is that it be true, and known in the society, that a high proportion of adults subscribe to these rules, that is, chiefly, that they are to some extent motivated to avoid violating the rules and feel guilty when they believe they have do so. ('Some Merits of One Form of Rule Utilitarianism' in Gorovitz, ed., *Mill: Utilitarianism, with Critical Essays* [Indianapolis, Ind., 1971].) This may not insure that the level of conformity with these rules is much greater than the level of moral behavior in societies we are familiar with. If it does not, then Brandt's theory may not be much more 'ideal' than the theory of rights offered here. The two theories appear to differ, however, on the issues discussed in sections 1 and 2 above. These issues also divide my view from R. M. Hare's version of rule utilitarianism, with which I am otherwise in much agreement. See his 'Ethical Theory and Utilitarianism', in H. D. Lewis, ed., *Contemporary British Philosophy, Fourth Series* (London, 1976). Like these more general theories, the account of rights offered here has a great deal in common with the view put forward by Mill in the final chapter of *Utilitarianism* (particularly if Mill's remarks about 'justice' are set aside).

Which features of one's society are to be held fixed in this way for purposes of moral argument about rights? This can be a controversial moral question and presents a difficult theoretical issue for anyone holding a view like rule utilitarianism. As more and more is held fixed, including more about what other agents are in fact doing, the view converges toward act utilitarianism. If, on the other hand, very little is held fixed then the problems of ideal forms of rule utilitarianism seem to loom larger: we seem to risk demanding individual observance of rights when this is pointless given the lack of general conformity.

This dilemma is most acute to the degree that the case for rights (or moral rules) is seen to rest on their role in promoting maximum utility through the coordination of individual action. Where this is actually the case – as it is with many rules and perhaps some rights – it is of undoubted importance what others are in fact doing – to what degree these rights and rules are generally observed and how individual action will affect general observance. I suggest, however, that this is not the case with most rights. On the view I propose, a central concern of most rights is the promotion and maintenance of an acceptable distribution of control over important factors in our lives. Where a certain curtailment of individual discretion or official authority is clearly required for this purpose, the fact that this right is not generally observed does not undermine the case for its observance in a given instance. The case against allowing some to dictate the private religious observances of others, for example, does not depend on the existence of a general practice of religious toleration. Some of the benefits at which rights of religious freedom are aimed – the benefits of a general climate of religious toleration – are secured only when there is general compliance with these rights. But the case for enforcing these rights does not depend in every instance on these benefits.

For these reasons, the view of rights I have proposed is not prey to objections often raised against ideal rule utilitarian theories. A further question is whether it is genuinely distinct from an act-consequentialist doctrine. It may seem that, for reasons given above, it cannot be: if an act in violation of a given right yields some consequence that is of greater value than those with which the right is concerned, then on my view the right is to be set aside.

If the act does not have such consequences then, in virtue of its conflict with the right and the values that right protects, it seems that the act would not be justifiable on act-consequentialist grounds anyway. But this rests on a mistake. The values supporting a particular right need not all stand to be lost in every case in which the right is violated. In defending the claim that there is a right of a certain sort, e.g., a particular right of privacy, we must be prepared to compare the advantages of having this right – the advantages, e.g., of being free to decline to be searched – against competing considerations – e.g., the security benefits derived from a more lenient policy of search and seizure. But what stands to be gained or lost in any given instance in which a policeman would like to search me need not coincide with either of these values. It may be that in that particular case I don't care.[8]

There is, then, no incoherence in distinguishing between the value of having a right and the cost of having it violated on a particular occasion. And it is just the values of the former sort that we must appeal to in justifying a two-tier view. What more can be said about these values? From an act-consequentialist point of view the value attached to the kind of control and protection that rights confer seems to rest on mistrust of others. If everyone could be relied upon to do the correct thing from an act-consequentialist standpoint would we still be so concerned with rights? This way of putting the matter obscures several important elements. First, it supposes that we can all agree on the best thing to be done in each case. But concern with rights is based largely on the warranted supposition that we have significantly differing ideas of the good and that we are interested in the freedom to put our own conceptions into practice. Second, the objection assumes that we are concerned only with the correct choice being made and have no independent concern with who makes it. This also seems clearly false. The independent value we attach to being able to make our own choices should, however, be distinguished from the further value we may attach to having it recognized that we are *entitled* to make them. This we may also value in itself as a sign of respect and personhood, but there is a question to what degree this value is an artifact of our moral beliefs and customs rather than a basis

[8] On the importance of establishing the proper terms of balancing see Fried, 'Two Concepts of Interests', p. 758.

for them. Where a moral framework of rights is established and recognized, it will be important for a person to have his status as a right holder generally acknowledged. But is there something analogous to this importance that is lost for everyone in a society of conscientious act consequentialists where no one holds rights? It is not clear to me that there is, but, however this may be, my account emphasizes the value attached to rights for the sake of what they may bring rather than their value as signs of respect.

If the factors just enumerated were the whole basis for concern with rights then one would expect the case for them to weaken and the force of act-consequentialist considerations to grow relatively stronger as (1) the importance attached to outcomes becomes absolutely greater and hence, presumably, also relatively greater as compared with the independent value of making choices one's self, and as (2) the assignment of values to the relevant outcomes becomes less controversial. To some extent both these things happen in cases where life and death are at stake, and here mistrust emerges as the more plausible basis for concern with rights.

4. *Cases of life and death*

From the point of view suggested in this paper, the right to life is to be seen as a complex of elements including particular liberties to act in one's own defense and to preserve one's life, claim-rights to aid and perhaps to the necessities of life, and restrictions on the liberty of others to kill or endanger. Let me focus here on elements in these last two categories, namely limits on the liberty to act in ways that lead to a person's death. An act-consequentialist standard could allow a person to take action leading to the death of another whenever this is necessary to avoid greater loss of life elsewhere. Many find this policy too permissive, and one explanation of this reaction is that it represents a kind of blind conservatism. We know that our lives are always in jeopardy in many ways. Tomorrow I may die of a heart attack or a blood clot. I may be hit by a falling tree or discover that I have a failing liver or find myself stood up against a wall by a group of terrorists. But we are reluctant to open the door to a further form of deadly risk

by licensing others to take our life should this be necessary to minimize loss of life overall. We are reluctant to do this even when the effect would be to increase our net chances of living a long life by decreasing the likelihood that we will actually die when one of the natural hazards of life befalls us. We adopt, as it were, the attitude of hoping against hope not to run afoul of any of these hazards, and we place less stock on the prospect of escaping alive should we be so unlucky. It would not be irrational for a person to *decide* to increase his chances of survival by joining a transplant-insurance scheme, i.e. an arrangement guaranteeing one a heart or kidney should he need one provided he agrees to sacrifice himself to become a donor if he is chosen to do so. But such a decision is sufficiently controversial and the stakes so high that it is not a decision that can be taken to have been made for us as part of a unanimously acceptable basis for the assignment of rights. What I have here called conservatism is, however, uncomfortably close to a bias of the lucky against the unlucky insofar as it rests on a conscious turning of attention away from the prospect of our being one of the unlucky ones.

A substitute for conservatism is mistrust. We are reluctant to place our life in *anyone's* hands. We are even more reluctant to place our lives in *everyone's* hands as the act-consequentialist standard would have us do. Such mistrust is the main factor supporting the observed difference between the rationality of joining a voluntary transplant-insurance scheme and the permissibility of having a compulsory one (let alone the universally administered one that unrestricted act consequentialism could amount to). A person who joins a voluntary scheme has the chance to see who will be making the decisions and to examine the safeguards on the process. In assessing the force of these considerations one should also bear in mind that what they are to be weighed against is not 'the value of life itself' but only a small increase in the probability of living a somewhat longer life.

These appeals to 'conservatism' and mistrust, if accepted, would support something like the distinction between killing and letting die: we are willing to grant to others the liberty not to save us from threat of death when this is necessary to save others, but we are unwilling to license them to put us under threat of death when we have otherwise escaped it. As is well known, however,

the killing/letting die distinction appears to permit some actions leading to a person's death that are not intuitively permissible. These are actions in which an agent refrains from aiding someone already under threat of death and does so because that person's death has results he considers advantageous. (I will assume that they are thought advantageous to someone other than the person who is about to die.) The intuition that such actions are not permitted would be served by a restriction on the liberty to fail to save, specifying that this course of action cannot be undertaken on the basis of conceived advantages of having the person out of the way. Opponents of the law of double effect have sometimes objected that it is strange to make the permissibility of an action depend on quite subtle features of its rationale. In the context of the present theory, however, the distinction just proposed is not formally anomalous. Conferrals of authority and limitations on it often take the form not simply of licensing certain actions or barring them but rather of restricting the grounds on which actions can be undertaken. Freedom of expression embodies restrictions of this kind, for example, and this is one factor responsible for the distinction between real and apparent violations mentioned above.[9]

Reasons for such a restriction in the present case are easy to come by. People have such powerful and tempting reasons for wanting others removed from the scene that it is obviously a serious step to open the door to calculations taking these reasons into account. Obviously, what would be proposed would be a qualified restriction, allowing consideration of the utilitarian, but not the purely self-interested, advantages to be gained from a person's death. But a potential agent's perception of this distinction does not seem to be a factor worth depending on.

The restriction proposed here may appear odd when compared to our apparent policy regarding mutual aid. If, as seems to be the case, we are prepared to allow a person to fail to save another when doing so would involve a moderately heavy sacrifice, why not allow him to do the same for the sake of a much greater benefit, to be gained from that person's death? The answer seems to be that, while a principle of mutual aid giving less consideration to

[9] For a view of freedom of expression embodying this feature, see Scanlon, 'A Theory of Freedom of Expression', *Philosophy and Public Affairs* 1 (1972), p. 204–26.

the donor's sacrifice strikes us as too demanding, it is not nearly as threatening as a policy allowing one to consider the benefits to be gained from a person's death.

These appeals to 'conservatism' and mistrust do not seem to me to provide adequate justification for the distinctions in question. They may explain, however, why these distinctions have some appeal for us and yet remain matters of considerable controversy.

[13]

Between Utility and Rights*

H.L.A. Hart**

I.

I do not think than anyone familiar with what has been published in the last ten years, in England and the United States, on the philosophy of government can doubt that this subject, which is the meeting point of moral, political and legal philosophy, is undergoing a major change. We are currently witnessing, I think, the progress of a transition from a once widely accepted old faith that some form of utilitarianism, if only we could discover the right form, *must* capture the essence of political morality. The new faith is that the truth must lie not with a doctrine that takes the maximisation of aggregate or average general welfare for its goal, but with a doctrine of basic human rights, protecting specific basic liberties and interests of individuals, if only we could find some sufficiently firm foundation for such rights to meet some long familiar objections. Whereas not so long ago great energy and much ingenuity of many philosophers were devoted to making some form of utilitarianism work, latterly such energies and ingenuity have been devoted to the articulation of theories of basic rights.

As often with such changes of faith or redirection of philosophical energies and attention, the new insights which are currently offered us seem to dazzle at least as much as they illuminate. Certainly, as I shall try to show by reference to the work of two now influential contemporary writers, the new faith has been presented in forms which are, in spite of much brillance, in the end unconvincing. My two examples, both American, are taken respectively from the Conservative Right and the Liberal Left of the political spectrum; and while the former, the Conservative, builds a theory of rights on the moral importance of the *separateness* or *distinctness* of human persons which utilitarianism is said to ignore, the latter, the Liberal Left, seeks to erect such a theory on their moral title to equal concern and respect which, it is said, unreconstructed utilitarianism implicitly denies. So while the first theory is dominated by the duty of governments to respect the separateness of persons, the second is dominated by the duty of governments to treat their subjects as equals, with equal concern and respect.

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II.

For a just appraisal of the first of these two theories it is necessary to gain a clear conception of what precisely is meant by the criticism, found in different forms in very many different modern writers, that unqualified utilitarianism fails to recognize or abstracts from the separateness of persons when, as a political philosophy, it calls on governments to maximise the total or the average net happiness or welfare of their subjects. Though this accusation of ignoring the separateness of persons can be seen as a version of the Kantian principle that human beings are ends in themselves it is nonetheless the distinctively modern criticism of utilitarianism. In England Bernard Williams [1] and in America John Rawls[2] have been the most eloquent expositors of this form of criticism; and John Rawls's claim that "Utilitarianism does not take seriously the distinction between persons" [3] plays a very important role in his *A Theory of Justice*. Only faint hints of this particular criticism flickered through the many different attacks made in the past on utilitarian doctrine, ever since Jeremy Bentham in 1776 announced to the world that both government and the limits of government were to be justified by reference to the greatest happiness of the greatest number, and not by reference to any doctrine of natural rights: such doctrines he thought so much "bawling upon paper," [4] and he first announced them in 1776 in a brief rude reply [5] to the American Declaration of Independence.

What then does this distinctively modern criticism of utilitarianism, that it ignores the moral importance of the separateness of individuals, mean? I think its meaning is to be summed up in four main points, though not all the writers who make this criticism would endorse all of them.

The first point is this: In the perspective of classical maximising utilitarianism separate individuals are of no intrinsic importance but only important as the points at which fragments of what *is* important, *i.e.* the total aggregate of pleasure or happiness, are located. Individual persons for it are therefore merely the channels or locations where what is of value is to be found. It is for this reason that as long as the totals are thereby increased there is nothing, if no independent principles of distribution are introduced, to limit permissible trade-offs between the satisfactions of different persons. Hence one individual's happiness or pleasure, however

1. *A Critique of Utilitarianism*, in J. SMART & B. WILLIAMS, UTILITARIANISM, FOR AND AGAINST 108-18 (1973); and *Persons, Character and Morality* in THE IDENTITY OF PERSONS (Rorty ed. 1977).

2. *See* J. RAWLS, A THEORY OF JUSTICE 22-24, 27, 181, 183, 187 (1971).

3. *Id.* at 187.

4. J. BENTHAM, *Anarchical Fallacies*, in 2 WORKS OF JEREMY BENTHAM 494 (Bowring ed. 1843).

5. For an acount of this reply included in *An Answer to the Declaration of the American Congress* (1776) by Bentham's friend John Lind, see my *Bentham and the United States of America*, 19 J.L. & ECON. 547, 555-56 (1976).

innocent he may be, may be sacrificed to procure a greater happiness or pleasure located in other persons, and such replacements of one person by another are not only allowed but required by unqualified utilitarianism when unrestrained by distinct distributive principles.

Secondly, utilitarianism is not, as sometimes it is said to be, an individualistic and egalitarian doctrine, although in a sense it treats persons as equals, or of equal worth. For it does this only by in effect treating individual persons as of *no* worth; since not persons for the utilitarian but the experiences of pleasure or satisfaction or happiness which persons have are the sole items of worth or elements of value. It is of course true and very important that, according to the utilitarian maxim, "everybody [is] to count for one, nobody for more than one" [6] in the sense that in any application of the greatest happiness calculus the equal pains or pleasures, satisfactions or dissatisfactions or preferences of different persons are given the same weight whether they be Brahmins or Untouchables, Jews or Christians, black or white. But since utilitarianism has no direct or intrinsic concern but only an instrumental concern with the relative *levels* of total well-being enjoyed by different persons, its form of equal concern and respect for persons embodied in the maxim "everybody to count for one, nobody for more than one" may license the grossest form of inequality in the actual treatment of individuals, if that is required in order to maximise aggregate or average welfare. So long as that condition is satisfied, the situation in which a few enjoy great happiness while many suffer is as good as one in which happiness is more equally distributed.

Of course in comparing the aggregate economic welfare produced by equal and unequal distribution of resources account must be taken of factors such as diminishing marginal utility and also envy. These factors favour an equal distribution of resources but by no means always favour it conclusively. For there are also factors pointing the other way, such as administrative and transaction costs, loss of incentives and failure of the standard assumption that all individuals are equally good pleasure or satisfaction machines, and derive the same utility from the same amount of wealth.

Thirdly, the modern critique of utilitarianism asserts that there is nothing self-evidently valuable or authoritative as a moral goal in the mere increase in totals of pleasure or happiness abstracted from all questions of distribution. The collective sum of different persons' pleasures, or the net balance of total happiness of different persons (supposing it makes sense to talk of adding them), is not in itself a pleasure or happiness which anybody experiences. Society is not an individual experiencing the aggre-

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6. *See* J.S. Mill, *Utilitarianism* (ch. 5), in 10 Collected Works of John Stuart Mill 157 (1969); J. Bentham, *Plan of Parliamentary Reform,* in 3 Works of Jeremy Bentham 459 (Bowring ed. 1843).

gate collected pleasures or pains of its members; no person experiences such an aggregate.

Fourthly, according to this critique, maximising utilitarianism, if it is not restrained by distinct distributive principles, proceeds on a false analogy between the way in which it is rational for a single prudent individual to order his life and the way in which it is rational for a whole community to order its life through government. The analogy is this: it is rational for one man as a single individual to sacrifice a present satisfaction or pleasure for a greater satisfaction later, even if we discount somewhat the value of the later satisfaction because of its uncertainty. Such sacrifices are amongst the most elementary requirements of prudence and are commonly accepted as a virtue, and indeed a paradigm of practical rationality, and, of course, any form of saving is an example of this form of rationality. In its misleading analogy with an individual's prudence, maximising utilitarianism not merely treats one person's pleasure as replaceable by some greater pleasure of that same person, as prudence requires, but it also treats the pleasure or happiness of one individual as similarly replaceable without limit by the greater pleasure of other individuals. So in these ways it treats the division between persons as of no more moral significance than the division between times which separates one individual's earlier pleasure from his later pleasure, as if individuals were mere parts of a single persisting entity.

III.

The modern insight that it is the arch-sin of unqualified utilitarianism to ignore in the ways I have mentioned the moral importance of the separateness of persons is, I think, in the main, a profound and penetrating criticism. It holds good when utilitarianism is restated in terms of maximum want or preference satisfaction and minimum want or preference frustration rather than in the Benthamite form of the balances of pleasure and pain as psychological states, and it holds good when the maximand is taken to be average rather than total general welfare. But it is capable of being abused to discredit all attempts to diminish inequalities and all arguments that one man's loss may be compensated by another's gain such as have inspired policies of social welfare; all these are discredited as if all necessarily committed the cardinal sin committed by maximising utilitarianism of ignoring the separateness of individuals. This is I think the basis of the libertarian strongly anti-utilitarian political theory developed by Robert Nozick in his influential book, *Anarchy, State and Utopia.*[7] For Nozick a strictly limited set of near absolute individual rights constitute the foundations of morality. Such rights for him "express the

7. R. Nozick, Anarchy, State, and Utopia (1974).

inviolability of persons" [8] and "reflect the fact of our separate existences." [9] The rights are these: each individual, so long as he does not violate the same rights of others, has the right not to be killed or assaulted, to be free from all forms of coercion or limitation of freedom and the right not to have property legitimately acquired, taken, or the use of it limited. He has also the secondary right to punish and exact compensation for violation of his rights, to defend himself and others against such violation. He has the positive right to acquire property by making or finding things and by transfer or inheritance from others and he has the right to make such transfers and binding contracts. The moral landscape which Nozick explicitly presents contains only rights and is empty of everything else except possibly the moral permissibility of avoiding what he terms catastrophe. Hence moral wrongdoing has only one form: the violation of rights, perpetrating a wrong to the holder of a right. So long as rights are not violated it matters not for morality, short of catastrophe, how a social system actually works, how individuals fare under it, what needs it fails to meet or what misery or inequalities it produces. In this scheme of things the basic rights which fill the moral landscape and express the inviolability of persons are few in number but are all equally stringent. The only legitimate State on this view is one to which individuals have transferred their right to punish or exact compensation from others, and the State may not go beyond the night-watchman functions of using the transferred rights to protect persons against force, fraud, and theft or breaches of contract. In particular the State may not impose burdens on the wealth or income or restraints on the liberty of some citizens to relieve the needs or suffering, however great, of others. So a State may only tax its citizens to provide the police, the law courts and the armed forces necessary for defence and the performance of the night-watchman functions. Taxing earnings or profits for the relief of poverty or destitution, however dire the need, or for the general welfare such as public education is on this view morally indefensible; it is said to be "on a par with" forced labour[10] or making the government imposing such taxes into a "part owner" of the persons taxed.[11]

Nozick's development of this extreme libertarian position is wide-ranging. It is full of original and ingenious argument splendidly designed to shake up any complacent interventionist into painful self-scrutiny. But it rests on the slenderest foundation. Indeed many critics have complained of the lack of any argument to show that human beings have the few and only the few but very stringent rights which Nozick assigns to them to support his conclusion that a morally legitimate government cannot have any more extensive functions than the night-watchman's. But the critics

8. *Id.* at 32.
9. *Id.* at 33.
10. *Id.* at 169.
11. *Id.* at 172.

are wrong: there is argument of a sort, though it is woefully deficient. Careful scrutiny of his book shows that the argument consists of the assertion that if the functions of government are not limited to the protection of the basic stringent rights, then that arch-sin of ignoring the separateness of persons which modern critics impute to utilitarianism will have been committed. To sustain this argument Nozick at the start of his book envelops in metaphors all policies imposing burdens or restraints going beyond the functions of the night-watchman State, and the metaphors are in fact all drawn from a description of the arch-sin imputed to utilitarianism. Thus, not only is taxation said to be the equivalent of forced labour but every limitation of property rights, every restriction of liberty for the benefit of others going beyond the constraints imposed by the basic rights, are described as *violating* a person,[12] as a *sacrifice* of that person,[13] or as an outweighing of *one life* by others,[14] or a treatment of a distinct individual as *a resource*[15] for others. So conceptions of justice permitting a graduated income tax to provide for basic needs or to diminish social or economic inequalities are all said to neglect the basic truth "that each individual is a separate person, that his is the only life he has."[16] To hold that a person should bear costs that benefit others more is represented as a "*sacrifice*" of that person and as implying what is false: namely that there is a single social entity with a life of which individual lives are merely part just as one individual's desires sacrificed for the sake of his other desires are only part of his life.[17] This imputation of the arch-sin committed by utilitarianism to any political philosophy which assigns functions to the state more extensive than the night-watchman's constitutes I think the foundation which Nozick offers for his system.

It is a paradoxical feature of Nozick's argument, hostile though it is to any form of utilitarianism, that it yields a result identical with one of the least acceptable conclusions of an unqualified maximising utilitarianism, namely that given certain conditions there is nothing to choose between a society where few enjoy great happiness and very many very little, and a society where happiness is more equally spread. For the utilitarian the condition is that in both societies either aggregate or average welfare is the same. For Nozick the condition is a historical one: that the patterns of distribution of wealth which exist at any time in a society should have come about through exercise of the rights and power of acquisition and voluntary transfer included in ownership and without any violation of the few basic rights. Given the satisfaction of this historical condition, how people fare under the resulting patterns of distribution, whether grossly

12. *Id.* at 32.
13. *Id.* at 33.
14. *Id.*
15. *Id.*
16. *Id.*
17. *Id.* at 32-33.

inegalitarian or egalitarian, is of no moral significance. The only virtue of social institutions on this view is that they protect the few basic rights, and their only vice is failure to do this. Any consequence of the exercise of such rights is unobjectionable. It is as if the model for Nozick's basic moral rights were a legal one. Just as there can be no legal objection to the exercise of a legal right, so in a morality as empty as Nozick's is of everything except rights, there can be no moral objection to the exercise of a moral right.

Why should a critic of society thus assume that there is only one form of moral wrong, namely, violation of individual rights? Why should he turn his gaze away from the consequences in terms of human happiness or misery produced by the working of a system of such rights? The only answer apparent in Nozick's work is that to treat this misery as a matter of moral concern and to require some persons to contribute to the assistance of others only makes sense if one is prepared like the maximising utilitarian to disregard the separateness of individuals and share the superstition that those required to make such contributions are merely part of the life of a single persisting social entity which both makes the contributions and experiences the balance of good that comes from such contributions. This of course simply assumes that utilitarianism is only intelligible if the satisfactions it seeks to maximise are regarded as those of a single social entity. It also assumes that the only alternative to the Nozickian philosophy of right is an unrestricted maximising utilitarianism which respects not persons but only experiences of pleasure or satisfaction; and this is of course a false dilemma. The impression that we are faced with these two unpalatable alternatives dissolves if we undertake the no doubt unexciting but indispensable chore of confronting Nozick's misleading descriptive terms such as "sacrifice of one individual for others," "treating one individual as a resource for others," "making others a part owner of a man," "forced labour" with the realities which these expressions are misused to describe. We must also substitute for the blindingly general use of concepts like "interference with liberty" a discriminating catalogue which will enable us to distinguish those restrictions on liberty which can be imposed only at that intolerable cost of sacrificing an individual's life or depriving it of meaning which according to Nozick is the cost of any restriction of liberty except the restriction on the violation of basic rights. How can it be right to lump together, and ban as equally illegitimate, things so different in their impact on individual life as taking some of a man's income to save others from some great suffering and killing him or taking one of his vital organs for the same purpose? If we are to construct a tenable theory of rights for use in the criticism of law and society we must, I fear, ask such boring questions as: Is taxing a man's earnings or income which leaves him free to choose whether to work and to choose what work to do not altogether different in terms of the burden it imposes from forcing him to labour? Does it really sacrifice him or make him or

his body just a resource for others? Does the admitted moral impermissibility of wounding or maiming others or the existence of an absolute moral right not to have one's vital organs taken for the benefit of others in any way support a conclusion that there exists an absolute moral right to retain untaxed all one's earnings or all the income accrued from inherited property except for taxes to support the army and the police? Can one man's great gain or relief from great suffering not outweigh a small loss of income imposed on another to provide it? Do such outweighings only make sense if the gain and the loss are of the same person or a single "social entity"? Once we shake off that assumption and once we distinguish between the gravity of the different restrictions on different specific liberties and their importance for the conduct of a meaningful life or the development of the personality, the idea that they all, like unqualified maximising utilitarianism, ignore the moral importance of the division of humanity into separate individuals and threaten the proper inviolability of persons disappears into the mist.

There is of course much of value to be learned from Nozick's ingenious and diverting pages, but there are also many quite different criticisms to be made of its foundations apart from the one which I have urged. But since other critics have been busy with many such criticisms I will here mention only one. Even if a social philosophy can draw its morality as Nozick assumes only from a single source; even if that source is individual rights, so that the only moral wrongdoing consists in wrongs done to individuals that violate their rights, and even if the foundation for such rights is respect for the separateness of persons, why should rights be limited as they are by Nozick to what Bentham called the negative services of others, that is to abstention from such things as murder, assault, theft and breach of contract? Why should there not be included a basic right to the positive service of the relief of great needs or suffering or the provision of basic education and skills when the cost of these is small compared with both the need to be met and with the financial resources of those taxed to provide them? Why should property rights, to be morally legitimate, have an absolute, permanent, exclusive, inheritable and unmodifiable character which leaves no room for this? Nozick is I think in particular called upon to answer this question because he is clear that though rights for him constitute the only source of constraint on action, they are not ends to be maximised;[18] the obligations they impose are, as Nozick insists, "side constraints," so the rights form a protective bastion enabling an individual to achieve his own ends in a life he shapes himself; and *that*, Nozick thinks, is the individual's way of giving meaning to life.[19]

But it is of course an ancient insight that for a meaningful life not only the protection of freedom from deliberate restriction but opportunities

18. *Id.* at 28-29.
19. *Id.* at 48-50.

and resources for its exercise are needed. Except for a few privileged and lucky persons, the ability to shape life for oneself and lead a meaningful life is something to be constructed by positive marshalling of social and economic resources. It is not something automatically guaranteed by a structure of negative rights. Nothing is more likely to bring freedom into contempt and so endanger it than failure to support those who lack, through no fault of their own, the material and social conditions and opportunities which are needed if a man's freedom is to contribute to his welfare.

IV.

My second example of contemporary right-based social philosophy is that put forward with very different political implications as one ground for rights in the original, fascinating, but very complex web of theory spun by Professor Ronald Dworkin in his book *Taking Rights Seriously*.[20] Dworkin's theory at first sight seems to be, like Nozick's, implacably opposed to any form of utilitarianism; so much so that the concept of a right which he is concerned to vindicate is expressly described by him as "an anti-Utilitarian Concept." It is so described because for Dworkin "if someone has a right to something then it is wrong for the government to deny it to him even though it would be in the general interest to do so." [21]

In fact the two writers, in spite of this surface similarity, differ on almost every important issue except over the conviction that it is a morality of individual rights which both imposes moral limits on the coercive powers of governments, and in the last resort justifies the use of that power.

Before I turn to examine in detail Dworkin's main thesis I shall summarise the major differences between these two modern philosophers of Right. For Nozick the supreme value is freedom—the unimpeded individual will; for Dworkin it is equality of concern and respect, which as he warns us does not always entail equality of treatment. That governments must treat all their citizens with equal concern and respect is for Dworkin "a postulate of political morality",[22] and, he presumes, everyone accepts it. Consequently these two thinkers' lists of basic rights are very different, the chief difference being that for Dworkin there is no general or residual right to liberty as there is for Nozick. Indeed though he recognizes that many, if not most, liberal thinkers have believed in such a right as Jefferson did, Dworkin calls the idea "absurd." [23] There are only rights to specific liberties such as freedom of speech, worship, association, and personal and sexual

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20. R. Dworkin, Taking Rights Seriously (1977).
21. *Id.* at 269.
22. *Id.* at 272.
23. *Id.* at 267. Yet "Hercules" (Dworkin's model of a Judge) is said not only to believe that the Constitution guarantees an abstract right to liberty but to hold that a right to privacy is a consequence of it. *Id.* at 117.

relationships. Since there is no general right to liberty there is no general conflict between liberty and equality, though the reconciliation of these two values is generally regarded as the main problem of liberalism; nor, since there is no general right to liberty, is there any inconsistency, as conservatives often claim, in the liberal's willingness to accept restriction on economic but not on personal freedom. This is why the political thrust of these two right-based theories is in opposite directions. So far from thinking that the State must be confined to the night-watchman's functions of protecting a few basic negative rights but not otherwise restricting freedom, Dworkin is clear that the State may exercise wide interventionist functions; so if overall social welfare fairly assessed would be thereby advanced, the State may restrict the use of property or freedom of contract; it may enforce desegregation, provide through taxation for public education and culture; it may both prohibit discrimination on grounds of sex or colour where these are taken to be badges of inferiority, and allow schemes of reverse racial discrimination, if required in the general interest, even in the form which the Supreme Court has recently refused to uphold in *Bakke*'s case.[24] But there is no general right to liberty: so the freedom from legal restriction to drive both ways on Lexington Avenue and the freedom, later regretted but upheld in *Lochner*'s case [25] against State legislation, to enter into labour contracts requiring more than ten hours work a day were, as long as they were left unrestricted, legal rights of a sort; but they were not and cannot constitute moral or political rights in Dworkin's strong "anti-Utilitarian" sense, just because restriction or abolition of these liberties might properly be imposed if it advanced general welfare. Finally, notwithstanding the general impression of hostility to utilitarianism suggested by his stress on the "anti-Utilitarian" character of the concept of a right, Dworkin does not reject it wholly as Nozick does, but, as in the Lexington Avenue and labour contract examples, actually endorses a form of utilitarianism. Indeed he says "the vast bulk of the laws which diminish my liberty are justified on Utilitarian grounds." [26] But the utilitarianism which Dworkin endorses is a purified or refined form of it in which a "corrupting" [27] element which he finds in vulgar Benthamite utilitarianism is not allowed to weigh in determining decisions. Where the corrupting element does weigh it destroys, according to Dworkin, the fair egalitarian character, "everybody to count for one, nobody for more than one," which utilitarian arguments otherwise have. This corrupting element causes their use or the use of a majority democratic vote (which he regards as the nearest practical political representation of

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24. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978): and *see* R. DWORKIN, *supra* note 20, at 223-39, and N.Y. Rev. Books, Nov. 10, 1977, at 11-15.

25. *See* Lochner v. New York, 198 U.S. 45 (1905), and R. DWORKIN, *supra* note 20, at 191, 269-278.

26. *Id.* at 269. It is clear that this means "adequately justified," not merely "said to be justified."

27. *Id.* at 235.

utilitarianism) to violate, in the case of certain issues, the fundamental right of all to equal concern and respect.

Before we consider what this "corrupting" element is and how it corrupts I wish to stress the following major point. Dworkin interestingly differs from most philosophers of the liberal tradition. He not merely seeks to draw a vital distinction between mere liberties which may be restricted in the general interest like freedom of contract to work more than ten hours a day, and those preferred liberties which are rights which may not be restricted, but he attempts to do this without entering into some familiar controversial matters. He does not make any appeal to the important role played in the conduct of individual life by such things as freedom of speech or of worship or of personal relations, to show that they are too precious to be allowed to be subordinated to general welfare. So he does not appeal to any theory of human nature designed to show that these liberties are, as John Stuart Mill claimed, among "the essentials of human well-being," [28] "the very ground work of our existence" [29] or to any substantive ideal of the good life or individual welfare. Instead Dworkin temptingly offers something which he believes to be uncontroversial by which to distinguish liberties which are to rank as moral rights like freedom of speech or worship from other freedoms, like freedom of contract or in the use of property, which are not moral rights and may be overridden if they conflict with general welfare. What distinguishes these former liberties is not their greater substantive value but rather a relational or comparative matter, in a sense a procedural matter: the mere consideration that there is an "antecedent likelihood" [30] that if it were left to an unrestricted utilitarian calculation of the general interest or a majority vote to determine whether or not these should be restricted, the balance would be tipped in favour of restriction by that element which, as Dworkin believes, corrupts utilitarian arguments or a majority vote as decision procedures and causes them to fail to treat all as equals with equal concern and respect. So anti-utilitarian rights essentially are a response to a defect—a species of unfairness—likely to corrupt some utilitarian arguments or a majority vote as decision procedures. Hence the preferred liberties are those such as freedom of speech or sexual relations, which are to rank as rights when we know "from our general knowledge of society" [31] that they are in danger of being overridden by the corrupting element in such decision procedures.

What then is this element which may corrupt utilitarian argument or a democratic vote? Dworkin identifies it by a distinction between the personal and external preferences [32] or satisfactions of individuals, both of which vulgar utilitarianism counts in assessments of general welfare and both of

28. J.S. Mill, *supra* note 6, at 255.
29. *Id.*
30. R. Dworkin, *supra* note 20, at 278.
31. *Id.* at 277.
32. *Id.* at 234-38, 275-78.

which may be represented in a majority vote. An individual's personal preferences (or satisfactions) are for (or arise from) the assignment of goods or advantages, including liberties, to himself; his external preferences are for such assignments to others. A utilitarianism refined or purified in the sense that it counted only personal preferences in assessing the balance of social welfare would for Dworkin be "the only defensible form of Utilitarianism" [33] and indeed it is that which justifies the "vast bulk of our laws diminishing liberty." [34] It would, he thinks, genuinely treat persons as equals, even if the upshot was not their equal treatment. So where the balance of personal self-interested preferences supported some restriction on freedom (as it did according to Dworkin in the labour contract cases) or reverse discrimination (as in *Bakke*'s case), the restriction or discrimination may be justified, and the freedom restricted or the claim not to be discriminated against is not a moral or political right. But the vulgar corrupt form of utilitarianism counts both external and personal preferences and is not an acceptable decision procedure since (so Dworkin argues) by counting in external preferences it fails to treat individuals with equal concern and respect or as equals.[35]

Dworkin's ambitious strategy in this argument is to derive rights to specific liberties from nothing more controversial than the duty of governments to treat their subjects with equal concern and respect. His argument here has a certain Byzantine complexity and it is important in assessing it not to be misled by an ambiguity in the way in which a right may be an "anti-Utilitarian right." There is a natural interpretation of this expression which is not Dworkin's sense; it may naturally be taken merely to mean that there are some liberties so precious for individual human life that they must not be overridden even in order to secure an advance in general welfare, because they are of greater value than any such increase of general welfare to be got by their denial, however fair the *procedure* for assessing the general welfare is and however genuinely as a procedure it treats persons as equals. Dworkin's sense is *not* that; his argument is not that these liberties must be safeguarded as rights because their value has been compared with that of the increase in general welfare and found to be greater than it, but because such liberties are likely to be defeated by an unfair form of utilitarian argument which by counting in external preferences fails to treat men as equals. So on this view the very identification of the liberties which are to rank as rights is dependent on the anticipated result of a majority vote or a utilitarian argument; whereas on the natural interpretation of an "anti-Utilitarian right" the liberties which are to rank as rights and prevail over general welfare are quite independently identified.

Dworkin's actual argument is more complicated [36] than this already

33. *Id.* at 276.
34. *Id.* at 269.
35. *Id.* at 237, 275.
36. The main complications are: (1) Personal and external preferences may be intertwined in two different ways. A personal preference, *e.g.*, for the segregated company of white men, may be parasitic on an external preference or prejudice against black men, and

complex story, but I do not think what is omitted is needed for its just assessment. I think both the general form of the argument and its detail are vulnerable to many different objections. The most general objection is the following. What moral rights we have will, on this view, depend on what external preferences or prejudices are current and likely at any given time in any given society to dominate in a utilitarian decision procedure or majority vote. So as far as this argument for rights is concerned, with the progressive liberalisation of a society from which prejudices against, say, homosexual behaviour or the expression of heterodox opinions have faded away, rights to these liberties will (like the State in Karl Marx) wither away. So the more tolerant a society is, the fewer rights there will be; there will not merely be fewer occasions for asserting rights. This is surely paradoxical even if we take Dworkin only to be concerned with rights against the State. But this paradox is compounded by another. Since Dworkin's theory is a response specifically to an alleged defect of utilitarian argument it only establishes rights against the outcome of utilitarian arguments concerning general welfare or a majority democratic vote in which external preferences are likely to tip the balance. This theory as it stands cannot provide support for rights against a tyranny or authoritative government which does not base its coercive legislation on considerations of general welfare or a majority vote. So this particular argument for rights helps to establish individual rights at neither extreme: neither in an extremely tolerant democracy nor in an extremely repressive tyranny. This of course narrows the scope of Dworkin's argument in ways which may surprise readers of his essay "What Rights Do We Have?"[37] But of course he is entitled to reply that, narrow though it is, the reach of this particular argument extends to contemporary Western democracies in which the allegedly corrupting "external preferences" hostile to certain liberties are rife as prejudices. He may say that *that* is good enough—for the time being.[38]

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such "parasitic" preferences are to rank as external preferences not to be counted. (*Id.* at 236). They are however to be distinguished from certain personal preferences when, although they too involve a reference to others, do so only in an instrumental way, regarding others as a means to their personal ends. So a white man's preference that black men be excluded from law school because that will increase his own chances of getting in (*id* at 234-35) or a black man's preference for reverse discrimination against whites because that will increase the number of black lawyers, is to rank as a personal preference and is to be counted. (2) Though personal and external preferences are in principle distinguishable, in practical politics it will often be impossible to discriminate them and to know how many of each lie behind majority votes. Hence whenever external preferences are likely to influence a vote against some specific liberty, the liberty will need to be protected as an "anti-Utilitarian right." So the "anti-Utilitarian" concept of a right is "a response to the philosophical defects of a utilitarianism that counts external preferences and the practical impossibility of a utilitarianism that does not." (*Id.* at 277). Notwithstanding this "practical impossibility," there are cases where according to Dworkin valid arguments may be made to show that external preferences are not likely to have tipped the balance. See his comments on *Lochner*'s case (*id.* at 278) and *Bakke*'s case (*see* note 23 and accompanying text *supra*) and his view that most of the laws limiting liberties are justified on utilitarian grounds (R. DWORKIN, *supra* note 20, at 269).

37. R. DWORKIN, *supra* note 20, at 266-78.

38. This argument from the defect of unreconstructed utilitarianism in counting external preferences is said to be "only one possible ground of rights" (*id.* at 272 and R. DWORKIN, *supra* note 20, at 356 (2d printing 1977)), and is stated to be applicable only in communities

However, even if we accept this reply, a close examination of the detail of the argument shows it to be defective even within its limited scope; and the ways in which it is defective show an important general failing. In constructing his anti-utilitarian right-based theory Dworkin has sought to derive too much from the idea of equal concern and respect for persons, just as Nozick in constructing his theory sought to derive too much from the idea of the separateness of persons. Both of course appear to offer something comfortably firm and uncontroversial as a foundation for a theory of basic rights. But this appearance is deceptive: that it is so becomes clear if we press the question why, as Dworkin argues, does a utilitarian decision procedure or democratic vote which counts both personal and external preferences, *for that reason,* fail to treat persons as equals, so that when as he says it is "antecedently likely" that external preferences may tip the balance against some individual's specific liberty, that liberty becomes clothed with the status of a moral right not to be overridden by such procedures. Dworkin's argument is that counting external preferences corrupts the utilitarian argument or a majority vote as a decision procedure, and this of course must be distinguished from any further independent moral objection there may be to the actual decision resulting from the procedure. An obvious example of such a vice in utilitarian argument or in a majority vote procedure would of course be double counting, *e.g.*, counting one individual's (a Brahmin's or a white man's) vote or preference twice while counting another's (an Untouchable's or a black man's) only once. This is, of course, the very vice excluded by the maxim "everybody [is] to count for one, nobody for more than one" which Mill thought made utilitarianism so splendid. Of course an Untouchable denied some liberty, say liberty to worship, or a black student denied access to higher education as a result of such double counting would not have been treated as an equal, but the right needed to protect him against this is not a right to any specific liberty but simply a right to have his vote or preference count equally with the Brahmin's or the white man's. And of course the decision to deprive him of the liberty in question might also be morally objectionable for reasons quite independent of the unfairness in the procedure by which it was reached: if freedom of religion or access to education is something of which no one should be deprived whatever decision procedure, fair or unfair, is used, then a right to that freedom would be necessary for its protection. But it is vital to distinguish the specific alleged vice of unrefined utilitarianism or a democratic vote in failing, *e.g.*, through double counting, to treat persons as equals, from any independent objection to a particular decision reached through that procedure. It is necesary to bear this in mind in considering Dworkin's argument.

So, finally, why is counting external preferences thought to be, like the

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where the general collective justifications of political decisions is the general welfare. Though Dworkin indicates that a different argument would be needed where collective justification is not Utilitarian (R. DWORKIN, *supra* note 20, at 365 (2d printing 1977)), he does not indicate how in such a case the liberties to be preferred as rights are to be identified.

double counting of the Brahmin's or white man's preference, a vice of utilitarian argument or a majority vote? Dworkin actually says that the inclusion of external preference *is* a "form of double counting."[39] To understand this we must distinguish cases where the external preference is *favourable* to, and so supports, some personal preference or want for some good or advantage or liberty from cases where the external preference is hostile. Dworkin's simple example of the former is where one person wants the construction of a swimming-pool[40] for his use and others, non-swimmers, support this. But why is this a "form of double counting"? No one's preference is counted twice as the Brahmin's is; it is only the case that the proposal for the allocation of some good to the swimmers is supported by the preferences both of the swimmer and (say) his disinterested non-swimmer neighbour. Each of the two preferences is counted only as one; and surely *not* to count the neighbour's disinterested preference on this issue would be to fail to treat the two as equals. It would be "undercounting" and presumably as bad as double counting. Suppose—to widen the illustration—the issue is freedom for homosexual relationships, and suppose that (as may well have been the case at least in England when the old law was reformed in 1967[41]) it was the disinterested external preferences of liberal heterosexuals that homosexuals should have this freedom that tipped the balance against the external preferences of other heterosexuals who would deny this freedom. How in this situation could the defeated opponents of freedom or any one else complain that the procedure, through counting external preferences (both those supporting the freedom for others and those denying it) as well as the personal preferences of homosexuals wanting it for themselves, had failed to treat persons as equals?

It is clear that where the external preferences are hostile to the assignment of some liberty wanted by others, the phenomenon of one person's preferences being supported by those of another, which, as I think, Dworkin misdescribes as a "form of double counting," is altogether absent. Why then, since the charge of double counting is irrelevant, does counting such hostile external preferences mean that the procedure does not treat persons as equals? Dworkin's answer seems to be that if, as a result of such preferences tipping the balance, persons are denied some liberty, say to form certain sexual relations, those so deprived suffer because by this result their concept of a proper or desirable form of life is despised by others, and this is tantamount to treating them as inferior to or of less worth than others, or not deserving equal concern and respect. So every denial of freedom on the basis of external preferences implies that those denied are not entitled to equal concern and respect, are not to be considered as equals. But even if we allow this most questionable interpretation of denials of freedom, still for Dworkin

39. R. Dworkin, *supra* note 20, at 235.
40. *Id.*
41. Sexual Offences Act, 1967, c. 60.

to argue in this way is altogether to change the argument. The objection is no longer that the utilitarian argument or a majority vote is, like double counting, unfair as a procedure because it counts in "external preference," but that a particular *upshot* of the procedure where the balance is tipped by *a particular kind* of external preference, one which denies liberty and is assumed to express contempt, fails to treat persons as equals. But this is a vice not of the mere externality of the preferences that have tipped the balance but of their content: that is, their liberty-denying and respect-denying content. But this is no longer to assign certain liberties the status of ("anti-Utilitarian") rights simply as a response to the specific defects of utilitarianism as Dworkin claims to do. Yet that is not the main weakness in his ingenious argument. What is fundamentally wrong is the suggested interpretation of denials of freedom as denials of equal concern or respect. This surely is mistaken. It is indeed least credible where the denial of a liberty is the upshot of a utilitarian decision procedure or majority vote in which the defeated minority's preferences or votes for the liberty were weighed equally with others and outweighed by numbers. Then the message need not be, as Dworkin interprets it, "You and your views are inferior, not entitled to equal consideration concern or respect," but "You and your supporters are too few. You, like everyone else, are counted as one but no more than one. Increase your numbers and then your views may win out." Where those who are denied by a majority vote the liberty they seek are able, as they are in a fairly working democracy, to continue to press their views in public argument and to attempt to change their opponents' minds, as they in fact with success did after several defeats when the law relating to homosexuality was changed in England, it seems quite impossible to construe every denial of liberty by a majority vote based on external preferences as a judgment that the minority whom it defeats are of inferior worth, not entitled to be treated as equals or with equal concern and respect. What is true is something different and quite familiar but no support for Dworkin's argument: namely that the procedural fairness of a voting system or utilitarian argument which weighs votes and preferences equally is no guarantee that all the requirements of fairness will be met in the actual working of the system in given social conditions. This is so because majority views may be, though they are not always, ill-informed and impervious to argument: a majority of theoretically independent voters may be consolidated by prejudice into a self-deafened or self-perpetuating bloc which affords no fair opportunities to a despised minority to publicise and argue its case. All that is possible and has sometimes been actual. But the moral unacceptability of the results in such cases is not traceable to the inherent vice of the decision procedure in counting external preferences, as if this was analogous to double counting. That, of course, would mean that every denial of liberty secured by the doubly counted votes or preferences would necessarily not only be a denial of liberty but also an instance of failing to treat those denied as equals.

I do not expect, however, that Professor Dworkin would concede the

point that the triumph of the external preference of a majority over a minority is not as such a denial of equal concern and respect for the defeated minority, even if in the face of my criticism he were to abandon the analogy which he uses to support the argument between such a triumph and the procedural vice of double counting, which vice in the plainest and most literal sense of these not very clear phrases certainly does fail to treat all "as equals" or with "equal concern and respect." He would, I think, simply fall back on the idea than any imposition of external preferences is tantamount to a judgment that those on whom they are imposed are of inferior worth, not to be treated as equals or with equal concern and respect. But is this true? Of course that governments should as far as possible be neutral between all schemes of values and impose no external preferences may be an admirable ideal, and it may be the true centre of liberalism, as Dworkin argues, but I cannot see that this ideal is explained or justified or strengthened by its description as a form of, or a derivative from, the duty of governments to show equal concern and respect for their citizens. It is not clear why the rejection of his ideal and allowing a majority's external preferences denying a liberty to prevail is tantamount to an affirmation of the inferior worth of the minority. The majority imposing such external preferences may regard the minority's views as mistaken or sinful; but overriding them, for those reasons (however objectionable on other grounds), seems quite compatible with recognising the equal worth of the holders of such views and may even be inspired by concern for them. In any event both the liberal prescription for governments, "impose no scheme of values on any one," and its opposite, "impose this particular conception of the good life on all," though they are universal prescriptions, seem to have nothing specifically to do with equality or the value of equal concern and respect any more than have the prescriptions "kill no one" and "kill everyone," though of course conformity with such universal prescriptions will involve treating all alike in the relevant respect.[42]

42. My suspicions that the ideas of "equal concern and respect" and treatment "as equals" are either too indeterminate to play the fundamental role which they do in Dworkin's theory or that a vacuous use is being made of the notion of equality are heightened by his latest observations on this subject. (*See Liberalism*, in PUBLIC AND PRIVATE MORALITY 127-28, 136-40 (Hampshire ed. 1978)). Here he argues that in addition to the liberal conception of equal concern and respect there is another, conservative, conception which, far from requiring governments to be as neutral as possible between values or theories of the good life, requires them to treat all men as a "good man would wish to be treated," according to some particular preferred theory of the good life. On this view, denials of certain forms of sexual liberty as well as the maintenance of social and economic inequalities, if required by the preferred moral theory, would be the conservative form of treating all as equals and with equal concern and respect. But a notion of equal concern and respect, hospitable to such violently opposed interpretations (or "conceptions of the concept") does not seem to me to be a single concept at all, and it is far from clear why either of these two conceptions should be thought of as forms of equal concern and respect to all. Though the claim that liberal rights are derived from the duty of governments to treat all their citizens with equal concern and respect has the comforting appearance of resting them on something uncontroversial ("a postulate of political morality" which all are "presumed to accept," R. DWORKIN, *supra* note 20, at 272), this appearance dissolves when it is revealed that there is an alternative interpretation of this fundamental duty from which most liberal rights could not be derived but negations of many liberal rights could.

Though the points urged in the last paragraphs destroy the argument that denial of liberty on the basis of external preferences is a denial of equal concern and respect and the attempted derivation of rights from equality, this does not mean that such denials of freedom are unobjectionable or that there is no right to it: it means rather that the freedom must be defended on other grounds than equality. Utilitarian arguments, even purified by the exclusion of external preferences, can produce illiberal and grossly inegalitarian results. Some liberties, because of the role they play in human life, are too precious to be put at the mercy of numbers even if in favourable circumstances they may win out. So to protect such precious liberties we need rights which are indeed "anti-Utilitarian rights" and "anti-" much else, but so far as they are "anti-Utilitarian" they are so in the common and not the Dworkinian sense of that expression, and they are needed as a shield not only against a preponderance of external preferences but against personal preferences also. Freedom of speech, for example, may need to be defended against those who would abridge and suppress it as dangerous to their prosperity, security, or other personal interests.[43] We cannot escape, as Dworkin's purported derivation of such rights from equality seeks to do, the assertion of the value of such liberties as compared with advances in general welfare, however fairly assessed.

It is in any case surely fantastic to suppose that what, for example, those denied freedom of worship, or homosexuals denied freedom to form sexual relations, have chiefly to complain about is not the restriction of their liberty with all its grave impact on personal life or development and happiness, but that they are not accorded *equal* concern and respect: that others are accorded a concern and respect denied to them. When it is argued that the denial to some of a certain freedom, say to some form of religious worship or to some form of sexual relations, is essentially a denial of equal concern and respect, the word "equal" is playing an empty but misleading role. The vice of the denial of such freedom is not its inequality or unequal impact: if that *were* the vice the prohibition by a tyrant of all forms of religious worship or sexual activity would not increase the scale of the evil as in fact it surely would, and the evil would vanish if all were converted to the banned faith or to the prohibited form of sexual relationship. The evil is the denial of liberty or respect; not *equal* liberty or *equal* respect: and what is deplorable is the ill-treatment of the victims and not the relational matter of the unfairness of their treatment compared with others. This becomes clear if we

43. Dworkin certainly seems to endorse utilitarian arguments purified of external preferences, yet he states that his arguments against an unrestricted utilitarianism are not in favor of a restricted one. (R. Dworkin, *supra* note 20, at 357 (2d printing 1977)). The contrary impression is given by earlier statements such as that the vast bulk of laws which diminish our liberty are justified on utilitarian grounds, R. Dworkin, *supra* note 20, at 269, and the following comment on the right of liberty of contract claimed in *Lochner*'s case: "I cannot think of any argument that a political decision to limit such a right . . . is antecedently likely to give effect to external preferences and *in that way* offend the right of those whose liberty is curtailed to equal concern and respect. If as I think no such argument can be made out then the alleged right does not exist." *Id.* at 278 (emphasis added).

contrast with this spurious invocation of equality a genuine case of a failure to treat men as equals in the literal sense of these words: namely literal double counting, giving the Brahmin or the white man two votes to the Untouchable's or black man's single vote. Here the single vote given to the latter is indeed bad just because the others are given two: it is, unlike the denial of a religious or sexual freedom, a genuine denial of *equality* of concern and respect, and this evil *would* vanish and *not* increase if the restriction to a single vote were made universal.

V.

I conclude that neither Nozick's nor Dworkin's attempt to derive rights from the seemingly uncontroversial ideas of the separateness of persons or from their title to equal concern and respect succeeds. So in the rough seas which the philosophy of political morality is presently crossing between the old faith in utilitarianism and the new faith in rights, perhaps these writers' chief and very considerable service is to have shown, by running up against them, some of the rocks and shoals to be avoided, but not where the safe channels lie for a prosperous voyage. That still awaits discovery. Much valuable work has been done, especially by these and other American philosophers, but there is much still to be done to identify the peculiar features of the dimension of morality constituted by the conception of basic moral rights and the way in which that dimension of morality relates to other values pursued through government; but I do not think a satisfactory foundation for a theory of rights will be found as long as the search is conducted in the shadow of utilitarianism, as both Nozick's and Dworkin's in their different ways are. For it is unlikely that the truth will be in a doctrine mainly defined by its freedom from utilitarianism's chief defect—neglecting the separateness of persons—or in a doctrine resting, like Dworkin's, everything on "equal concern and respect" as a barrier against an allegedly corrupt form of utilitarianism.

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ARE THERE ANY ABSOLUTE RIGHTS?

By Alan Gewirth

It is a widely held opinion that there are no absolute rights. Consider what would be generally regarded as the most plausible candidate: the right to life. This right entails at least the negative duty to refrain from killing any human being. But it is contended that this duty may be overridden. that a person may be justifiably killed if this is the only way to prevent him from killing some other, innocent person. or if he is engaged in combat in the army of an unjust aggressor nation with which one's own country is at war. It is also maintained that even an innocent person may justifiably be killed if failure to do so will lead to the deaths of other such persons. Thus an innocent person's right to life is held to be overridden when a fat man stuck in the mouth of a cave prevents the exit of speleologists who will otherwise drown, or when a child or some other guiltless person is strapped onto the front of an aggressor's tank, or when an explorer's choice to kill one among a group of harmless natives about to be executed is the necessary and sufficient condition of the others' being spared, or when the driver of a runaway trolley can avoid killing five persons on one track only by killing one person on another track.[1] And topping all such tragic examples is the cata-

[1]For the cave example, see Philippa Foot, "The Problem of Abortion and the Doctrine of Double Effect", *Oxford Review*, no. 5 (1967), p. 7 For the "innocent shield" and the tank, see Robert Nozick, *Anarchy, State, and Utopia* (New York, 1974), p. 35, and Judith J. Thomson, *Self-Defense and Rights* (Lindley Lecture, University of Kansas, 1976), p. 11. For the explorer and the natives, see Bernard Williams, "A Critique of Utilitarianism", in J. J. C. Smart and B. Williams, *Utilitarianism For and Against* (Cambridge, 1973), pp. 98-9. For the trolley example, see Foot, *op. cit.*, p. 8, and Judith J. Thomson, "Killing, Letting Die, and the Trolley Problem", *The Monist*, 59 (1976), pp. 206 ff. I have borrowed from Thomson's *Self-Defense and Rights*, p. 10, the terminological distinction used below between "infringing" and "violating" a right.

strophic situation where a nuclear war or some other unmitigated disaster can be avoided only by infringing some innocent person's right to life.

Despite such cases, I shall argue that certain rights can be shown to be absolute. But first the concept of an absolute right must be clarified.

I

1. I begin with the Hohfeldian point that the rights here in question are claim-rights (as against liberties, powers, and so forth) in that they are justified claims or entitlements to the carrying out of correlative duties, positive or negative. A duty is a requirement that some action be performed or not be performed; in the latter, negative case, the requirement constitutes a prohibition.

A right is *fulfilled* when the correlative duty is carried out, i.e., when the required action is performed or the prohibited action is not performed. A right is *infringed* when the correlative duty is not carried out, i.e., when the required action is not performed or the prohibited action is performed. Thus someone's right to life is infringed when the prohibited action of killing him is performed; someone's right to medical care is infringed when the required action of providing him with medical care is not performed. A right is *violated* when it is unjustifiably infringed, i.e., when the required action is unjustifiably not performed or the prohibited action is unjustifiably performed. And a right is *overridden* when it is justifiably infringed, so that there is sufficient justification for not carrying out the correlative duty, and the required action is justifiably not performed or the prohibited action is justifiably performed.

A right is *absolute* when it cannot be overridden in any circumstances, so that it can never be justifiably infringed and it must be fulfilled without any exceptions.

The idea of an absolute right is thus doubly normative: it includes not only the idea, common to all claim-rights, of a justified claim or entitlement to the performance or non-performance of certain actions, but also the idea of the exceptionless justifiability of performing or not performing those actions as required. These components show that the question whether there are any absolute rights demands for its adequate answer an explicit concern with criteria of justification. I shall here assume what I have elsewhere argued for in some detail: that these criteria, insofar as they are valid, are ultimately based on a certain supreme principle of morality, the Principle of Generic Consistency (*PGC*).[2] This principle requires of every agent that he act in accord with the generic rights of his recipients as well as of himself, i.e., that he fulfil these rights. The generic rights are rights to the necessary conditions of action, freedom and well-being, where the latter is defined in terms of the various substantive abilities and conditions needed for action and for successful action in general. The *PGC* provides the ultimate

[2]Alan Gewirth, *Reason and Morality* (Chicago, 1978), pp. 135 ff., 197-198, 343-44.

justificatory basis for the validity of these rights by showing that they are equally had by all prospective purposive agents, and it also provides in general for the ordering of the rights in cases of conflict. Thus if two moral rights are so related that each can be fulfilled only by infringing the other, that right takes precedence whose fulfilment is more necessary for action. This criterion of degrees of necessity for action explains, for example, why one person's right not to be lied to must give way to another person's right not to be killed when these two rights are in conflict. In some cases the application of this criterion requires a context of institutional rules.

2. The general formula of a right is as follows: "A has a right to X against B by virtue of Y". In addition to the right itself, there are four elements here: the *subject* of the right, the right-holder (A); the *object* of the right (X); the *respondent* of the right, the person who has the correlative duty (B); and the *justificatory basis* or *ground* of the right (Y). I shall refer to these elements jointly as the *contents* of the right. Each of the elements may vary in generality. Various rights may conflict with one another as to one or another of these elements, so that not all rights can be absolute.

One aspect of these conflicts is especially important for understanding the question of absolute rights. Although, as noted above, the *objects* of moral rights are hierarchically ordered (according to the degree of their necessity for action), this is not true of the *subjects* of the rights. If one class or group of persons inherently had superior moral rights over another class or group (as was held to be the case throughout much of human history), any conflict between their respective rights would be readily resoluble: the rights of the former group would always take precedence, they would never be overridden (at least by the rights of members of other groups), and to this extent they would be absolute.[3] It is because (as is shown by the *PGC* as well as by other moral principles) moral rights are equally distributed among all human persons as prospective purposive agents that some of the main conflicts of rights arise. This is most obviously the case where one person's right to life conflicts with another person's, since in the absence of guilt on either side, it is assumed that the two persons have equal rights. Thus the difficulty of supporting the thesis that there are absolute rights derives much of its force from its connection with the principle that all persons are equal in their moral rights.

3. The differentiation of the elements of rights serves to explicate the various levels at which rights may be held to be absolute. We may distinguish three such levels. The first is that of *Principle Absolutism*. According to this, what is absolute, and thus always valid and never overridden, is only some moral principle of a very high degree of generality which, referring to

[3]Cf. Friedrich Nietzsche, *The Will to Power*, sec. 872: "The great majority of men have no right to existence, but are a misfortune to higher men" (trans. Walter Kaufmann (New York, 1967), p. 467). See also Nietzsche, *Beyond Good and Evil*, sec. 260 (trans. Kaufmann (New York, 1966), p. 206).

the subjects, the respondents, and especially the objects of rights in a relatively undifferentiated way, presents a general formula for all the diverse duties of all respondents or agents toward all subjects or recipients. The *PGC* is such a principle; so too are the Golden Rule, the law of love, Kant's categorical imperative, and the principle of utility. Principle Absolutism, however, may leave open the question whether any specific rights are always absolute, and what is to be done in cases of conflict. Even act-utilitarianism might be an example of Principle Absolutism, for it may be interpreted as saying that those rights are absolute whose fulfilment would serve to maximize utility overall. These rights, whatever they may be, might of course vary in their specific contents from one situation to another.

At the opposite extreme is *Individual Absolutism*, according to which an individual person has an absolute right to some particular object at a particular time and place when all grounds for overriding the right in the particular case have been overcome. But this still leaves open the question of what are the general grounds or criteria for overriding any right, and what are the other specific relevant contents of such rights.

It is at the intermediate level, that of *Rule Absolutism*, that the question of absolute rights arises most directly. At this level, the rights whose absoluteness is in question are characterized in terms of specific objects with possible specification also of subjects and respondents, so that a specific rule can be stated describing the content of the right and the correlative duty. The description will not use proper names and other individual referring expressions, as in the case of Individual Absolutism, nor will it consist only in a general formula applicable to many specifically different kinds of rights and duties and hence of objects, subjects, and respondents, as in the case of Principle Absolutism. It is at this level that one asks whether the right to life of all persons or of all innocent persons is absolute, whether the rights to freedom of speech and of religion are absolute, and so forth.

The rights whose absoluteness is considered at the level of Rule Absolutism may vary in degree of generality, in that their objects, their subjects, and their respondents may be given with greater or lesser specificity. Thus there is greater specificity as we move along the following scale: the right of all persons to life, the right of all innocent persons to life, the right of all innocent persons to an economically secure life, the right of children to receive an economically secure and emotionally satisfying life from their parents, and so forth.

This variability raises the following problem. For a right to be absolute, it must be conclusively valid without any exceptions. But, as we have seen, rights may vary in generality, and all the resulting specifications of their objects, subjects, or respondents may constitute exceptions to the more general rights in which such specifications are not present. For example, the right of innocent persons to life may incorporate an exception to the right of all persons to life, for the rule embodying the former right may be

stated thus. All persons have a right not to be killed except when the persons are not innocent, or except when such killing is directly required in order to prevent them from killing somebody else. Similarly, when it is said that all persons have a right to life, the specification of 'persons' may suggest (although it does not strictly entail) the exception-making rule that all animals (or even all organisms) have a right to life except when they are not persons (or not human). Hence, since an absolute right is one that is valid without any exceptions, it may be concluded either that no rights are absolute because all involve some specification, or that all rights are equally absolute because once their specifications are admitted they are entirely valid without any further exceptions.

The solution to this problem consists in seeing that not all specifications of the subjects, objects, or respondents of moral rights constitute the kinds of exception whose applicability to a right debars it from being absolute. I shall indicate three criteria for permissible specifications. First, when it is asked concerning some moral right whether it is absolute, the kind of specification that may be incorporated in the right can only be such as results in a concept that is recognizable to ordinary practical thinking. This excludes rights that are "overloaded with exceptions" as well as those whose application would require intricate utilitarian calculations.[4]

Second, the specifications must be justifiable through a valid moral principle. Since, as we saw above, the idea of an absolute right is doubly normative, a right with its specification would not even begin to be a candidate for absoluteness unless the specification were morally justified and could hence be admitted as a condition of the justifiability of the moral right. There is, for example, a good moral justification for incorporating the restriction of innocence on the subjects of the right not to be killed; but there is not a similarly good moral justification for incorporating racial, religious, and other such particularist specifications. It must be emphasized, however, that this moral specification guarantees only that the right thus specified is an appropriate candidate for being absolute; it is, of itself, not decisive as to whether the right *is* absolute.

A third criterion is that the permissible specification of a right must exclude any reference to the possibly disastrous consequences of fulfilling the right. Since a chief difficulty posed against absolute rights is that for any right there can be cases in which its fulfilment may have disastrous consequences, to put this reference into the very description of the right would remove one of the main grounds for raising the question of absoluteness.

The relation between rights and disasters is complicated by the fact that the latter, when caused by the actions of persons, are themselves infringe-

[4]See R. M. Hare, "Principles", *Proceedings of the Aristotelian Society*, 73 (1972-73), pp. 7 ff. This paper is also relevant to some of the other issues of "exceptions" discussed above. See also Marcus G. Singer, *Generalization in Ethics* (New York, 1961), pp. 100-103, 124-133, and David Lyons, "Mill's Theory of Morality", *Noûs*, 10 (1976), pp. 112-13.

ments of rights. This point casts a new light on the consequentialist's thesis that there are no absolute rights. For when he says that every right may be overridden if this is required in order to avoid certain catastrophes—such as when torture alone will enable the authorities to ascertain where a terrorist has hidden a fused charge of dynamite—the consequentialist is appealing to basic rights. He is saying that in such a case one right—the right not to be tortured—is overridden by another right—the right to life of the many potential victims of the explosion. This raises the following question. Can the process of one right's overriding another continue indefinitely or does the process come to a stop with absolute rights?

In order to deal with this question, two points must be kept in mind. First, even when catastrophes threatening the infringement of basic rights are invoked to override other rights, at least part of the problem created by such conflict depends, as was noted above, on the assumption that all the persons involved have equal moral rights. There would be no serious conflict of rights and no problem about absolute rights if, for example, the rights of the persons threatened by the catastrophe were deemed inferior to those of persons not so threatened.

Second, despite the close connection between rights in general and the rights threatened by disastrous consequences, it is important to distinguish them. For if the appeal to avoidance of disastrous consequences were to be construed simply as an appeal for the fulfilment or protection of certain basic rights, then, on the assumption that certain disasters must always be avoided when they are threatened, the consequentialist would himself be an absolutist. We can escape this untoward result and render more coherent the opposition between absolutism and consequentialism if we recognize a further important assumption of the question whether there are any absolute rights. Amid the various possible specifications of Rule Absolutism, the rights in question are the normative property of *distinct individuals*.[5] In referring to some event as a "disaster" or a "catastrophe", on the other hand, what is often meant is that a large mass of individuals *taken collectively* loses some basic good to which they have a right. It is their *aggregate* loss that constitutes the catastrophe. (This, of course, accounts for the close connection between the appeal to disastrous consequences and utilitarianism.) Thus the question whether there are any absolute rights is to be construed as asking whether distinct individuals, each of whom has equal moral rights (and who are to be characterized, according to the conditions of Rule Absolutism, by specifications that are morally justifiable and recognizable to ordinary practical thinking), have any rights that may never be overridden by any other considerations, including even their catastrophic consequences for collective rights.

[5]Cf. H. L. A. Hart, "Are There Any Natural Rights?", *Philosophical Review*, 64 (1955), p. 182, and Hart, "Bentham on Legal Rights", in *Oxford Essays in Jurisprudence*, 2nd Series, ed. A. W. B. Simpson (Oxford, 1973), p. 193.

II

4. We must now examine the merits of the prime consequentialist argument against the possibility of absolute moral rights: that circumstances can always be imagined in which the consequences of fulfilling the rights would be so disastrous that their requirements would be overridden. The formal structure of the argument is as follows: (1) If R, then D. (2) $O(\sim D)$ (3) Therefore, $O(\sim R)$. For example, (1) if some person's right to life is fulfilled in certain circumstances, then some great disaster may or will occur. But (2) such disaster ought never to (be allowed to) occur. Hence, (3) in such circumstances the right ought not to be fulfilled, so that it is not absolute.

Proponents of this argument have usually failed to notice that a parallel argument can be given in the opposite direction. If exceptions to the fulfilment of any moral right can be justified by imagining the possible disastrous consequences of fulfilling it, why cannot exceptionless moral rights be justified by giving them such contents that their infringement would be unspeakably evil? The argument to this effect may be put formally as follows: (1) If $\sim R$, then E. (2) $O(\sim E)$. (3) Therefore, $O(R)$. For example, (1) if a mother's right not to be tortured to death by her own son is not fulfilled, then there will be unspeakable evil. But (2) such evil ought never to (be allowed to) occur. Hence, (3) the right ought to be fulfilled without any exceptions, so that it is absolute.

Two preliminary points must be made about these arguments. First, despite their formal parallelism, there is an important difference in the meaning of 'then' in their respective first premises. In the first argument, 'then' signifies a consequential causal connection: if someone's right to life is fulfilled, there may or will ensue as a result the quite distinct phenomenon of a certain great disaster. But in the second argument, 'then' signifies a moral conceptual relation: the unspeakable evil is not a causal *consequence* of a mother's being tortured to death by her own son; it is rather a central moral constituent of it. Thus the second argument is not consequentialist, as the first one is, despite the fact that each of their respective first premises has the logical form of antecedent and consequent.

A related point bears on the second argument's specification of the right in question as a mother's right not to be tortured to death by her own son. This specification does not transgress the third requirement given above for permissible specifications: that reference to disastrous consequences must not be included in the formulation of the right. For the torturing to death is not a disastrous causal consequence of infringing the right; it is directly an infringement of the right itself, just as not being tortured to death by her own son is not a consequence of fulfilling the right but *is* the right. This distinction can perhaps be seen more clearly in such a less extreme case as the right not to be lied to. Being told a lie is not a causal *consequence* of infringing this right; rather, it just is an infringement of the right. In each case, moreover, the first two requirements for permissible specifications of

moral rights are also satisfied: their contents are recognizable to ordinary practical thinking and they are justified by a valid moral principle.

5. Let us now consider the right mentioned above: a mother's right not to be tortured to death by her own son. Assume (although these specifications are here quite dispensable) that she is innocent of any crime and has no knowledge of any. What justifiable exception could there be to such a right? I shall construct an example which, though fanciful, has sufficient analogues in past and present thought and action to make it relevant to the status of rights in the real world.[6]

Suppose a clandestine group of political extremists have obtained an arsenal of nuclear weapons; to prove that they have the weapons and know how to use them, they have kidnapped a leading scientist, shown him the weapons, and then released him to make a public corroborative statement. The terrorists have now announced that they will use the weapons against a designated large distant city unless a certain prominent resident of the city, a young politically active lawyer named Abrams, tortures his mother to death, this torturing to be carried out publicly in a certain way at a specified place and time in that city. Since the gang members have already murdered several other prominent residents of the city, their threat is quite credible. Their declared motive is to advance their cause by showing how powerful they are and by unmasking the moralistic pretensions of their political opponents.

Ought Abrams to torture his mother to death in order to prevent the threatened nuclear catastrophe? Might he not merely pretend to torture his mother, so that she could then be safely hidden while the hunt for the gang members continued? Entirely apart from the fact that the gang could easily pierce this deception, the main objection to the very raising of such questions is the moral one that they seem to hold open the possibility of acquiescing and participating in an unspeakably evil project. To inflict such extreme harm on one's mother would be an ultimate act of betrayal; in performing or even contemplating the performance of such an action the son would lose all self-respect and would regard his life as no longer worth living.[7] A mother's right not to be tortured to death by her own son is beyond any compromise. It is absolute.

[6]Cf. Aristotle, *Nicomachean Ethics*, III. 1. 1110a5, 27, and H. V. Dicks, *Licensed Mass Murder: A Socio-Psychological Study of Some S.S. Killers* (London, 1972). For similar extreme examples, see I. M. Crombie, "Moral Principles", in *Christian Ethics and Contemporary Philosophy*, ed. Ian T. Ramsey (New York, 1966), p. 258; Paul Ramsey, "The Case of the Curious Exception", in *Norm and Context in Christian Ethics*, ed. Gene H. Outka and P. Ramsey (New York, 1968), pp. 101, 127 ff.; Donald Evans, "Paul Ramsey on Exceptionless Moral Rules", *American Journal of Jurisprudence*, 16 (1971), pp. 204, 207; John M. Swomley, Jr., in *The Situation Ethics Debate*, ed. Harvey Cox (Philadelphia, 1968), p. 87. I have elsewhere argued for another absolute right: the right to the non-infliction of cancer. See Alan Gewirth, "Human Rights and the Prevention of Cancer", *American Philosophical Quarterly*, 17 (1980), pp. 117-25.

[7]This reference to the minimal moral conditions of a worthwhile life is, of course, an ancient theme; see Aristotle, *Nicomachean Ethics*, III. 1. 1110a 27; IV. 3. 1124b 7; IX. 8. 1169a 20 ff. For an excellent contemporary statement, see Alan Donagan, *The*

This absoluteness may be analysed in several different interrelated dimensions, all stemming from the supreme principle of morality. The principle requires respect for the rights of all persons to the necessary conditions of human action, and this includes respect for the persons themselves as having the rational capacity to reflect on their purposes and to control their behaviour in the light of such reflection. The principle hence prohibits using any person merely as a means to the well-being of other persons. For a son to torture his mother to death even to protect the lives of others would be an extreme violation of this principle and hence of these rights, as would any attempt by others to force such an action. For this reason, the concept appropriate to it is not merely 'wrong' but such others as 'despicable', 'dishonourable', 'base', 'monstrous'. In the scale of moral modalities, such concepts function as the contrary extremes of concepts like the supererogatory. What is supererogatory is not merely good or right but goes beyond these in various ways; it includes saintly and heroic actions whose moral merit surpasses what is strictly required of agents. In parallel fashion, what is base, dishonourable, or despicable is not merely bad or wrong but goes beyond these in moral demerit since it subverts even the minimal worth or dignity both of its agent and of its recipient and hence the basic presuppositions of morality itself. Just as the supererogatory is superlatively good, so the despicable is superlatively evil and diabolic, and its moral wrongness is so rotten that a morally decent person will not even consider doing it. This is but another way of saying that the rights it would violate must remain absolute.

6. There is, however, another side to this story. What of the thousands of innocent persons in the distant city whose lives are imperilled by the threatened nuclear explosion? Don't they too have rights to life which, because of their numbers, are far superior to the mother's right? May they not contend that while it is all very well for Abrams to preserve his moral purity by not killing his mother, he has no right to purchase this at the expense of their lives, thereby treating them as mere means to his ends and violating their own rights? Thus it may be argued that the morally correct description of the alternative confronting Abrams is not simply that it is one of not violating or violating an innocent person's right to life, but rather not violating one innocent person's right to life and thereby violating the right to life of thousands of other innocent persons through being partly responsible for their deaths, or violating one innocent person's right to life and thereby protecting or fulfilling the right to life of thousands of other innocent persons. We have here a tragic conflict of rights and an illustration of the heavy price exacted by moral absolutism. The aggregative consequentialist who holds that that action ought always to be performed which maxi-

Theory of Morality (Chicago, 1977), especially pp. 156-57, 183. For other recent discussions of the relation of the agent's character and intentions to moral absolutism, see John Casey, "Actions and Consequences", in *Morality and Moral Reasoning*, ed. J. Casey (London, 1971), pp. 155-7, 195 ff.; R. A. Duff, "Absolute Principles and Double Effect", *Analysis*, 36 (1976), pp. 73 ff.; P. T. Geach, *The Virtues* (Cambridge, 1977), pp. 113-17.

mizes utility or minimizes disutility would maintain that in such a situation the lives of the thousands must be preferred.

An initial answer may be that terrorists who make such demands and issue such threats cannot be trusted to keep their word not to drop the bombs if the mother is tortured to death; and even if they now do keep their word, acceding in this case would only lead to further escalated demands and threats. It may also be argued that it is irrational to perpetrate a sure evil in order to forestall what is so far only a possible or threatened evil. Philippa Foot has sagely commented on cases of this sort that if it is the son's duty to kill his mother in order to save the lives of the many other innocent residents of the city, then "anyone who wants us to do something we think wrong has only to threaten that otherwise he himself will do something we think worse".[8] Much depends, however, on the nature of the "wrong" and the "worse". If someone threatens to commit suicide or to kill innocent hostages if we do not break our promise to do some relatively unimportant action, breaking the promise would be the obviously right course, by the criterion of degrees of necessity for action. The special difficulty of the present case stems from the fact that the conflicting rights are of the same supreme degree of importance.

It may be contended, however, that this whole answer, focusing on the probable outcome of obeying the terrorists' demands, is a consequentialist argument and, as such, is not available to the absolutist who insists that Abrams must not torture his mother to death whatever the consequences.[9] This contention imputes to the absolutist a kind of indifference or even callousness to the sufferings of others that is not warranted by a correct understanding of his position. He can be concerned about consequences so long as he does not regard them as possibly superseding or diminishing the right and duty he regards as absolute. It is a matter of priorities. So long as the mother's right not to be tortured to death by her son is unqualifiedly respected, the absolutist can seek ways to mitigate the threatened disastrous consequences and possibly to avert them altogether. A parallel case is found in the theory of legal punishment: the retributivist, while asserting that punishment must be meted out only to the persons who deserve it because of the crimes they have committed, may also uphold punishment for its deterrent effect so long as the latter, consequentialist consideration is subordinated to and limited by the conditions of the former, antecedentalist consideration.[10] Thus the absolutist can accommodate at least part of the consequentialist's substantive concerns within the limits of his own principle.

Is any other answer available to the absolutist, one that reflects the core of his position? Various lines of argument may be used to show that in refusing to torture his mother to death Abrams is not violating the rights

[8] "The Problem of Abortion and the Doctrine of Double Effect" (see n. 1), p. 10.

[9] See Jonathan Bennett, "Whatever the Consequences", *Analysis*, 26 (1966), pp. 89-91.

[10] See Gewirth, *Reason and Morality*, pp. 294-9.

of the multitudes of other residents who may die as a result, because he is not morally responsible for their deaths. Thus the absolutist can maintain that even if these others die they still have an absolute right to life because the infringement of their right is not justified by the argument he upholds. At least three different distinctions may be adduced for this purpose. In the unqualified form in which they have hitherto been presented, however, they are not successful in establishing the envisaged conclusion.

One distinction is between direct and oblique intention. When Abrams refrains from torturing his mother to death, he does not directly intend the many ensuing deaths of the other inhabitants either as end or as means. These are only the foreseen but unintended side-effects of his action or, in this case, inaction. Hence, he is not morally responsible for those deaths.

Apart from other difficulties with the doctrine of double effect, this distinction as so far stated does not serve to exculpate Abrams. Consider some parallels. Industrialists who pollute the environment with poisonous chemicals and manufacturers who use carcinogenic food additives do not directly intend the resulting deaths; these are only the unintended but foreseen side-effects of what they do directly intend, namely, to provide profitable demand-fulfilling commodities. The entrepreneurs in question may even maintain that the enormous economic contributions they make to the gross national product outweigh in importance the relatively few deaths that regrettably occur. Still, since they have good reason to believe that deaths will occur from causes under their control, the fact that they do not directly intend the deaths does not remove their causal and moral responsibility for them. Isn't this also true of Abrams's relation to the deaths of the city's residents?

A second distinction drawn by some absolutists is between killing and letting die. This distinction is often merged with others with which it is not entirely identical, such as the distinctions between commission and omission, between harming and not helping, between strict duties and generosity or supererogation. For the present discussion, however, the subtle differences between these may be overlooked. The contention, then, is that in refraining from killing his mother, Abrams does not kill the many innocent persons who will die as a result; he only lets them die. But one does not have the same strict moral duty to help persons or to prevent their dying as one has not to kill them; one is responsible only for what one does, not for what one merely allows to happen. Hence, Abrams is not morally responsible for the deaths he fails to prevent by letting the many innocent persons die, so that he does not violate their rights to life.

The difficulty with this argument is that the duties bearing on the right to life include not only that one not kill innocent persons but also that one not let them die when one can prevent their dying at no comparable cost. If, for example, one can rescue a drowning man by throwing him a rope, one has a moral duty to throw him the rope. Failure to do so is morally

culpable. Hence, to this extent the son who lets the many residents die when he can prevent this by means within his power is morally responsible for their deaths.

A third distinction is between respecting other persons and avoiding bad consequences. Respect for persons is an obligation so fundamental that it cannot be overridden even to prevent evil consequences from befalling some persons. If such prevention requires an action whereby respect is withheld from persons, then that action must not be performed, whatever the consequences.

One of the difficulties with this important distinction is that it is unclear. May not respect be withheld from a person by failing to avert from him some evil consequence? How can Abrams be held to respect the thousands of innocent persons or their rights if he lets them die when he could have prevented this? The distinction also fails to provide for degrees of moral urgency. One fails to respect a person if one lies to him or steals from him; but sometimes the only way to prevent the death of one innocent person may be by stealing from or telling a lie to some other innocent person. In such a case, respect for one person may lead to disrespect of a more serious kind for some other innocent person.

7. None of the above distinctions, then, serves its intended purpose of defending the absolutist against the consequentialist. They do not show that the son's refusal to torture his mother to death does not violate the other persons' rights to life and that he is not morally responsible for their deaths. Nevertheless, the distinctions can be supplemented in a way that does serve to establish these conclusions.

The required supplement is provided by the principle of the intervening action. According to this principle, when there is a causal connection between some person A's performing some action (or inaction) X and some other person C's incurring a certain harm Z, A's moral responsibility for Z is removed if, between X and Z, there intervenes some other action Y of some person B who knows the relevant circumstances of his action and who intends to produce Z or who produces Z through recklessness. The reason for this removal is that B's intervening action Y is the more direct or proximate cause of Z and, unlike A's action (or inaction), Y is the sufficient condition of Z as it actually occurs.[11]

An example of this principle may help to show its connection with the absolutist thesis. Martin Luther King Jr. was repeatedly told that because he led demonstrations in support of civil rights, he was morally responsible for the disorders, riots, and deaths that ensued and that were shaking the American Republic to its foundations.[12] By the principle of the intervening

[11]Cf. H. L. A. Hart and A. M. Honoré, *Causation in the Law* (Oxford, 1959), pp. 69 ff., 127 ff., 292 ff. For an application of this principle in a related context, see Gewirth, "Human Rights and the Prevention of Cancer" (n. 6 above), pp. 118-9.

[12]See, e.g., Charles E. Whittaker in Whittaker and William Sloane Coffin Jr., *Law, Order and Civil Disobedience* (Washington, D.C., 1967), pp. 11 ff.

action however, it was King's opponents who were responsible because their intervention operated as the sufficient conditions of the riots and injuries. King might also have replied that the Republic would not be worth saving if the price that had to be paid was the violation of the civil rights of black Americans. As for the rights of the other Americans to peace and order, the reply would be that these rights cannot justifiably be secured at the price of the rights of blacks.

It follows from the principle of the intervening action that it is not the son but rather the terrorists who are morally as well as causally responsible for the many deaths that do or may ensue on his refusal to torture his mother to death. The important point is not that he lets these persons die rather than kills them, or that he does not harm them but only fails to help them or that he intends their deaths only obliquely but not directly. The point is rather that it is only through the intervening lethal actions of the terrorists that his refusal eventuates in the many deaths. Since the moral responsibility is not the son's, it does not affect his moral duty not to torture his mother to death, so that her correlative right remains absolute.

This point also serves to answer some related questions about the rights of the many in relation to the mother's right. Since the son's refusal to torture his mother to death is justified, it may seem that the many deaths to which that refusal will lead are also justified, so that the rights to life of these many innocent persons are not absolute. But since they are innocent, why aren't their rights to life as absolute as the mother's? If, on the other hand, their deaths are unjustified, as seems obvious, then isn't the son's refusal to torture his mother to death also unjustified, since it leads to those deaths? But from this it would follow that the mother's right not to be tortured to death by her son is not absolute, for if the son's not infringing her right is unjustified, then his infringing it would presumably be justified.

The solution to this difficulty is that it is a fallacy to infer, from the two premises (1) the son's refusal to kill his mother is justified and (2) many innocent persons die as a result of that refusal, to the conclusion (3) their deaths are justified. For, by the principle of the intervening action, the son's refusal is not causally or morally responsible for the deaths; rather, it is the terrorists who are responsible. Hence, the justification referred to in (1) does not carry through to (2). Since the terrorists' action in ordering the killings is unjustified, the resulting deaths are unjustified. Hence, the rights to life of the many innocent victims remain absolute even if they are killed as a result of the son's justified refusal, and it is not he who violates their rights. He may be said to intend the many deaths obliquely, in that they are a foreseen but unwanted side-effect of his refusal. But he is not responsible for that side-effect because of the terrorists' intervening action.

It would be unjustified to violate the mother's right to life in order to protect the rights to life of the many other residents of the city. For rights cannot be justifiably protected by violating another right which, according

to the criterion of degrees of necessity for action, is at least equally important. Hence, the many other residents do not have a right that the mother's right to life be violated for their sakes. To be sure, the mother also does not have a right that their equally important rights be violated in order to protect hers. But here too it must be emphasized that in protecting his mother's right the son does not violate the rights of the others; for by the principle of the intervening action, it is not he who is causally or morally responsible for their deaths. Hence too he is not treating them as mere means to his or his mother's ends.

8. Where, then, does this leave us? From the absoluteness of the mother's right not to be tortured to death by her son, does it follow that in the described circumstances a nuclear explosion should be permitted to occur over the city so that countless thousands of innocent persons may be killed, possibly including Abrams and his mother?

Properly to deal with this question, it is vitally important to distinguish between abstract and concrete absolutism. The abstract absolutist at no point takes account of consequences or of empirical or causal connections that may affect the subsequent outcomes of the two alternatives he considers. He views the alternatives as being both mutually exclusive and exhaustive. His sole concern is for the moral guiltlessness of the agent, as against the effects of the agent's choices for human weal or woe.

In contrast, as I suggested earlier, the concrete absolutist is concerned with consequences and empirical connections, but always within the limits of the right he upholds as absolute. His consequentialism is thus limited rather than unlimited. Because of his concern with empirical connections, he takes account of a broader range of possible alternatives than the simple dualism to which the abstract absolutist confines himself. His primary focus is not on the moral guiltlessness of the agent but rather on the basic rights of persons not to be subjected to unspeakable evils. Within this focus, however, the concrete absolutist is also deeply concerned with the effects of the fulfilment of these rights on the basic well-being of other persons.

The significance of this distinction can be seen by applying it to the case of Abrams. If he is an abstract absolutist, he deals with only two alternatives which he regards as mutually exclusive as well as exhaustive: (1) he tortures his mother to death; (2) the terrorists drop a nuclear bomb killing thousands of innocent persons. For the reasons indicated above, he rejects (1). He is thereby open to the accusation that he chooses (2) or at least that he allows (2) to happen, although the principle of the intervening action exempts him from moral guilt or responsibility.

If, however, Abrams is a concrete absolutist, then he does not regard himself as being confronted only by these two terrible alternatives, nor does he regard them or their negations as mutually exclusive. His thought-processes include the following additional considerations. In accordance with a point suggested above, he recognizes that his doing (1) will not *assure* the non-occurrence of (2). On the contrary, his doing (1) will probably lead to further threats of the occurrence of (2) unless he or someone else performs

further unspeakably evil actions (3), (4), and so forth. (A parallel example may be found in Hitler's demand for Czechoslovakia at Munich after his taking over of Austria, his further demand for Poland after the capitulation regarding Czechoslovakia, and the ensuing tragedies.) Moreover, (2) may occur even if Abrams does (1). For persons who are prepared to threaten that they will do (2) cannot be trusted to keep their word.

On the other hand, Abrams further reasons, his not doing (1) may well not lead to (2). This may be so for several reasons. He or the authorities or both must try to engage the terrorists in a dialogue in which their grievances are publicized and seriously considered. Whatever elements of rationality may exist among the terrorists will thereby be reinforced, so that other alternatives may be presented. At the same time, a vigorous search and preventive action must be pursued so as to avert the threatened bombing and to avoid any recurrences of the threat.

It is such concrete absolutism, taking due account of consequences and of possible alternatives, that constitutes the preferred pattern of ethical reasoning. It serves to protect the rights presupposed in the very possibility of a moral community while at the same time it gives the greatest probability of averting the threatened catastrophe. In the remainder of this paper, I shall assume the background of concrete absolutism.

III

9. I have thus far argued that the right of a mother not to be tortured to death by her son is absolute. But the arguments would also ground an extension of the kind of right here at issue to many other subjects and respondents, including fathers, daughters, wives, husbands, grandparents, cousins, and friends. So there are many absolute rights, on the criterion of plurality supplied by Rule Absolutism.

It is sometimes held that moral obligations are "agent-relative" in that, at least in cases of conflict, one ought to give priority to the welfare of those persons with whom one has special ties of family or affection.[13] Applied to the present question, this view would suggest that the subjects having the absolute right that must be respected by respondents are limited to the kinds of relations listed above. It may also be thought that as we move away from familial and affectional relations, the proposed subjects of rights come to resemble more closely the anonymous masses of other persons who would be killed by a nuclear explosion, so that a quantitative measure of numbers of lives lost would become a more cogent consideration in allocating rights.

These conclusions, however, do not follow. Most of the arguments I have given above for the mother's absolute right not to be tortured to death apply to other possible human subjects without such specifications. My purpose in beginning with such an extreme case as the mother-son relation was to focus the issue as sharply as possible; but, this focus once gained, it may be

[13] See Derek Parfit, "Innumerate Ethics", *Philosophy and Public Affairs*, 7 No. 4 (1978), p. 287.

widened in the ways just indicated. Although the mother has indeed a greater right to receive effective concern from her son than from other, unrelated persons, the unjustifiability of violating rights that are on the same level of necessity for action is not affected either by degrees of family relationship or by the numbers of persons affected. Abrams would not be justified in torturing to death some other innocent person in the described circumstances, and in failing to murder he would not be morally responsible for the deaths of other innocent persons who might be murdered by someone else as a consequence.

These considerations also apply to various progressively less extreme objects of rights than the not being tortured to death to which I have so far confined the discussion. The general content of these objects may be stated as follows: All innocent persons have an absolute right not to be made the intended victims of a homicidal project. This right, despite its increase in generality over the object, subject, and respondents of the previous right, still conforms to the requirements of Rule Absolutism. The word 'intended' here refers both to direct and to oblique intention, with the latter being subject to the principle of the intervening action. The word 'project' is meant to indicate a definite, deliberate design; hence, it excludes the kind of unforeseeable immediate crisis where, for example, the unfortunate driver of a trolley whose brakes have failed must choose between killing one person or five. The absolute right imposes a prohibition on any form of active participation in a homicidal project against innocent persons, whether by the original designers or by those who would accept its conditions with a view to warding off what they would regard as worse consequences. The meaning of 'innocent' raises many questions of interpretation into which I have no space to enter here, but some of its main criteria may be gathered from the first paragraph of this paper. As for 'persons', this refers to all prospective purposive agents.

The right not to be made the intended victim of a homicidal project is not the only specific absolute right, but it is surely one of the most important. The general point underlying all absolute rights stems from the moral principle presented earlier. At the level of Principle Absolutism, it may be stated as follows: Agents and institutions are absolutely prohibited from degrading persons, treating them as if they had no rights or dignity. The benefit of this prohibition extends to all persons, innocent or guilty; for the latter, when they are justly punished, are still treated as responsible moral agents who are capable of understanding the principle of morality and acting accordingly, and the punishment must not be cruel or arbitrary. Other specific absolute rights may also be generated from this principle. Since the principle requires of every agent that he act in accord with the generic rights of his recipients as well as of himself, specific rights are absolute insofar as they serve to protect the basic presuppositions of the valid principle of morality in its equal application to all persons.

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POSTMODERNIST BOURGEOIS LIBERALISM*

COMPLAINTS about the social irresponsibility of the intellectuals typically concern the intellectual's tendency to marginalize herself, to move out from one community by interior identification of herself with some other community—for example, another country or historical period, an invisible college, or some alienated subgroup within the larger community. Such marginalization is, however, common to intellectuals and to miners. In the early days of the United Mine Workers its members rightly put no faith in the surrounding legal and political institutions and were loyal only to each other. In this respect they resembled the literary and artistic avant-garde between the wars.

It is not clear that those who thus marginalize themselves can be criticized for social irresponsibility. One cannot be irresponsible toward a community of which one does not think of oneself as a member. Otherwise runaway slaves and tunnelers under the Berlin Wall would be irresponsible. If such criticism were to make sense there would have to be a supercommunity one *had* to identify with—humanity as such. Then one could appeal to the needs of that community when breaking with one's family or tribe or nation, and such groups could appeal to the same thing when criticizing the irresponsibility of those who break away. Some people believe that there is such a community. These are the people who think there are such things as intrinsic human dignity, intrinsic human rights, and an ahistorical distinction between the demands of morality and those of prudence. Call these people "Kantians." They are opposed by people who say that "humanity" is a biological rather than a moral notion, that there is no human dignity that is not derivative from the dignity of some specific community, and no appeal beyond the relative merits of various actual or proposed communities to impartial criteria which will help us weigh those merits. Call these people "Hegelians." Much of contemporary social philosophy in the English-speaking world is a three-cornered debate between Kantians (like John Rawls and Ronald Dworkin) who want to keep an ahistorical morality-prudence distinction as a buttress for the institutions and practices of the surviving democracies, those (like the post-Marxist philosophical left in Europe, Ro-

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berto Unger, and Alasdair MacIntyre) who want to abandon these institutions both because they presuppose a discredited philosophy and for other, more concrete, reasons, and those (like Michael Oakeshott and John Dewey) who want to preserve the institutions while abandoning their traditional Kantian backup. These last two positions take over Hegel's criticism of Kant's conception of moral agency, while either naturalizing or junking the rest of Hegel.

If the Hegelians are right, then there are no ahistorical criteria for deciding when it is or is not a responsible act to desert a community, any more than for deciding when to change lovers or professions. The Hegelians see nothing to be responsible to except persons and actual or possible historical communities; so they view the Kantians' use of 'social responsibility' as misleading. For that use suggests not the genuine contrast between, for example, Antigone's loyalties to Thebes and to her brother, or Alcibiades' loyalties to Athens and to Persia, but an illusory contrast between loyalty to a person or a historical community and to something "higher" than either. It suggests that there is a point of view that abstracts from any historical community and adjudicates the rights of communities vis-à-vis those of individuals.

Kantians tend to accuse of social irresponsibility those who doubt that there is such a point of view. So when Michael Walzer says that "A given society is just if its substantive life is lived in . . . a way faithful to the shared understandings of the members," Dworkin calls this view "relativism." "Justice," Dworkin retorts, "cannot be left to convention and anecdote." Such Kantian complaints can be defended using the Hegelian's own tactics, by noting that the very American society which Walzer wishes to commend and to reform is one whose self-image is bound up with the Kantian vocabulary of "inalienable rights" and "the dignity of man." Hegelian defenders of liberal institutions are in the position of defending, on the basis of solidarity alone, a society which has traditionally asked to be based on something more than mere solidarity. Kantian criticism of the tradition that runs from Hegel through Marx and Nietzsche, a tradition which insists on thinking of morality as the interest of a historically conditioned community rather than "the common interest of humanity," often insists that such a philosophical outlook is—if one values liberal practices and institutions—irresponsible. Such criticism rests on a prediction that such practices and institutions will not survive the removal of the traditional Kantian buttresses, buttresses which include an account of "rationality" and "morality" as transcultural and ahistorical.

I shall call the Hegelian attempt to defend the institutions and

practices of the rich North Atlantic democracies without using such buttresses "postmodernist bourgeois liberalism." I call it "bourgeois" to emphasize that most of the people I am talking about would have no quarrel with the Marxist claim that a lot of those institutions and practices are possible and justifiable only in certain historical, and especially economic, conditions. I want to contrast bourgeois liberalism, the attempt to fulfill the hopes of the North Atlantic bourgeoisie, with philosophical liberalism, a collection of Kantian principles thought to justify us in having those hopes. Hegelians think that these principles are useful for *summarizing* these hopes, but not for justifying them (a view Rawls himself verges upon in his Dewey Lectures). I use 'postmodernist' in a sense given to this term by Jean-François Lyotard, who says that the postmodern attitude is that of "distrust of metanarratives," narratives which describe or predict the activities of such entities as the noumenal self or the Absolute Spirit or the Proletariat. These metanarratives are stories which purport to justify loyalty to, or breaks with, certain contemporary communities, but which are neither historical narratives about what these or other communities have done in the past nor scenarios about what they might do in the future.

"Postmodernist bourgeois liberalism" sounds oxymoronic. This is partly because, for local and perhaps transitory reasons, the majority of those who think of themselves as beyond metaphysics and metanarratives also think of themselves as having opted out of the bourgeoisie. But partly it is because it is hard to disentangle bourgeois liberal institutions from the vocabulary that these institutions inherited from the Enlightenment—e.g., the eighteenth-century vocabulary of natural rights, which judges, and constitutional lawyers such as Dworkin, must use *ex officiis*. This vocabulary is built around a distinction between morality and prudence. In what follows I want to show how this vocabulary, and in particular this distinction, might be reinterpreted to suit the needs of us postmodernist bourgeois liberals. I hope thereby to suggest how such liberals might convince our society that loyalty to itself is morality enough, and that such loyalty no longer needs an ahistorical backup. I think they should try to clear themselves of charges of irresponsibility by convincing our society that it need be responsible only to its own traditions, and not to the moral law as well.

The crucial move in this reinterpretation is to think of the moral self, the embodiment of rationality, not as one of Rawls's original choosers, somebody who can distinguish her *self* from her talents and interests and views about the good, but as a network of beliefs,

desires, and emotions with nothing behind it—no substrate behind the attributes. For purposes of moral and political deliberation and conversation, a person just *is* that network, as for purposes of ballistics she is a point-mass, or for purposes of chemistry a linkage of molecules. She is a network that is constantly reweaving itself in the usual Quinean manner—that is to say, not by reference to general criteria (e.g., "rules of meaning" or "moral principles") but in the hit-or-miss way in which cells readjust themselves to meet the pressures of the environment. On a Quinean view, rational behavior is just adaptive behavior of a sort which roughly parallels the behavior, in similar circumstances, of the other members of some relevant community. Irrationality, in both physics and ethics, is a matter of behavior that leads one to abandon, or be stripped of, membership in some such community. For some purposes this adaptive behavior is aptly described as "learning" or "computing" or "redistribution of electrical charges in neural tissue," and for others as "deliberation" or "choice." None of these vocabularies is privileged over against another.

What plays the role of "human dignity" on this view of the self? The answer is well expressed by Michael Sandel, who says that we cannot regard ourselves as Kantian subjects "capable of constituting meaning on our own," as Rawlsian choosers,

> . . .without great cost to those loyalties and convictions whose moral force consists partly in the fact that living by them is inseparable from understanding ourselves as the particular people we are—as members of this family or community or nation or people, as bearers of this history, as sons and daughters of that revolution, as citizens of this republic.[1]

I would argue that the moral force of such loyalties and convictions consists *wholly* in this fact, and that nothing else has *any* moral force. There is no "ground" for such loyalties and convictions save the fact that the beliefs and desires and emotions which buttress them overlap those of lots of other members of the group with which we identify for purposes of moral or political deliberations, and the further fact that these are *distinctive* features of that group, features which it uses to construct its self-image through contrasts with other groups. This means that the naturalized Hegelian analogue of "intrinsic human dignity" is the comparative dignity of a group with which a person identifies herself. Nations

[1] *Liberalism and the Limits of Justice* (New York: Cambridge, 1982), p. 179. Sandel's remarkable book argues masterfully that Rawls cannot naturalize Kant and still retain the meta-ethical authority of Kantian "practical reason."

or churches or movements are, on this view, shining historical examples not because they reflect rays emanating from a higher source, but because of contrast-effects—comparisons with other, worse communities. Persons have dignity not as an interior luminescence, but because they share in such contrast-effects. It is a corollary of this view that the moral justification of the institutions and practices of one's group—e.g., of the contemporary bourgeoisie—is mostly a matter of historical narratives (including scenarios about what is likely to happen in certain future contingencies), rather than of philosophical metanarratives. The principal backup for historiography is not philosophy but the arts, which serve to develop and modify a group's self-image by, for example, apotheosizing its heroes, diabolizing its enemies, mounting dialogues among its members, and refocusing its attention.

A further corollary is that the morality/prudence distinction now appears as a distinction between appeals to two parts of the network that is the self—parts separated by blurry and constantly shifting boundaries. One part consists of those beliefs and desires and emotions which overlap with those of most other members of some community with which, for purposes of deliberation, she identifies herself, and which contrast with those of most members of other communities with which hers contrasts itself. A person appeals to morality rather than prudence when she appeals to this overlapping, shared part of herself, those beliefs and desires and emotions which permit her to say "WE do not do this sort of thing." Morality is, as Wilfrid Sellars has said, a matter of "we-intentions." Most moral dilemmas are thus reflections of the fact that most of us identify with a number of different communities and are equally reluctant to marginalize ourselves in relation to any of them. This diversity of identifications increases with education, just as the number of communities with which a person may identify increases with civilization.

Intra-societal tensions, of the sort which Dworkin rightly says mark our pluralistic society, are rarely resolved by appeals to general principles of the sort Dworkin thinks necessary. More frequently they are resolved by appeals to what he calls "convention and anecdote." The political discourse of the democracies, at its best, is the exchange of what Wittgenstein called "reminders for a particular purpose"—anecdotes about the past effects of various practices and predictions of what will happen if, or unless, some of these are altered. The moral deliberations of the postmodernist bourgeois liberal consists largely in this same sort of discourse, avoiding the formulation of general principles except where the sit-

uation may require this particular tactic—as when one writes a constitution, or rules for young children to memorize. It is useful to remember that this view of moral and political deliberation was a commonplace among American intellectuals in the days when Dewey—a post-modernist before his time—was the reigning American philosopher, days when "legal realism" was thought of as desirable pragmatism rather than unprincipled subjectivism.

It is also useful to reflect on why this tolerance for anecdote was replaced by a reattachment to principles. Part of the explanation, I think, is that most American intellectuals in Dewey's day still thought their country was a shining historical example. They identified with it easily. The largest single reason for their loss of identification was the Vietnam War. The War caused some intellectuals to marginalize themselves entirely. Others attempted to rehabilitate Kantian notions in order to say, with Chomsky, that the War not merely betrayed America's hopes and interests and self-image, but was *immoral*, one which we had had no *right* to engage in in the first place.

Dewey would have thought such attempts at further self-castigation pointless. They may have served a useful cathartic purpose, but their long-run effect has been to separate the intellectuals from the moral consensus of the nation rather than to alter that consensus. Further, Dewey's naturalized Hegelianism has more overlap with the belief-systems of the communities we rich North American bourgeois need to talk with than does a naturalized Kantianism. So a reversion to the Deweyan outlook might leave us in a better position to carry on whatever conversation between nations may still be possible, as well as leaving American intellectuals in a better position to converse with their fellow citizens.

I shall end by taking up two objections to what I have been saying. The first objection is that on my view a child found wandering in the woods, the remnant of a slaughtered nation whose temples have been razed and whose books have been burned, has no share in human dignity. This is indeed a consequence, but it does not follow that she may be treated like an animal. For it is part of the tradition of *our* community that the human stranger from whom all dignity has been stripped is to be taken in, to be reclothed with dignity. This Jewish and Christian element in our tradition is gratefully invoked by free-loading atheists like myself, who would like to let differences like that between the Kantian and the Hegelian remain "merely philosophical." The existence of human rights, in the sense in which it is at issue in this meta-ethical debate, has as much or as little relevance to our treatment of

such a child as the question of the existence of God. I think both have equally little relevance.

The second objection is that what I have been calling "post-modernism" is better named "relativism," and that relativism is self-refuting. Relativism certainly is self-refuting, but there is a difference between saying that every community is as good as every other and saying that we have to work out from the networks we are, from the communities with which we presently identify. Post-modernism is no more relativistic than Hilary Putnam's suggestion that we stop trying for a "God's-eye view" and realize that "We can only hope to produce a more rational conception of rationality or a better conception of morality if we operate from within our tradition."[2] The view that every tradition is as rational or as moral as every other could be held only by a god, someone who had no need to use (but only to mention) the terms 'rational' or 'moral,' because she had no need to inquire or deliberate. Such a being would have escaped from history and conversation into contemplation and metanarrative. To accuse postmodernism of relativism is to try to put a metanarrative in the postmodernist's mouth. One will do this if one identifies "holding a philosophical position" with having a metanarrative available. If we insist on such a definition of "philosophy," then post-modernism is post-philosophical. But it would be better to change the definition.[3]

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[2] *Reason, Truth and History* (New York: Cambridge, 1981), p. 216.

[3] I discuss such redefinition in the Introduction to *Consequences of Pragmatism* (Minneapolis: Univ. of Minnesota Press, 1982), and the issue of relativism in "Habermas and Lyotard on Postmodernity," forthcoming in *Praxis International* and in "Solidarité ou Objectivité?" forthcoming in *Critique*.

[16]

CARLOS S. NINO

THE COMMUNITARIAN CHALLENGE TO LIBERAL RIGHTS

After the quasi-monopoly that liberalism has maintained during decades in the field of analytic political philosophy — which has been only disturbed by internal controversies — now it must confront again positions which are generally deemed "communitarian". The ghost of Hegel challenges once again the spirit of Kant.

For a long time, mainly after the second World War, analytical political philosophy was dominated by utilitarian liberalism, which was supposed to be (of course, incorrectly) the substantive moral conception least incompatible with metaethical skepticism which was still carried over from logical positivism. Both the prevailing vision of the good as satisfaction of preferences, whatever they are, and the apparent rational character of the evaluation of actions on the basis of their consequences to the satisfaction of preferences, aggregatively considered, made utilitarianism attractive for minds distrustful of any postulation which is not accompanied by a more or less direct empirical support. From the 1970s on, however, teleological liberalism inspired by Bentham and Mill was displaced by deontological liberalism of Kantian origin. This reaction was not due to the perception of difficulties in the utilitarian vision of the good (which was perfected by replacing the satisfaction of preferences by the materialization of plans of life). The difficulties perceived lay mainly in the evaluation of actions on the basis of their effects with regard to an aggregative composition of the good. This latter was seen as ignoring the separateness of persons when compensating the sacrifices of some with the benefits of others.

In the last years the common assumptions of both liberal trends have been put into question by philosophers who exhibit an accute intellectual sophistication: Charles Taylor[1], Alasdair MacIntyre[2], Michael

[1] See *Hegel* (Cambridge, 1977.)

[2] See *After Virtue* (Notre Dame, 1981.)

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Sandel[3], and in part also Michael Walzer[4], Bernard Williams[5], Stuart Hampshire[6], and Susan Wolf[7]. As I said, the influence of Hegel is noticeable in many of them – through their insistence on the social character of humans and on the connection between morality and the customs of each society. But behind Hegel also looms the figure of Aristotle, since many of these communitarian philosophers defend a conception of the good related to a teleological vision of human nature and reflected on a set of virtues.

One of the contributions of this communitarian trend consists in giving a picture of liberalism which is sometimes clearer than that provided by liberals themselves. Thus, MacIntyre points out the following distinguishing features of liberalism, mainly in its Kantian variant. First, the idea that morality is mainly composed of rules which would be accepted by any rational individual under ideal circumstances; second, the requirement that these rules be neutral with regard to the interests of individuals; third, the demand that moral standards be also neutral with regard to conceptions of the good that individuals may subscribe to; finally, the requirement that moral rules be applied equally to all individual human beings regardless of their social context.

Communitarianism objects to each one of these assumptions of liberalism and it does so after proposing a diagnosis of the common source of so many philosophical miscarriages. Charles Taylor, for instance, locates that source in an "atomist" conception of individuals according to which they are self-sufficient regardless of the social framework. Sandel expands the argument maintaining that Kantian liberalism assumes an image of moral agents as constant along time, disconnected thus from their own desires and interests, free from the causal flux which affects those desires and interests, mutually separated and isolated from social context. MacIntyre in his turn maintains that the abandonment of a teleological conception of human nature

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3 See *Liberalism and the Limits of Justice* (Cambridge, 1982.)

4 See *Spheres of Justice*, 1983.

5 See *Ethics and the Limits of Philosophy* (London, 1985.)

6 See *Morality and Conflict* (Cambridge, 1981.)

7 See Moral Saints in *The Journal of Philosophy*, **LXXIX**, No. 8 (August 1982.)

seriously disrupted moral discourse, since it lacks now the element which constituted a bridge between factual propositions about actual human behaviour and moral rules which have a normative character.

According to these authors, only an impoverished conception of the moral person, such as that referred to above, allows Kantian liberalism to sustain its distinctive thesis about the independence of justice and individual rights from a conception of what is good in life. Liberal neutrality about the ideals of human excellence is only achieved at the expense of a conception of moral agents as noumenal entities which not only lack a distinctive telos, but also possess an identity which is independent from their own desires, from other individuals, and from the social environment. Thus, liberals are accused of basing morality on elements like human rights which cannot be supported without a conception of the good, as shown in the case of conflicts of rights that can only be solved by resorting to such a conception. Alternatively, liberals are accused of smuggling in a hidden conception of the good, despite their pretense of neutrality. The conception of the good which liberalism is said implicitly to endorse is the same as that of utilitarianism in the prevailing version: the satisfaction of desires or preferences whatever their content. This conception of the good is, in its turn, generally put into question: its apparent plausibility derives from a confusion between the satisfaction of desires and pleasure (which, despite being a good, cannot be the only one); the object of some desires and preferences may be to obtain pleasure and sometimes the satisfaction of a desire causes pleasure, but not all desires have as their object the achievement of pleasure and not every satisfaction of desires causes pleasure. If we disconnect in this way desires and preferences from pleasure, the idea that the satisfaction of desires is something valuable in itself regardless of their content loses plausibility; if each one of us desires something only in so far as we believe it to be valuable either in the moral sense or in the prudential one, including the consideration of our own pleasure or in the aesthetic sense, etc., it does not appear reasonable to assign objective value to the satisfaction of desires regardless of the value of that which is desired.

Charles Taylor intends to show, in almost syllogistical fashion, how liberal thinking contradicts itself when it assumes there is a set of individual rights which has primacy over other normative relations;

the latter include the duty of belonging to a society or state, since for liberalism it is only justified on the basis of a consent given within the framework of those rights. Taylor's reasoning runs as follows: (1) The ascription of rights depends on the recognition of certain capacities, like expressing opinions, developing a spiritual life, feeling pleasure and pain, etc. The liberal might want to block this move, putting forth the case of children or the comatose, but they would have to desist as soon as they are asked why rights are not also ascribed to trees or clouds; then they must admit that in the case of children the potential capacity is relevant, and that in the case of the comatose either rights are absent or are ascribed for special reasons (e.g., for respect to what is normally a proper receptacle of those capacities; for creating a protective barrier which impede mistakes or abuses in other cases; taking into account the rights of other people). (2) It is not enough for ascribing rights to recognize certain capacities. These should be considered *valuable* so as to be differentiated from others which are not the grounds of rights. (3) If something is valuable there is a duty to preserve and to expand it, materializing the conditions on which that preservation or expansion depends. (4) The majority, if not all, of the human capacities on which the ascription of rights depends are conditioned to the membership in a society; they require tools like language, conceptual schemes or institutions that are inherently social. Liberalism may pretend to block also this move either through the limitation of the relevant capacities to that of feeling pleasure or pain, or through the limitation of associative relations to those based on consent, like the family; but the capacity of sentience seems to be insufficient as a ground for a broad set of rights, which in any case can only be reduced to an ample capacity to choose plans of life, and the consensual associations do not seem to be sufficient for developing the relevant capacities.

The conclusion of this reasoning is, of course, that the ascription of individual rights presupposes the duty to preserve the links of community which make possible the development of the valuable capacities which underlie rights. Liberalism contradicts itself when it gives to rights primacy over the duties related to the preservation of society that makes the former possible.

MacIntyre arrives at the same conclusion with light variations in the

premises: the rules which ascribe rights are justified on the basis of certain goods; these goods are internal to changing social practices. Thus, moral evaluation is subject to the traditions and practices of each society. This author recognizes this may be dangerous, since it restricts the capacity of criticism of social institutions and practices, except those which constitute part of the nation conceived as a project; but he contends the dissociation between morality and social practices, that underlies liberalism is also dangerous, a dissociation that neutralizes all justification and motivation to be moral.

This allows us to distinguish the following aspects in the communitarian program: in the first place, the derivation of the principles of justice and moral rightness from a certain conception of the good; second, a conception of the good in which the social dimension is central and even dominant; third, a relativization of the rights and duties of individuals to their particular attachments to other individuals and the particular features of their society; finally, a dependency of moral *criticism* on moral *practice* as it is manifested in the traditions, conventions and institutions of each society. Even when we cannot see here in detail how different thinkers link together these aspects of the communitarian conception, I think one can adumbrate that the pivotal element is a conception of the good that prevails over principles of justice, and which both includes as central the membership in society and more restricted groups and is developed through the practice carried out within the society and those groups.

This tight presentation of the distinguishing marks of communitarianism allows us to notice that though it may offer to us an amiable face, with its emphasis on a realist vision of man, on the value of family and social links as grounds for special rights and duties, on the connection between values and social evaluation, it also could present a frightful countenance. Each one of the distinguishing marks of comunitarianism may generate, when it is developed in all its implications, a different aspect of a totalitarian vision of society. The primacy of the good over individual rights allows for the justification of perfectionist policies which intend to impose ideals of excellence or personal virtue, even when individuals do not perceive them as such and thus do not subscribe to them. In effect if rights are only the means to satisfy a certain conception of the good, why not prescind

them when that conception may be more efficaciously materialized through other routes? The idea that the social dimension is dominant in a conception of the good, may lead one to justify sacrifices of individuals for the sake of promoting the society or the State conceived of in holistic terms; the glorification of particular links with social groups, like the family or the Nation, may serve as ground for tribalist and nationalist attitudes that underline many of the conflicts that humanity must endure. Lastly, the dependency of criticism on moral practice may lead to a conservative relativism that, on the one hand, is inept for solving conflicts among those who appeal to different traditions or conventions, and, on the other hand, does not permit the evaluation of those traditions and conventions in the context of a society, since the evaluation would presuppose social practices without counting with independent principles to discriminate between them.

Given this unattractive face which communitarianism presents when its basic theses are developed in all their implications, the question which one should ask is if it is possible to preserve from the communitarian assault certain basic postulates of liberalism that serve as barriers to those implications.

Perhaps the soundest strategy would be to concede the orthodox presentation of liberalism has offered weak points which allow for successful shots of the opposite band, and thus to attempt to make room for some of the communitarian claims without abandoning the core of liberalism. This is the strategy prominent liberal thinkers like John Rawls, Ronald Dworkin and Thomas Nagel have carried out. I believe, however, that some of the concessions they and other liberals have made compromise central aspects of the liberal vision.

John Rawls[8], for instance, has turned lately towards a more relativist and conventionalist position, conceived of political philosophy as an activity independent from ethics and metaphysics and which has the practical task of discovering the "overlapping consensus" that may be found among the political views defended by different groups in society. His own theory of "justice as fairness" is now described as an

[8] See specially 'Justice as Fairness: Political not Metaphysical', in *Philosophy and Public Affairs*, vol. 14, No. 3 (summer 1985.)

attempt to detect such an overlapping consensus underlying a democratic culture, which requires the exploration of the normative conceptions of the person and of a well-ordered society adopted as part of that culture, without incurring in any metaphysical speculations about the nature of the personal good. This relativism does not, however, allow for giving reasons in favor of a democratic culture and not even for solving the conflicts that arise within that culture outside the limits of the *de facto* consensus. Far from having a practical mission, political philosophy would have the merely contemplative task of certifying the coincidences and dissents which are given in the social ambit. If the overlapping consensus is achieved through different conceptions of the person and of the good, the limits of that consensus can hardly be broadened without discussing such conceptions.

Thomas Nagel,[9] in his turn, tries to show that liberalism is not just another sectarian doctrine, rather it seeks a higher level of impartiality with regard to diverse conceptions of the good (including the ideals of autonomy and individuality of the liberalism of Kant and Mill). This kind of higher level liberalism does not deny that some conception of the good may be true, but limits State coercion to what may be justified according to standards of objectivity that are stricter than those applied to the principles that only affect the life of the agent alone. Nevertheless, Nagel maintains the demands of an impartial morality that satisfy those standards of objectivity must leave an ample space for the criticism of conceptions of the good, since it is necessary to take into account the existence of a pervasive tension in our lives between the impersonal and the subjective points of view. Impartial morality must absorb that tension recognizing limits to the universal demand and admitting relative obligations that follow from particular commitments and attachments and from rights derived from the adoption of a certain conception of the good. This certainly presents the problem of the scope of these relative rights and duties and of the generally unsolvable conflicts which multiply when these limits are relaxed too much. On the other hand, it is not completely clear, as we shall soon see, how the standards of objectivity, which must be

[9] See especially 'Moral Conflict and Political Legitimacy', 16, No. 3 (summer 1987.)

satisfied in order to impose coercively moral demands, are to be discovered and to what extent these demands may be sustained without a conception of the person and of the good.

Finally, Ronald Dworkin has recently[10] attempted to justify his old semirelativism in the legal field (which implies that principles that allow us to complete and evaluate the existing law not only must be supported by a valid moral theory but by one that permits justification of the standards in force). He now grounds this view on the value of *integrity*, that is, on the requirement that the community as a whole, and its officials in particular, act according to a coherent set of principles. This position not only confirms the doubts evoked by a thesis which implies that if the rules in force are abhorrent the principles which complete and evaluate them cannot be satisfactory, but now it is supported by a demand of justificatory coherence addressed to the community as a whole conceived in holistic terms. If there is no other point of view but that of individuals, these must exhibit integrity by not accepting norms enacted by other individuals who do not conform to the principles they profess. The idea the community and their representatives as a whole must exhibit coherence, not only in relation to their acts and the rules which determine them, but also with regard to their grounds, seems to presuppose a collective moral subject. This corresponds to the endorsement of the rules in force which are the product of different individuals (which shows some connection between relativism or conventionalism — which Dworkin partially subscribes to notwithstanding his lucid objections to it — and holism, since the latter position endorses standards which are the result not of individual action but of collective practice).

Like these authors, I believe that the preservation of the liberal conception of society requires the weakening of some aspects of its orthodox presentation. But I think this weakening should not go as far as the concessions of these philosophers. They should, in fact, consist in using the very weapons of communitarianism to give a firmer foothold to the core of the liberal vision.

The first aspect of the orthodox presentation that must be weakened

[10] See *The Law's Empire* (Cambridge, 1984.)

is the dissociation of moral criticism from moral practice. I think that it must be admitted that dissociation may deprive moral evaluation of any intersubjective basis. Nevertheless, I think that Rawls goes too far in his last attempt to connect criticism with practice. I do not believe the whole democratic culture with all its ideological implications must be taken as given and exempt from discussion, but solely the practice of moral discussion itself as it is carried out in what is vaguely called the "Western civilization" (the essential assumptions of which were inherited from the Englightenment movement though they were already anticipated in the classical thought).

This practice of moral discussion is certainly a variable and contingent human activity; it has not been present in the same form in all historical periods and even today it is not universally followed. It constitutes the "internal aspect" of democratic-liberal institutions – like majoritarian rule and judicial review – but its currency is in no way limited to those societies in which such liberal institutions are actually in force. Defenders of the most diverse ideologies resort to this practice, and the discussion develops more or less with the same characteristics both in the public and the private spheres.

The fact that the given practice is that of arguing in favor or against certain moral principles or solutions and not the social adhesion to any particular moral principle or solution allows for the preservation of the liberal ideal of submitting everything to criticism: the only thing which is exempted from criticism is the very practice of criticizing.

In this way the relativism or conventionalism which is being accepted is much more limited than that advocated by communitarianism and accepted by some liberal thinkers: moral judgements are relative to the conventions which characterize the practice of moral discussion itself. What do those conventions embrace? This is not easy to determine since there is no sharp boundary between what is part of the practice itself and what is being defended by exercising it. Perhaps one may mention a certain system of concepts – like the concepts of right, reasonable, etc. – some conservational implications and some value-presuppositions which are connected with the practice and its social functions (besides, of course, the concepts and rules inherent in any discourse or reasoning).

It is important to note especially the way in which the practice of

moral discourse operates to fulfill its distinctive social functions. From it some structural and procedural features of such a discussion may be inferred without adhering at all to any suspect teleological conceptions of reality and avoiding the derivation of any evaluative conclusion, which would be circular. It seems clear to me that the spread of the practice of moral discussion in diverse times and places is due to this fact: this practice is one of the several social mechanisms employed to solve conflicts and to facilitate human cooperation, overcoming adverse circumstances of the human condition which generate tendencies to get into conflict and to refuse to cooperate. The distinctive way in which moral discussion satisfies these functions is through the search of consensus, that is, the free acceptance of the same principles of conduct to guide the actions and attitudes of the participants.

From this mode of operation for satisfying social functions it is possible, as I said, to infer some structural features of moral discourse. Such a discourse might have incorporated, as undoubtedly was the case in other times and places, some components that communitarianism celebrates. It might have been based on the social conventions in force as the final criteria of validity of moral principles. It might as well have admitted principles which take as situations relevant to ascribing different normative consequences, some which are described by proper names or definite descriptions. If moral discourse had developed in this way, as doubtless it happened at other times and happens in other cultures, its capacity to generate both criticisms of social arrangements and solutions in the face of possible conflicts would be much more limited (it is true the expansion of the capacity of criticism necessitates the expansion of the capacity of solving conflicts). This is probably why our moral discourse evolved in the way masterfully described by MacIntyre, incorporating a criterion of moral validity which does not relate to the actual acceptance of moral principles but to their counterfactual acceptability under ideal conditions. These include those of rationality and impartiality and the requirement that the acceptable principles be general (that their formulation does not use proper names or definite descriptions) and universal (that they apply to all the situations which do not differ with respect to properties the principles take as relevant).

This implies that communitarianism incurs into a radical contradic-

tion: on the one hand it defends a relativist and conventionalist metaethical position, and, on the other, it criticizes our current culture for incorporating as essential elements the assumptions of Kantian liberalism. But it is the *fact* that these assumptions are actually incorporated to our moral discourse, even that of the communitarians themselves, which protects them from the communitarian attack. Thus the communitarian program presupposes what it is objecting to, if what its advocates say about the common culture is true. Therefore, rather than an attempt to argue against those assumptions the program seems an attempt to change them.

This vision of the moral discourse which is part of our culture serves also to confront the recurrent Hegelian criticism to the model of moral subject presupposed by Kantian liberalism. Obviously the image of subjects who are separate from their own desires and interests, who are free from the causal course which affect those desires, who are mutually independent and isolated from the social context, and who are immutable through time would be grotesquely false as a description of the flesh-and-blood beings who populate our planet. But it is hard to think that the intention of the liberal thinkers was to provide such a description, though it is necessary to be cautious against an excessive metaphysical imagination in speculations about the essence of moral personality. That model of the moral subject acquires instead plausibility if we interpret it as a representation of the presuppositions of moral discourse. For instance, if we accept the view that moral discourse presupposes the relevance of the *decision* to accept some principles of conduct and to abide by them, we also have to accept as its consequences certain ideas of separation between persons, continuity of personal identity through time and the possibility of ascribing normative consequences to decisions, despite their causal determination.

But this minimal conception of moral personality may be the object of an attack of a much wider scope. It may be contended, as many of the above-mentioned authors contend in fact, that even if the description of the structure of moral discourse were right, that structure would be powerless to allow us to derive substantive principles. Criteria like universability or the acceptability of principles under the condition of impartiality, are insufficient for generating standards of

action unless a certain conception of personal good is presupposed. This conception must, in its turn, be associated with a certain vision of moral personality. Remember MacIntyre's claim that the liberal project must inevitably have to fail for having abandoned a teleological conception of human nature, which, with its vision of the good, connected the description of men as they happen to be with normative standards of action.

This is where I think liberalism must fortify itself by making a second great concession to the criticism of its orthodox presentation.

It seems, in effect, it is impossible to obtain a set of rights unless a conception of the good is assumed. This is clearly perceived in cases of conflicts of rights which must be solved by standards which are independent of them.

In fact, the rights-conceptions like those of Rawls[11], Dworkin[12], and Gewirth[13] and that which I myself have tried to articulate elsewhere presuppose the good of autonomy. Furthermore, it does not seem that the new attempt by Rawls and Nagel to search for a liberalism which is neutral in relation to the values of autonomy and individuality shows promise of a fecund development. The practice of moral discourse itself, which is — as I said and these authors seem to suggest — the sole firm platform of moral justification, incorporates implicitly the value of autonomy. That discourse is addressed to the free acceptance of principles of conduct — which is what constitutes moral autonomy in the broad sense articulated by Kant — and hence honest participation in the practice involves the acceptance of the value of a free adoption of moral principles. Furthermore, whereas moral autonomy limits itself when it refers to principles which prescribe actions that may affect other people, since the adoption of those principles may restrain the autonomy of others, this does not happen in the case of personal ideals which evaluate actions that only affect their very agent. In this case autonomy does not limit itself, which generates the value of *personal* autonomy, that is, the restricted sense of autonomy which refers to the free adoption of personal ideals.

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[11] See *A Theory of Justice* (Oxford, 1971.)

[12] See in particular *A Matter of Principle* (Cambridge, 1985.)

[13] See *Reason and Morality* (Chicago, 1987.)

Hence, if we start from the basis of moral discourse as developed in our culture, the raw material for articulating principles of justice that generates individual rights is not only given by the procedural criterion of the acceptability of universal, general principles under ideal conditions, but also includes the substantive value of autonomy which underlies that discourse.

But the advocates of communitarianism might still reply this is insufficient for generating substantive moral principles. They might ask us to reflect on the value of autonomy. This value does not seem to provide us with ultimate reasons to act. Nobody has as his end to be autonomous, rather to exert his autonomy for such and such end. It is possible that autonomy be an essential component of the good, but it does not seem to exhaust it, not even to define its central core.

This might be accepted by liberals while stressing at the same time that autonomy is the only aspect of the good which concerns intersubjective standards of morality, and consequently State action. Hence the very value of autonomy proscribes examining further other aspects of the good to the effect of interfering with the decisions of individuals.

Communitarians, however, might retort that even if the foregoing is by hypothesis true with regard to the limits of social morality and of State action, it is not so with regard to individual motivation and justification. Even if we admit the value of autonomy is presupposed in moral discourse, it is hard to understand it if it is not connected with the value of something else for the achievement of which autonomy is exerted. For instance, if, as many liberals seem to do, we adopt a subjectivist view of the value of personal ideals, it is hard to infer from this subjective value the objective value of the autonomy needed to materialize them. If, instead, we adopt, like other liberals, an objective conception of the good, consisting in the satisfaction of subjective preferences, we expose ourselves to the weaknesses of utilitarianism already mentioned, since we have desires or preferences (except perhaps the most primitive impulses) because we value (from the moral, prudential, etc., points of view) some things, and we do not value the satisfactions of preferences in itself, but as a function of the value of that which we prefer. This includes pleasure, which is not in itself the satisfaction of preferences; we make it the object of pre-

ferences because we consider it valuable and sometimes it may be provoked by the satisfaction of some preferences.

But, on the other hand, if the ultimate good cannot have merely subjective value and cannot consist in the objective value of the satisfaction of subjective preferences, autonomy seems to dissolve. This is so because that good would provide impersonal reasons for acting regardless of the subjective preferences of the subjects of that good. If, as was said, autonomy seems to be an essential presupposition of current moral discourse, a presupposition which together with procedural criteria leads to substantive principles, the admission that it cannot be an ultimate good but must be in function of another good which happens to cancel it, would imply the defeat of liberalism through the demonstration that its main weapon — the practice of moral discourse — is, as MacIntyre says, inherently defective.

Here we arrive at an extremely complex subject with which I only dare to deal in a very tentative way in the brief last paragraphs of these reflections. I believe that liberalism should put forward a conception of the good which includes autonomy as a central component. I think that the most plausible candidate for that conception is the old idea of self-realization. This idea has seemed suspicious for liberals because it has been understood as "personal realization" rather than as an autonomous realization which is frustrated by external interferences.

The idea of autonomous realization includes, certainly, the exercise of autonomy but puts that exercise in relation to some end that is the realization of the individual. The idea of self-fulfillment entails the development of the capacities among which we count the intellectual capacity, the capacity of pleasure, the capacity of physical activity, the capacity to have aesthetic and spiritual experiences, et cetera.

We positively value those who develop some of these capacities to the maximum extent possible without absolutely precluding the development of the others. For instance, we admire an artist or scientific genius and we admit the exercise of it leads her to weaken her other capacities, but only up to a certain limit. The possibility of combining the development of the different capacities is endless and we value the creativeness in the choice of the alternatives. Hence, even when self-fulfillment is assigned objective value, it does not provide reasons for

actions which frustrate the decisions of the individuals for the sake of whose good we act. It can well be that the adhesion to this conception of the good as self-fulfillment is what leads us to attempt to solve interpersonal and even intrapersonal conflicts through the moral discourse to which underlies, as we saw, the value of autonomy. Perhaps that practice presupposes the more comprehensive value of self-realization.

This is related to another suspicion that this conception of the good provokes: it is often contended that when we speak of capacities, we tacitly assume evaluative standards which are necessarily connected with a metaphysical teleology, since we do not take into account the evil capacities that humans possess, like the capacity to hate, to kill or to become drug-addicts.

I think, however, the same value of self-realization, as it must be defended within the context of moral discourse, provides a criterion for distinguishing among capacities.

In the first place, as we saw, the development of some capacity to such an extreme that it cancels completely the rest, is a disvalue. This is the case with seeking pleasure through drugs when it destroys other capacities like the intellectual, the physical or the affective. (We should remember, however, that the component of autonomy of any realization which is valuable precludes perfectionist attempts at interference even in that case).

Secondly, in the same way as the value of fulfillment is qualified by autonomy, the value of this latter is qualified by the value of impartiality inherent in moral discourse. Autonomy is valuable to the extent it benefits individuals and, given that they are separate and independent, autonomy is not evaluated in an aggregative way. This means the increase in or the exercise of the autonomy of an individual at the expense of a lesser autonomy of other individuals is not objectively valuable. This precludes the impersonal value of the development of capacities that harms other people. If autonomy is not objectively valuable, if it is not distributed in an impartially acceptable way, neither is personal fulfillment achieved through that kind of autonomy.

This connection between autonomy and impartiality presents difficulties that have been adumbrated by communitarian thinkers since the impartial distribution of autonomy may restrain such autonomy,

mainly when it is realized that impartial distribution does not only require negative duties, but also positive ones that may cancel the resources and time for a balanced and creative development of our own capacities. I do not think there is an exact formula for solving this tension; the most we can say is that though our own autonomy lacks impersonal value, if it is exercised at the expense of a lesser autonomy of others, the impartially acceptable distribution of autonomy cannot reach so far that what is being distributed is no longer autonomy.

In spite of these problems of enormous complexity that require a continuous collective reflexion, I think the central core of Kantian liberalism is considerably strengthened if we make these two concessions to communitarianism, which allow us to struggle in its own field: it is true moral criticism has to have contact with moral practice, but precisely our culture counts with a practice which subjects all the other practices and traditions to criticism according to universal and impartial principles. It is also true that such a practice of moral discourse presupposes a full conception of the good without which it could not lead to the principles that liberalism defends; but that conception of the good, even when it is not exhausted by the value of autonomy impartially distributed, includes it as an essential component, and any action which, for the sake of the goods, threatens that autonomy is self-frustrating.

Given that it is difficult for communitarian Hegelians to evade, without inconsistency, a moral discourse with the foregoing assumptions, their complaints, as I said, are rather addressed to change them. But, even though it is impossible to argue without circularity against that change, what it is indeed possible to do is to resist it by illuminating the structure and the assumptions of current moral discourse. Besides this, we must trust that the evolution of our culture towards an expansion of the possibilities of criticism and of the consensual mechanism for overcoming conflicts across any particularistic frontiers follows its course, avoiding the regress to which this new romanticism invites us.

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THE STRUCTURE OF PROLETARIAN UNFREEDOM

1. According to Karl Marx, a member of a social class belongs to it by virtue of his position within social relations of production. In keeping with this formula, Marx defined the proletarian as the producer who has (literally or in effect) nothing to sell but his own labour power.[1] He inferred that the worker is *forced* to sell his labour power (on pain of starvation).

In this chapter I am not concerned with the adequacy of Marx's definition of working-class membership. I propose instead to assess the truth of the consequence he rightly or wrongly inferred from that definition. Is it true that workers are forced to sell their labour power?

This question is debated in the real world, by non-academic people. Supporters and opponents of the capitalist system tend to disagree about the answer to it. There is a familiar right-wing answer to it which I think has a lot of power. In this chapter I argue against Leftists who do not see the answer's power and against Rightists who do not see the answer's limitations.

2. Some would deny that workers are forced to sell their labour power, on the ground that they have other choices: the worker can go on the dole, or beg, or simply make no provision for himself and trust to fortune.

It is true that the worker is free to do these other things. The acknowledgment that he is free to starve to death gets its sarcastic power from the fact that he *is* free to starve to death: no one threatens to *make* him stay alive by, for example, force-feeding him. But to infer that he is therefore not forced to sell his labour power is to employ a false account of what it is to be forced to do something. When I am forced to do something I have no *reasonable* or *acceptable* alternative course. It need not be true that I have no alternative whatsoever. At least usually, when a person says, 'I was

[1] For elaboration of this definition and a defence of its attribution to Marx, see *KMTH*, 63–77, 222–3, 333–6.

forced to do it. I had no other choice,' the second part of the statement is elliptical for something like 'I had no other choice worth considering.' For in the most familiar sense of '*X* is forced to do *A*,' it is entailed that *X* is forced to *choose* to do *A*, and the claim that the worker is forced to sell his labour power is intended in that familiar sense. Hence the fact that he is free to starve or beg instead is not a refutation of the mooted claim: the claim entails that there are other (unacceptable) things he is free to do.[2]

3. Robert Nozick might grant that many workers have no acceptable alternative to selling their labour power, and he recognizes that they need not have no alternative at all in order to count as forced to do so. But he denies that having no acceptable alternative but to do *A* entails being forced to do *A*, no matter how bad *A* is, and no matter how much worse the alternatives are, since he thinks that to have no acceptable alternative means to be forced only when unjust actions help to explain the absence of acceptable alternatives. Property distributions reflecting a history of acquisition and exchange may leave the worker with no other acceptable option, but he is nevertheless not forced to sell his labour power, if the acquiring and exchanging were free of injustice.

Nozick's objection to the thesis under examination rests upon a moralized account of what it is to be forced to do something. It is a false account, because it has the absurd upshot that if a criminal's imprisonment is morally justified, he is then not forced to be in prison. We may therefore set Nozick's objection aside.[3]

4. There is, however, an objection to the claim that workers are forced to sell their labour power which does not depend upon a moralized view of what being forced involves. But before we come to it in section 5, I must explain how I intend the predicate 'is forced to sell his labour power.' The claim in which it figures here comes from Karl Marx. Now I noted that Marx characterized classes by

[2] For further defence and elaboration of that claim, see ch. 14, sect. 4 above.

[3] For Nozick's view, see *Anarchy, State and Utopia*, 262–4, and, for further criticism of it, the refs. at ch. 12 n. 20 above, and ch. 14, pp. 292–6 below. A partly similar critique of moralized accounts of force and freedom is given by David Zimmerman at 'Coercive Wage offers', 121–31.

reference to social relations of production, and the claim that workers are forced to sell their labour power is intended to satisfy that condition: it purports to say something about the proletarian's position in capitalist relations of production. But relations of production are, for Marxism, *objective*: what relations of production a person is in does not turn on his consciousness. It follows that if the proletarian is forced to sell his labour power in the relevant Marxist sense, then this must be because of his objective situation, and not merely because of his attitude to himself, his level of self-confidence, his cultural attainment, and so on. It is in any case doubtful that limitations in those subjective endowments can be sources of what interests us: unfreedom, as opposed to something similar to it but also rather different: incapacity. But even if diffidence and the like could be said to force a person to sell his labour power, that would be an irrelevant case here (except, perhaps, where personal subjective limitations are caused by capitalist relations of production, a possibility considered in section 15 below).

To be forced to do *A* by one's objective situation is to do it because of factors other than the subjective ones just mentioned. Many would insist that the proper source of force, and *a fortiori* of objective force, is action by other people, what they have done, or are doing, or what they would do were one to try to do *A*. I agree with Harry Frankfurt[4] that this insistence is wrong, but I shall accede to it in the present chapter, for two reasons. The first is that the mooted restriction makes it harder, and therefore more interesting, to show that workers are forced to sell their labour power. The second is that, as I shall now argue, where relations of production force people to do things, people force people to do things, so the 'no force without a forcing agent' condition is satisfied here, even if it does not hold generally.

The relations of production of a society may be identified with the powers its differently situated persons have with respect to the society's productive forces, that is, the labour capacities of its producers and the means of production they use.[5] We can

[4] Frankfurt points out that natural things and processes operating independently of human action also force people to do things. See his 'Coercion and Moral Responsibility', 83–4. (Note that one can agree with Frankfurt while denying that lack of capacity restricts freedom: the question whether internal obstacles restrict it is distinct from the question which kinds of external obstacles do.)

[5] See *KMTH* 31–5, 63–5, 217–25; ch. 1, p. 5 ff.

distinguish between standard and deviant uses of the stated powers. Let me then propose that a worker is forced to sell his labour power in the presently required sense if and only if the constraint is a result of standard exercises of the powers constituting relations of production.

If a millionaire is forced by a blackmailer to sell his labour power, he is not forced to do so in the relevant Marxist sense, since the blackmailer does not use economic power to get him to do so. The relevant constraint must reflect use of economic power, and not, moreover, just any use of it, but a *standard* exercise of it. I do not know how to define 'standard', but it is not hard to sort out cases in an intuitive way. If, for example, a capitalist forces people to work for him by hiring gunmen to get them to do so, the resulting constraint is due to a non-standard exercise of economic power. And one can envisage similarly irrelevant cases of relaxation of constraint: a philanthropic capitalist might be willing to transfer large shares in the ownership of his enterprise to workers, on a 'first come first served' basis. That would not be a standard use of capitalist power.

Suppose, however, that economic structural constraint does not, as just proposed, operate through the regular exercise by persons of the powers constituting the economic structure, but in some more *im*personal way, as Althusserians seem to imagine. It might still be said, for a different reason, that if the structure of capitalism leaves the worker no choice but to sell his labour power, then he is forced to do so by actions of persons. For the structure of capitalism is not in all senses self-sustaining. It is sustained by a great deal of intentional human action, notably on the part of the functionaries of the state. Since the state deliberately protects the property of the capitalist class, the structural constraint by virtue of which the worker must sell his labour power has enough human will behind it to satisfy the stipulation that where there is force, there are forcing human beings.

The latter stipulation would be satisfied by doctrine weaker than that which presents the state as an *instrument* of the capitalist class. Suppose that the state upholds the capitalist order not because it is a *capitalist* order, but because it is the prevailing order, and the state is dedicated to upholding whatever order prevails. That relatively weak claim suffices to secure the contention that workers

are forced to sell their labour power in face of the insistence that no one is forced unless somebody forces.[6]

5. Under the stated interpretation of 'is forced to sell his labour power', a serious problem arises for the thesis under examination. For if there are persons whose objective position is identical with that of proletarians but who are not forced to sell their labour power, then proletarians are not relevantly so forced, and the thesis is false. And there do seem to be such persons.

I have in mind those proletarians who, initially possessed of no greater resources than most, secure positions in the petty bourgeoisie and elsewhere, thereby rising above the proletariat. Striking cases in Britain are members of certain immigrant groups, who arrive penniless, and without good connections, but who propel themselves up the class hierarchy with effort, skill, and luck. One thinks—it is a contemporary example—of those who are willing to work very long hours in shops bought from native British petty bourgeois, shops which used to close early. Their initial capital is typically an amalgam of savings, which they accumulated, perhaps painfully, while still in the proletarian condition, and some form of external finance. *Objectively speaking*, most[7] British proletarians are in a position to obtain these. Therefore most British proletarians are not forced to sell their labour power.

6. I now refute two predictable objections to the above argument.

The first says that the recently mentioned persons were, *while*

[6] For a more developed, and brilliant, account of structural force, which also satisfies the 'no force without a forcing agent' requirement see Jeffrey Reiman's 'Exploitation' 11–18. I disagree with Reiman's account of structural force with respect to only one of its claims: I do not think that he is right (see ibid. 15, 39) that a person can be forced to do *A* even when he has an acceptable alternative to doing *A* (though he can, of course, be forced to choose *between* *A* and such an alternative). I do not agree that Reiman's stage-coach passenger (ibid. 15) has an acceptable alternative to yielding his cash to the outlaw, since he has a 'decided preference' against all his alternatives to that course, each of which is thoroughly bad. (See the definition of 'acceptable alternative' offered in section 16 below.)

[7] At least most: it could be argued that *all* British proletarians are in such a position, but I stay with 'most' lest some ingenious person discover objective proletarian circumstances worse than the worst once suffered by now prospering immigrants. But see also n. 8 below.

they were proletarians, forced to sell their labour power. Their cases do not show that proletarians are not forced to sell their labour power. They show something different: that proletarians are not forced to remain proletarians.

This objection illegitimately contracts the scope of the Marxist claim that workers are forced to sell their labour power. But before I say what Marxists intend by that statement, I must defend this general claim about freedom and constraint: *fully explicit attributions of freedom and constraint contain two temporal indexes.* To illustrate: I may now be in a position truly to say that I am free to attend a concert tomorrow night, since nothing has occurred, up to now, to prevent my doing so. If so, I am *now* free to attend a concert *tomorrow night.* In similar fashion, the time when I am constrained to perform an action need not be identical with the time of the action: I might *already* be forced to attend a concert *tomorrow night* (since you might already have ensured that if I do not, I shall suffer some great loss).

Now when Marxists say that proletarians are forced to sell their labour power, they mean more than 'X is a proletarian at time t only if X is at t forced to sell his labour power at t'; for that would be compatible with his not being forced to at time $t + n$, no matter how small n is. X might be forced on Tuesday to sell his labour power on Tuesday, but if he is not forced on Tuesday to sell his labour power on Wednesday (if, for example, actions open to him on Tuesday would bring it about that on Wednesday he need not do so), then, though still a proletarian on Tuesday, he is not then someone who is forced to sell his labour power in the relevant Marxist sense. The manifest intent of the Marxist claim is that the proletarian is forced at t to *continue* to sell his labour power, throughout a period from t to $t + n$, for some considerable n. It follows that because there is a route out of the proletariat, which our counter-examples travelled, reaching their destination in, as I would argue, an amount of time less than n,[8] they were, though

[8] This might well be challenged, since the size of n is a matter of judgment. I would defend mine by reference to the naturalness of saying to a worker that he is not forced to (continue to) sell his labour power, since he can take steps to set himself up as a shopkeeper. Those who judge otherwise might be able, at a pinch, to deny that most proletarians are not forced to sell their labour power, but they cannot dispose of the counter-examples to the generalization that all are forced to. For our prospective petty bourgeois is a proletarian on the eve of his ascent when, unless, absurdly, we take n as O, he is not forced to sell his labour power.

proletarians, not forced to sell their labour power in the required Marxist sense.

Proletarians who have the option of class ascent are not forced to continue to sell their labour power, just because they do have that option. Most proletarians have it as much as our counter-examples did. Therefore most proletarians are not forced to sell their labour power.[9]

7. But now I face a second objection. It is that necessarily not more than a few proletarians can exercise the option of upward movement. For capitalism requires a substantial hired labour force, which would not exist if more than just a few workers rose.[10] Put differently, there are necessarily only enough petty bourgeois and other non-proletarian positions for a small number of the proletariat to leave their estate.

I agree with the premiss, but does it defeat the argument against which it is directed? Does it refute the claim that most proletarians are not forced to sell their labour power? I think not.

An analogy will indicate why I do not think so. Ten people are placed in a room, the only exit from which is a huge and heavy

[9] The foregoing section is reproduced from the article forming the basis of this chapter and the objection predicted in its first sentence occurs in more developed form in sect. 3 of Reiman's 'Exploitation', which I think substantially misguided. I disagree with Reiman's contention (p. 35) that 'the charge that capitalism is slavery of some sort can stand on the synchronic claim independent of the diachronic', where the synchronic claim says that the proletarian is forced to sell his labour power in order to get his next meal (see ibid. 32) and the diachronic one says that he is forced to continue to sell it in the sense that that is his enduring fate. *Pace* Reiman, the Marxian characterization of the proletarian condition is false if workers are not locked into their situations, if each can turn himself into a non-worker in, say, one week (which is consistent with the synchronic claim). What Reiman calls the 'permeability of the barriers around and between . . . classes' is partly constitutive of class positions themselves. (*KMTH* was rightly criticized on that score by Jon Elster at *Making Sense of Marx*, 343–4, and Elster's point also applies against Reiman's distinction between what it is to belong to a certain class and how easy it is to get out of it.) A complete description of pre-capitalist guild class structure must specify whether or not a journeyman can expect one day to be a master; and if proletarianhood were, in general, a kind of temporary apprenticeship, then the class structure of capitalism would not be what Marxists say it is.

[10] 'The truth is this, that in this bourgeois society every workman, if he is an exceedingly clever and shrewd fellow, and gifted with bourgeois instincts and favoured by an exceptional fortune, can possibly convert himself into an *exploiteur du travail d'autrui*. But if there were no *travail* to be *exploité*, there would be no capitalist nor capitalist production' (Karl Marx, 'Results of the Immediate Process of Production', 1079). For commentary on similar texts see *KMTH* 243.

locked door. At various distances from each lies a single heavy key. Whoever picks up this key—and each is physically able, with varying degrees of effort, to do so—and takes it to the door will find, after considerable self-application, a way to open the door and leave the room. But if he does so he alone will be able to leave it. Photoelectric devices installed by a gaoler ensure that it will open only just enough to permit one exit. Then it will close, and no one inside the room will be able to open it again.

It follows that, whatever happens, at least nine people will remain in the room.

Now suppose that not one of the people is inclined to try to obtain the key and leave the room. Perhaps the room is no bad place, and they do not want to leave it. Or perhaps it is pretty bad, but they are too lazy to undertake the effort needed to escape. Or perhaps no one believes he would be able to secure the key in face of the capacity of the others to intervene (though no one would in fact intervene, since, being so diffident, each also believes that he would be unable to remove the key from anyone else). Suppose that, whatever may be their reasons, they are all so indisposed to leave the room that if, counterfactually, one of them were to try to leave, the rest would not interfere. The universal inaction is relevant to my argument, but the explanation of it is not.

Then whomever we select, it is true of the other nine that not one of them is going to try to get the key. Therefore it is true of the selected person that he is free to obtain the key, and to use it.[11] He is therefore not forced to remain in the room. But all this is true of whomever we select. Therefore it is true of each person that he is not forced to remain in the room, even though necessarily at least nine will remain in the room, and in fact all will.

Consider now a slightly different example, a modified version of the situation just described. In the new case there are two doors and two keys. Again, there are ten people, but this time one of them does try to get out, and succeeds, while the rest behave as before. Now necessarily eight will remain in the room, but it is true of each

[11] For whatever may be the correct analysis of '*X* is free to do *A*', it is clear that *X* is free to do *A* if *X* would do *A* if he tried to do *A*, and that sufficient condition of freedom is all that we need here. (Some have objected that the stated condition is not sufficient: a person, they say, may do something he is not free to do, since he may do something he is not legally, or morally, free to do. Those who agree with that unhelpful remark can take it that I am interested in the non-normative use of 'free', which is distinguished by the sufficient condition just stated.)

of the nine who do stay that he or she is free to leave it. The pertinent general feature, present in both cases, is that there is at least one means of egress which none will attempt to use, and which each is free to use, since, *ex hypothesi*, no one would block his way.

By now the application of the analogy may be obvious. The number of exits from the proletariat is, as a matter of objective circumstance, small. But most proletarians are not trying to escape, and, as a result, *it is false that each exit is being actively attempted by some proletarian*. Therefore for most[12] proletarians there exists a means of escape. So even though necessarily most proletarians will remain proletarians, and will sell their labour power, perhaps none, and at most a minority, are forced to do so.

In reaching this conclusion, which is about the proletariat's *objective* position, I used some facts of consciousness, regarding workers' aspirations and intentions. That is legitimate. For if workers are objectively forced to sell their labour power, then they are forced to do so whatever their subjective situation may be. But their actual subjective situation brings it about that they are not forced to sell their labour power. Hence they are not objectively forced to sell their labour power.

8. One could say, speaking rather broadly, that we have found more freedom in the proletariat's situation than classical Marxism asserts. But if we return to the basis on which we affirmed that most proletarians are not forced to sell their labour power, we shall arrive at a more refined description of the objective position with respect to force and freedom. What was said will not be withdrawn, but we shall add significantly to it.

That basis was the reasoning originally applied to the case of the people in the locked room. Each is free to seize the key and leave. But note the conditional nature of his freedom. He is free not only *because* none of the others tries to get the key, but *on condition* that they do not (a condition which, in the story, is fulfilled). Then *each is free only on condition that the others do not exercise their similarly conditional freedom*. Not more than one can exercise the liberty they all have. If, moreover, any one were to exercise it, then, because of the structure of the situation, all the others would lose it.

[12] See nn. 7, 8 above.

Since the freedom of each is contingent on the others not exercising their similarly contingent freedom, we can say that there is a great deal of unfreedom in their situation. Though each is individually free to leave, he suffers with the rest from what I shall call *collective unfreedom*.

In defence of that description, let us reconsider the question why the people do not try to leave. None of the reasons suggested earlier—lack of desire, laziness, diffidence—go beyond what a person wants and fears for himself alone. But sometimes people care about the fate of others, and they sometimes have that concern when they share a common oppression. Suppose, then, not so wildly, that there is a sentiment of solidarity in that room. A fourth possible explanation of the absence of attempt to leave now suggests itself. It is that no one will be satisfied with a personal escape which is not part of a general liberation.[13]

The new supposition does not upset the claim that each is free to leave, for we may assume that it remains true of each person that he would suffer no interference if, counterfactually, he sought to use the key (assume that the others would have contempt for him, but not try to stop him). So each remains free to leave. Yet we can envisage members of the group communicating to their gaoler a demand for freedom, to which he could hardly reply that they are free already (even though, individually, they are). The hypothesis of solidarity makes the collective unfreedom evident. But unless we say, absurdly, that the solidarity creates the unfreedom to which it is a response, we must say that there is collective unfreedom whether or not solidarity obtains.

Returning to the proletariat, we can conclude, by parity of reasoning, that although most proletarians are free to escape the proletariat, and, indeed, even if every one is, the proletariat is collectively unfree, an imprisoned class.

[13] In a stimulating commentary on the argument of sects. 7 and 8, Jon Elster notes that it involves avoidance of two fallacies, that of composition ('What is true of each must be true of all') and that of division ('What is true of all must be true of each'): 'It is true of any individual worker that he is free to leave the class, but not of all workers simultaneously. And the reason why the individual worker is free to leave the class is that the others do not want to leave it; and the reason why the others do not want to leave it is that whatever is desirable if it happens to all members simultaneously is not necessarily desirable if it happens to one member separately and exclusively' (first draft of paper on 'Freedom and Power', 63). Elster shows that such structures pervade social life.

Marx often maintained that the worker is forced to sell his labour power not to any particular capitalist, but just to some capitalist or other, and he emphasized the ideological value of that distinction.[14] The present point is that although, in a collective sense, workers are forced to sell their labour power, scarcely any particular proletarian is forced to sell himself even to some capitalist or other. And this too has ideological value. It is part of the genius of capitalist exploitation that, by contrast with exploitation which proceeds by 'extra-economic compulsion',[15] it does not require the unfreedom of specified individuals. There is an ideologically valuable anonymity on *both* sides of the relationship of exploitation.

9. It was part of the argument for affirming the freedom to escape of proletarians, taken individually, that not every exit from the proletariat is crowded with would-be escapees. Why should this be so? Here are some of the reasons:

1. It is possible to escape, but it is not easy, and often people do not attempt what is possible but hard.

2. There is also the fact that long occupancy, for example from birth, of a subordinate class position nurtures the illusion, which is as important for the stability of the system as the myth of easy escape, that one's class position is natural and inescapable.

3. Finally, there is the fact that not all workers would like to be petty or trans-petty bourgeois. Eugene Debs said 'I do not want to rise above the working class, I want to rise with them', thereby evincing an attitude like the one lately attributed to the people in the locked room. It is sometimes true of the worker that, in Brecht's words,

> He wants no servants under him
> And no boss over his head.[16]

Those lines envisage a better liberation: not just from the working class, but from class society.

[14] See *KMTH* 223 for exposition and references.

[15] The phrase comes from Marx, *Capital*, iii. 926. See *KMTH* 82–4 for a discussion of different modes of exploitation.

[16] From his 'Song of the United Front'.

10. In the rest of this chapter I consider objections to the arguments of sections 7 and 8, which I shall henceforth call argument 7 and argument 8, after the numbers of the sections in which they were presented. Shorn of expository detail, the arguments are as follows:

7. There are more exits from the British proletariat than there are workers trying to leave it. Therefore, British workers are individually free to leave the proletariat.
8. There are very few exits from the British proletariat and there are very many workers in it. Therefore, British workers are collectively unfree to leave the proletariat.

In the useful language of the medieval schoolmen, the workers are not forced to sell their labour power *in sensu diviso*, but they are forced to *in sensu composito*.

The arguments are consistent with one another. Hillel Steiner has pointed to a potential conflict between them, but it is unlikely to materialize. The potential conflict relates to my attribution to Marxism (see section 6) of the claim that the worker is forced to remain a worker for some considerable amount of time *n*, a claim which the conclusion of argument 7 is intended to deny. Now, the larger *n* is, the easier it is to refute the Marxist claim and affirm argument 7's conclusion. But as *n* grows larger, the number of exits from the proletariat increases, and the conclusion of argument 8 becomes correspondingly less secure. To sustain both arguments without equivocation one must choose an intuitively plausible *n* under these opposite pressures. But it is not hard to meet that requirement: five years, for example, will do.

Right-wing readers will applaud argument 7, but they will want to resist argument 8. Left-wing readers will have, in each case, the opposite reaction. In the remaining seven sections I deal first with four right-wing objections to argument 8, and then with three left-wing objections to argument 7.[17]

A one-premiss argument may be challenged in respect of its premiss, its inference, and, independently of the way it is drawn, its conclusion. Section 11 considers the inference of argument 8; sections 12 and 13 examine whether its conclusion is true, or, if

[17] Further left-wing objections to argument 7 have been pressed by George Brenkert in his 'Cohen on Proletarian Unfreedom'. I think they are misconceived, and I explain why in 'Are Workers Forced to Sell their Labour Power?'

true, interesting; and section 14 investigates its premiss. In sections 15 and 16 the inference of argument 7 is challenged, and in section 17 its premiss is scrutinized.

11. Someone who, unlike Frankfurt, believes that only human action can force people to do things, might object as follows to the derivation of the conclusion of argument 8, that British workers are collectively unfree. 'The prisoners in the room are collectively unfree, since the availability of only one exit is a result of a gaoler's action. If they had wandered into a cave from which, for peculiar reasons, only one could leave, then, though *unable*, collectively, to leave, they would not have been *unfree* to, since there would have been no one forcing them to stay. It is true that, *in sensu composito*, most proletarians must remain proletarians, but that is due to a numerical relationship which does not reflect human design. It is therefore not correct to speak of the proletariat as collectively *unfree* to leave, as opposed to collectively *unable*. In short, the restrictions on proletarian ascent are not caused by factors which would justify application of the concepts of force and unfreedom.'

I have four replies to this objection.

First, what was said about the cave, if it illustrates the thesis that people are forced only when people force them, also shows how unlikely a thesis that is. For it seems false that the hapless wanderers are forced to remain in the cave only if someone put them there, or keeps them there.

It is, moreover, arguable that the (anyhow questionable) requirement of a forcing human agency is met in the cave case. I say that there is collective unfreedom to leave in that as soon as one person left, the rest would be prevented from doing so. And just as there is individual unfreedom when a person's attempt to do *A* would be blocked by someone else doing it, so there is collective unfreedom when an attempt by more than *n* to do *A* would be blocked by that subset of *n* which succeeded in doing it. This applies to the proletariat, when the number of exits is limited. They are collectively unfree since, were more to try to escape than there are exits, the successful would ensure the imprisonment of those who failed.

But apart from the mutual constraint arising out of the surplus of persons over exits, there is the fact that the adverse numerical

relationship reflects the structure of capitalism which, we saw in section 4, is sufficiently connected, in various ways, with human actions to satisfy the un-Frankfurtian scruples motivating the present objection. Proletarians suffer restricted access to means of liberation because the rights of private property are enforced by exercise of capitalist power.

Finally, even if we should have to abandon the claim that workers are collectively unfree to escape and embrace instead the idea that they are collectively unable to, the withdrawal would be only a tactical one. For anyone concerned about human freedom and the prospect of expanding it must also care about structurally induced disability (or whatever he chooses to call it), which he refuses to regard as absence of freedom. Even if he is right that the wanderers are not *forced* to stay in the cave, he surely cannot deny that whoever released them would be *liberating* them.

12. The objector of section 11 doubted that the situation of the proletariat could be described as one of collective unfreedom, but he did not challenge the very concept of a collective unfreedom distinct from individual unfreedom. I now deal with a differently inspired scepticism. Set aside the question of what causes the restriction on the number of non-proletarian positions. Does the resulting lack of access justify my description of the workers as lacking collective freedom? I argued that there is some sense in which they are not all free to escape, and, since they are free *in sensu diviso*, I called their unfreedom collective unfreedom.

Collective unfreedom can be defined as follows: a group suffers collective unfreedom with respect to a type of action *A* if and only if performance of *A* by all members of the group is impossible.[18] Collective unfreedom comes in varying amounts, and it is greater the smaller the ratio of the maximum that could perform *A* to the total number in the group. Collective unfreedom is particularly interesting when, as in our example, there is more freedom for a set of individuals taken individually than for the same individuals when they are taken as members of a group: collective unfreedom,

[18] That is, if and only if it is not possible that for all *X*, *X* performs *A* (even if for all *X*, it is possible that *X* performs *A*). One might also have to specify the kind of cause that makes it impossible, a complication discussed in sect. 11 above and here set aside.

we might say, is *irreducibly* collective when more can perform *A in sensu diviso* than can perform it *in sensu composito*. And collective unfreedom matters more the smaller the ratio mentioned above is, and the more important or desirable action *A* is.

A person shares in a collective unfreedom when, to put it roughly, he is among those who are so situated that if enough others exercise the corresponding individual freedom, then they lose their individual freedoms. More precisely: *X* shares in a collective unfreedom with respect to a type of action *A* if and only if *X* belongs to a set of *n* persons which is such that:

1. No more than *m* of them (where $m < n$) are free (*in sensu composito*) to perform *A*,

and

2. no matter which *m* members performed *A*, the remaining $n - m$ would then be unfree (*in sensu diviso*) to perform *A*.[19]

Using both expressions as terms of art, one might distinguish between *collective* unfreedom and *group* unfreedom, and I am not here concerned with the latter. In the proffered definition of collective unfreedom the relevant agents are individuals, not a group as such. We are not discussing freedom and the lack of it which groups have *qua* groups, but which individuals have as members of groups. Thus, for example, the freedom or lack of it which the proletariat has to overthrow capitalism falls outside our scope,[20] since no individual proletarian could ever be free to overthrow capitalism, even when the proletariat is free to do so.

Another form of essentially interpersonal freedom is that canonically reported in sentences of the form '*X* is free to do *A* with *Y*,' where *Y* is another agent, and where if *X* does *A* with *Y*, then *Y* does *A* with *X* (the last condition is needed to exclude such actions as wiping the floor with *Y*: 'with' means 'together with' in sentences of the indicated form). This can be called *freedom-to-act-with*, or *relational freedom*.[21] Note that the relevant relation is neither symmetrical nor transitive. If I am free to do *A* with you, it does not

[19] The concept of sharing in a collective unfreedom might be used in an attempt to define the proletariat, for example, as the largest group in a society all members of which share a collective unfreedom with respect to the sale of labour power.

[20] See *KMTH* 243–5 for remarks on that issue.

[21] Robert Ware brought the important concept of relational freedom to my attention.

follow that you are free to do *A* with me, since, for example, doing *A* might be seeing a film which you would love to see with me but which I do not want to see. And if I am free to make love with you and you are free to make love with him, it does not follow that I am free to make love with him. Freedom-to-act-with figured implicitly in the argument of section 8, when I hypothesized a sentiment of solidarity which moved each person in the room to regret that (though free to leave) he was not free-to-leave-with the others. But freedom-to-act-with is different from what is here meant by collective freedom: in the case of the latter there need be no reference to another person in the description of the action people are free or unfree to perform.

Now someone might say: Since irreducibly collective unfreedom obtains only when individuals are free, why should it be a source of concern? Why should we care about anything other than the freedom of individuals?[22] The question forgets that it is a fact touching each individual in the group, namely, the mutually conditional nature of their freedom, which licenses the idea of collective unfreedom. As soon as enough people exercise the coexisting individual freedoms, collective unfreedom generates individual unfreedoms. If, though free to do *A*, I share in a collective unfreedom with respect to *A*, I am less free than I otherwise would be.

But it might be claimed that there are structures manifesting what I defined as collective unfreedom which would not normally be regarded as examples of lack of freedom. Suppose, for instance, that a hotel, at which one hundred tourists are staying, lays on a coach trip for the first forty who apply, since that is the number of seats in the coach. And suppose that only thirty want to go. Then, on my account, each of the hundred is free to go, but their situation displays a collective unfreedom. Yet it seems wrong, the objector says, to speak of unfreedom here.

I do not agree. For suppose that all of the tourists did want to go. Then it would seem appropriate to say that they are not all free to go. But in the case of individual freedom, while there is less reason

[22] One might reply: Because there are some things which we may hope groups are free to do which we would not expect, or would not want, individuals to be free to do. But that answer is out of place here, because of the distinction just drawn between group and collective freedom.

to regret an unfreedom to do what I have no desire to do,[23] I am not less unfree for lacking that desire.[24] Why should the position be different in the case of collective unfreedom? Thwarted desire throws unfreedom into relief, and sometimes thwarted desire is needed to make unfreedom deserving of note, but it is not a necessary condition of unfreedom.

The coach case is a rather special one. For we tend to suppose that the management lay on only one coach because they correctly anticipate that one will be enough to meet the demand. Accordingly, we also suppose that if more had wanted to go, there would have been an appropriately larger number of seats available. If all that is true, then the available amount of collective freedom non-accidentally accords with the tourists' desires, and though there still is a collective unfreedom, it is, as it were, a purely technical one. But if we assume that there is only one coach in town, and some such assumption is required for parity with the situation of proletarians, then the tourists' collective unfreedom is more than merely technical.

There are two significantly different variants of the merely technical version of the coach case. In the first the management decide how many coaches to order after first asking each tourist whether or not he wants to go. In that case there is a time at which all are free to go, even *in sensu composito*, though they cease to be after they have declared themselves.[25] But the management might order one coach without consulting the tourists, out of knowledge of the normal distribution of tourist desire. In that case there is no time at which all are free to go, *in sensu composito*, but the collective unfreedom is still purely technical and singularly unregrettable.

Now someone who accepts my concept of collective unfreedom might argue that it is not in general a lamentable thing, and that it

[23] Less reason, but not no reason, since the desire for freedom is not reducible to the desire to do what one would be free to do if one had it. I may resent my lack of freedom to do what I have no wish to do: Soviet citizens who dislike restrictions on foreign travel need not want to go abroad.

[24] See Isaiah Berlin, *For Essays on Liberty*, pp. xxxviii ff. 139–40; Hillel Steiner, 'Individual Liberty', 34. But see Elster, *Sour Grapes*, 127 ff. for a good challenge to the claim defended by those authors.

[25] That is, there is a time t at which they are all free to go at $t + n$, and a time $t + (n-m)$ at which they are not all free to go at $t + n$, where $m>m>0$. See sect. 6 on the need to refer twice to time in fully explicit specifications of freedom.

need not be lamentable even when the amount of collective unfreedom is not, as above, directly or indirectly causally connected, in a benign way, with people's desires. There is at present (or was when I first wrote this) a shortage of bus conductors in London, so that there is a good deal of individual freedom to become one, but also a large amount of collective unfreedom, since not more than very few of us can be bus conductors. But so what?

The rhetorical question is apposite in this case, but it is out of place when there is unfreedom to abstain from selling one's labour power to another. As I remarked earlier, the extent to which collective unfreedom with respect to an action matters depends upon the nature of the action. I grant that collective unfreedom with respect to the sale of labour power is not lamentable merely because it is collective unfreedom, since some collective unfreedom, like some individual unfreedom, is not lamentable. It is what this particular collective unfreedom forces workers to do which makes it a proper object of regret and protest. They are forced to subordinate themselves to others who thereby gain control over their, the workers', productive existence. The contrast between them and those others is the subject of the next section.

13. In an argument which does not challenge the concept of collective unfreedom, Hillel Steiner and Jan Narveson[26] say that if there is a sense in which capitalism renders workers unfree, then it does the same to capitalists. For if having no choice but to sell his labour power makes the worker unfree, then the capitalist is similarly unfree, since he has no choice but to invest his capital. Sometimes authors sympathetic to Marx say similar things. Thus Gary Young argues that the 'same line of reasoning' which shows that 'the worker is compelled to sell his labour power to some capitalist . . . shows equally that the capitalist is compelled to obtain labour power from the worker'.[27]

I shall presently question the claim that capitalists are forced to invest their capital. But even if we suppose that they are, the disanalogy between them and the workers remains so great that the Steiner/Narveson challenge must be judged rather insensitive.

[26] In separate personal correspondence.
[27] From p. 448 of his valuable article on 'Justice and Capitalist Production'.

For the worker is more closely connected with his labour power than the capitalist is with his capital. When I sell my labour power, I put *myself* at the disposal of another, and that is not true when I invest my capital. I come with my labour power, I am part of the deal.[28] That is why some people call wage labour wage slavery, and that is why John Stuart Mill said that 'to work at the bidding and for the profit of another . . . is not . . . a satisfactory state to human beings of educated intelligence, who have ceased to think themselves naturally inferior to those whom they serve.'[29] I am sure that many will think it an irresponsible exaggeration to call wage labour wage slavery. But note that no one would say, even by way of exaggeration, that having to invest one's capital is a form of slavery.

But Steiner and Narveson are not, in any case, entitled to say that capitalists are forced to invest their capital. To begin with, some are so rich that they could devote the rest of their days to spending it on consumer goods. But let us focus on the more modestly situated remainder. When Marxists claim that workers are forced to sell their labour power, they mean that they have no acceptable alternative, if they want to stay alive. But capitalists, some might say, do have an acceptable alternative to investing their capital: they are free to sell their labour power instead.[30] Of course, Steiner and Narveson, in order to defend their thesis, might deny that that is an acceptable alternative, and I, for other reasons, might agree. But if they take that line, then they should not have proposed their analogy in the first place. So either the capitalist is not forced to invest his capital, since he could, after all, sell his labour power; or, if he is, then that is because of how bad selling one's labour power is, in comparison with investing one's capital.[31]

It might be said that the capitalist is, *qua* capitalist, forced to invest his capital: in so far as he acts in that capacity, he has no

[28] 'The fact that labour and the labourer are inseparable creates certain difficulties', David O'Mahoney declares, but he reassures us that 'analytically labour is no different from any other resource the owners of which contract with the entrepreneur to use it for his purposes' ('Labour Management and the Market Economy', 30).

[29] *Principles of Political Economy*, 766.

[30] We can set aside the special case of a wholly infirm capitalist. If capitalists were in general unable to live except by investing their capital, their bargaining position *vis-à-vis* workers would be rather different.

[31] And not only in comparison with investing capital, but also absolutely, if the account of acceptability in alternatives in sect. 16 below is right.

other choice. But even if that is so—and I am not sure that it is—it is irrelevant. For while it is sometimes appropriate to deal with individuals 'only in so far as they are the personifications of economic categories',[32] that form of abstraction is out of place here. We are not here interested in the freedom and bondage of abstract characters, such as the capitalist *qua* capitalist. We are interested in *human* freedom, and hence in the human being who is a capitalist; and if the capitalist *qua* capitalist is forced to invest his capital, it does not follow that the human being who is a capitalist is forced to. It is also irrelevant, if true, that the capitalist is forced to invest his capital as long as he wants to be a capitalist. Note that, in order to confer plausibility on the claim that the worker is forced to sell his labour power, it is not necessary to stick in such phrases as '*qua worker*' or 'as long as he wants to be a worker.'

Those capitalists who are not dizzily rich are forced to invest their capital or sell their labour power. So they have an alternative to selling their labour power which the worker lacks. But they are not gods. Like the worker, they 'enter into relations that are indispensable and independent of their will'.[33] Everyone has to take capitalism as it is. But people have different amounts of choice about where to enter the set of relations it imposes, and capitalists typically have vastly more such choice than workers do.

In the foregoing discussion I did not observe the distinction between the freedom of capitalists *in sensu diviso* and their freedom *in sensu composito*, since the Steiner/Narveson objection is presented without reference to that distinction. We can, however, imagine an objection of the same general style which does make use of it. 'The individual capitalist may have more freedom of choice than the individual worker, but your own emphasis is not on the unfreedom of the worker taken as an individual, but on the unfreedom he shares with other members of his class. And if we look at capitalists as a class, we find a similar collective unfreedom. They could not *all* become sellers of labour power, since for there to be sellers of it there have to be buyers of it. Capitalists consequently suffer from a collective unfreedom parallel to that of workers.'

I have three replies to this objection.

Recall, first, that collective unfreedom comes in varying amounts (see page 268 above). Then note that, even if the objection is

[32] Marx, *Capital*, i. 92.

[33] Marx, Preface to the *Critique of Political Economy*, 20.

otherwise sound, it demonstrates much less collective unfreedom for capitalists than can be attributed to workers, since the members of any group of all but any (say) two or three of the capitalists are not structurally prevented from giving their wealth to those two or three. Mass escape from the proletariat, leaving only two or three workers behind, is, by contrast, structurally impossible.

But one can go further. It is unlikely that capitalists suffer *any* collective unfreedom with respect to becoming wage-workers, since if literally all capitalists wanted to do so, so that none of their number was willing to play the role of hirer, it would probably be easy to find workers willing and able to fill it.

Finally, the objection ignores a way in which capitalists could stop being capitalists *without* becoming wage-workers: by yielding their wealth not, as above, to particular others, but to sociey at large. I do not propose this as a new road to socialism, since it is a practical certainty that capitalists will not travel it.[34] My point is that there is no structural barrier against complete self-extinction of the capitalist class, whereas there is a structural barrier to mass exit from the proletariat: the capitalists own the means of production.

14. The final challenge from the Right to be considered here concerns the premiss of the argument of section 8: that there are not very many exits from the proletariat. The objector I have in mind grants that there cannot be general escape in the direction of the petty (and more than petty) bourgeoisie: workers could not become, *en masse*, shopkeepers and employers of other workers, if only because there would then be too few left to produce what shopkeepers sell. But the objector draws attention to a way out which has not yet been mentioned in this chapter: proletarians can form workers' co-operatives. There is enormous scope for the creation of such entities, and therefore virtually unlimited exit prospects. If, then, exiting is not widespread, the reason must be the fecklessness of workers, their unwillingness to undertake risks, and so on[35]

Note that this objection is not intended to support the conclusion

[34] 'A proposition is a practical certainty if its probability is so high as to allow us to reason, in *any* decision problem, as if its probability were 1' (Richard Jeffrey, 'Statistical Explanation vs. Statistical Inference', 105).

[35] See Nozick, *Anarchy, State and Utopia*, 255–6.

of argument 7, that workers are individually free to escape, which is a thesis I not only grant but defend. Fresh support for it comes from the plausible claim that there exist unexploited opportunities to form co-operatives. But the opportunities have to be very extensive indeed for the premiss of argument 8 to be affected, and hence for collective proletarian unfreedom to be substantially smaller than I have maintained. So when, in due course, I reply to the objection, by describing obstacles to the formation of co-operatives (such as the hostility to them of the capitalist class, which has a lot of power), my aim is not to deny that there are a goodly number of unexploited exits of this kind, but to assert that there are not, and could not be, enough to permit *mass* escape from the proletariat through them.

The objector might develop his case as follows: 'The rules of capitalism do not prohibit the formation of co-operatives. They confer on everyone the right to contract with whomsoever he pleases howsoever he pleases; they therefore give workers the right to contract with one another instead of with bosses, and the great recommendation of capitalism is that it (and not a society of workers' co-operatives) is what results when free contracting is allowed to proceed. Workers in a capitalist society are free to transform it into a society without capitalists, within the rules of capitalism itself (as opposed to through political revolution), but they choose not to do so.'

The first thing to say in reply is that procedures permitted by the rules might be extremely difficult to carry out, for objective reasons. There is, for example, a serious problem of co-ordination affecting the initial formation of co-operatives. There might be many workers each of whom would be willing and able to prosper co-operatively with the rest, did he but know who they were and how to unite with them. The high costs of search and trial attending the formation of new enterprises create a need for initial capital which workers cannot easily supply. That is one reason why there is more tendency to convert existing firms into co-operatives than to found them from scratch. But the conversions are often ill-fated, since they are least resisted when commercial failure is actual or imminent.

Widespread exiting through co-operatives would require substantial external finance, but financiers are reluctant to back even commercially viable co-operative ventures, since dispensing with

the capitalist owner sets a bad example: 'the capitalist economy reacts like an organism on which one grafts a foreign organ: it spontaneously rejects the graft.'[36] Towards commercially viable ventures that reaction is irrational, in the terms of bourgeois economics, but capitalists are less blinkered than economists about what is rational, all things considered. And there are also purely economic reasons for withholding finance, since special risks attach to investment in self-managed firms, such as the danger that the workers will 'plunder' it, that is, pay themselves such handsome wages that the co-operative will be unable to meet its obligations to investors. To forestall their anxieties investors might be offered a measure of control over the firm, but that would tend to turn the co-operators into sellers of labour power, in effect if not in form.[37]

There is a general reply to the position of the bourgeois ideologist expounded earlier in this section. It is that a capitalist society is not a set of rules, but a set of relations conforming to them, an economic structure. And transformations permitted by the rules might be blocked by the structure. Creation of workers' co-operatives on the extensive scale envisaged in the right-wing objection would, after all, mean the demise of great capitalist fortunes and institutions, whose agents are in an excellent position to frustrate transition to a co-operative market society. When the Labour government of 1974–79 denied support to workers' co-operatives of a kind routinely given to private industry,[38] the City of London did not rush in to fill the breach.

Recall that I do not deny that (despite the obstacles) there exist unexploited opportunities for exit through co-operation. My different point is that those opportunities are not, and could not be, extensive enough to constitute a means of extinguishing capitalism within the rules of the capitalist system. That is why the most

[36] Branko Horvat, 'Plan de socialisation progressive du capital', 183.

[37] See Jaroslav Vanek, *The General Theory of Labour-Managed Market Economies*, 291 ff. and 317–18 (on 'the dilemma of the collateral'); O'Mahoney, 'Labour Management', 33 ff.

[38] The first Minister of Industry in that government, Tony Benn, favoured co-operatives, which is one reason why he was replaced in the summer of 1975 by Eric Varley, who interpreted Labour's semi-socialist election manifesto commitments in an unsocialist way. See Ken Coates, *Work-ins, Sit-ins and Industrial Democracy*, 140 ff.; id. (ed.), *The New Worker Co-operatives*, 6, 95, 218. For a lucid presentation of the record of business and government hostility to co-operatives in my native Quebec, see the Vaillancourts' 'Government Aid to Worker Production Co-operatives'.

enthusiastic proponents of the co-operative market economy rely on the state to promote a transition to that form of society.[39]

15. One left-wing objection to the argument of section 7 does not question its premiss, that there are more exits from the proletariat than there are workers trying to leave it. The objection is that it is unrealistic to infer that the great majority of workers are individually free to leave. For most lack the requisite assets of character and personality: they have no commercial shrewdness, they do not know how to present themselves well, they are not good at perceiving opportunities, and so on.[40]

To assess this objection, we must distinguish between the freedom to do something and the capacity to do it.

Suppose that the world's best long-distance swimmer has just begun to serve a long prison sentence. Then he has the capacity to swim the English Channel, but he is not free to do so. My situation is the opposite of his. I am free to swim it, but I lack the capacity.

One might suggest, by way of generalization, that a person is unfree to do *A* if and only if, were he to try to do *A*, he would fail to do *A* as a result of the action(s) of one or more other persons; and that a person lacks the capacity to do *A* if and only if, were he to try to do *A*, then, even if circumstances were maximally favourable, he would fail to do *A*. If a person does *A*, then he has both the capacity to do it and the freedom to do it (at the time when he does it).[41]

The suggested analysis of 'X if unfree to do *A*' is both controversial and difficult to interpret. Some would strengthen it by requiring that the freedom-removing action be *intended* to cause removal of freedom. I do not accept that. I think that if you get in my way you make me unfree even if you are there by accident.

[39] Vanek (*General Theory*, 165 ff.) says that there is not 'much real possibility ... in a liberal capitalist environment' for developing a co-operative market economy, and Horvat ('Plan de socialisation', 165 ff.) proposes what amounts to expropriation without compensation as a means of instituting it.

[40] See the requirements listed by Marx in the passage quoted at n. 10 above.

[41] One might say that one is *able* to do *A* if and only if one has both the capacity and the freedom to do *A*.

Some would reject the above definition of incapacity on the ground that it entails that someone who does *A* by fluke has the capacity to do *A*. I reply that if someone does *A* by fluke, then he shows a capacity to do *A*, to wit, by fluke, which other people might not have. Unlike a six-month-old child, I have the capacity to hit the bull's-eye by fluke. For the view I am opposing here see Anthony Kenny, *Will, Freedom, and Power*, 136.

Others, such as Harry Frankfurt, would defend a weaker *analysans*: for Frankfurt, natural obstacles restrict freedom. I think that he is right, but I have resolved (see section 4 above) to proceed as if he were not.

On the given definitions, the left-wing objection, as presented above, fails, since deficiencies of character and personality that make the worker incapable of leaving his class do not therefore make him unfree to leave it. But the definitions, when put together, possess an entailment which might enable the left-wing objection to be presented in a more persuasive form. It follows from the definitions that if one lacks the capacity to do *A* as a result of the action of others, then one is not only incapable of doing *A* but also unfree to do it. To see how this entailment might be used on behalf of the left-wing objection, let us first return to the case of the prisoners in the locked room.

Each is (conditionally) free to escape, and I stipulated that each has the capacity to seize and wield the key, so each, in addition, has the capacity to escape. The stipulation was not required to prove that they are free to escape, but it made the exhibition of their freedom more vivid. Suppose now that some or all lack the capacity to escape, because they cannot pick up the key; and that they cannot pick it up because they are too weak, since the gaoler gives them low-grade food, in order to make it difficult or impossible for anyone to escape. Then our definitions entail that those without the capacity to use the key are not free to escape.

Now if workers cannot escape the proletariat because of personal deficiency, then this need not, on the given definitions, detract from their freedom to escape, *but it does if the deficiency is appropriately attributable to human action* (if, for example, it is due to needlessly bad education?). If a worker suffers from an appropriately generated or maintained deficiency of a sufficiently severe kind, then he is not free to escape the proletariat, and he is forced to sell his labour power. Is he, in addition, forced to sell his labour power in the required Marxist sense? That depends on whether the causation of the deficiency is suitably connected with the prevailing relations of production (see section 4). Positive answers to these questions would upset the argument of section 7. If it is plausible to say that capitalism *makes* most workers incapable of being anything else, then it is false that most workers are free, *in sensu diviso*, not to be proletarians.

16. Argument 7 says that (most) British workers are not forced to sell their labour power, since they have the reasonable alternative of setting up as petty bourgeois instead, it being false that all petty-bourgeois positions are already occupied. The inference turns on the principle that *a person is not forced to do A if he has a reasonable or acceptable alternative course.* The objection of section 15 can be treated as a challenge to that principle. It says that even if an acceptable alternative lies before an agent, he is forced to do *A* if he is (or, in the improved version of the objection, if he has been made) incapable of seizing it.

A different left-wing objection to the inference of argument 7 is substantially due to Chaim Tannenbaum. Tannenbaum accepts the italicized principle. That is, he agrees that a person is not forced to do *A* if he has an acceptable alternative course; and he also does not deny that petty-bourgeois existence is relevantly superior to proletarian.[42] His objection is that for most workers the existence of petty-bourgeois exits does not, as I have supposed, generate an acceptable alternative course to remaining a worker. For one must consider, as I did not, the risk attached to the attempt to occupy a petty-bourgeois position, which, to judge by the rate at which fledgeling enterprises fail, is very high; and also the costs of failure, since often a worker who has tried and failed to become a petty bourgeois is worse off than if he had not tried at all. The Tannenbaum objecton does not challenge the premiss of argument 7. The exits may exist but, so the objection goes, it is difficult to know where they are, and the price of fruitless search for them is considerable. Accordingly, the expected utility of attempting the petty-bourgeois alternative is normally too low to justify the statement that most workers are not forced to sell their labour power.

Attention to expected utility also illuminates the case of the immigrant petty bourgeois (section 5), on whom argument 7 was founded. For their lot within the working class is usually worse than that of native proletarians, who are not victims of racism and

[42] Unlike some Leftists, who resist the inference of argument 7 by urging that petty-bourgeois life is no better than proletarian because of its long hours, short holidays, financial risk, and so on. I reply (1) that the petty bourgeois, being 'his own boss', has an autonomy Leftists are ill placed to disparage, since they so strongly emphasize the loss of it entailed by 'proletarianization'; and (2) that it is in any case possible to base the conclusion of argument 7 on the availability of higher-grade, not-so-petty, bourgeois positions, into which workers also from time to time rise.

who are consequently less prone to super-exploitation. Hence a smaller probability of success is required to make immigrant attempts at escape rational. The disproportionately high number of immigrants in the petty bourgeoisie is therefore less due to differences in expertise and attitude and more due to objective circumstances than seems at first to be the case.

To assess the soundness of the Tannenbaum objection, let us state the argument it proposes as it would apply to a typical worker, whom I shall call *W*:

1. The expected utility to *W* of trying the petty-bourgeois course is less than the expected utility of remaining a worker (even if the utility of becoming and remaining a petty bourgeois is greater than that of remaining a worker).
2. An alternative to a given course is acceptable in the relevant sense if and only if it has at least as much expected utility as the given course. (The relevant sense of acceptability is that in which a person is forced to do *A* if he has no acceptable alternative to doing *A*.)

Therefore,

3. The existence of petty bourgeois exits does not show that *W* has an acceptable alternative course.

Therefore,

4. The existence of petty bourgeois exits does not show that *W* is not forced to sell his labour power.

Therefore,

5. The conclusion of argument 7 does not follow from its premiss.

The first premiss is a (more or less) factual claim, and the second is conceptual. In assessing the truth of the factual premiss, we must discount that part of the probability of failure in attempts at petty-bourgeois enterprise which is due to *purely* personal deficiencies: see section 15. But, even if we could carry out the needed discounting, it would remain extremely difficult to tell whether the factual premiss is true, since the answer would involve many matters of judgment, and also information which is not a matter of judgment but which happens to be unavailable: the frequency with which enterprises founded by ex-workers succeed in the United

Kingdom is not given in the bankruptcy statistics, which do not distinguish those new enterprises from other ones. I shall, however, assume that the factual premiss is true, in order to focus on the conceptual claim embodied in premiss 2.

If a person (who does *A*) is forced to do *A* if he has no acceptable alternative, then what makes for acceptability in the required sense? Suppose that I am doing *A*, and doing *B* is an alternative to that. In order to see whether it is an acceptable one, do I consider only the utility of the best possible outcome of *B*, or do I take into account all its possible outcomes, summing the products of the utility and probability of each, so that I can compare the result with the expected utility of doing *A*, and thereby obtain an answer?

It seems clear that the best possible outcome of doing *B* cannot be all that counts, since, if it were, I would not be forced to hand over my money at gunpoint where there was a minute probability that the gun would misfire. People are regularly forced to do things to which there are alternatives with low probabilities of very high rewards.

It becomes plausible to conclude that expected utility must figure in the calculus of constraint. But I think it figures in a more complex way than premiss 2 of the Tannenbaum objection allows. An alternative to a given course can be acceptable even if it has less expected utility than the given course. Illustrations: 'You're not forced to holiday in Brighton, since you can also go to Margate, though you're less likely to have a good time there.'

Premiss 2 of the Tannenbaum objection is false, but something similar to it may be true. Reflection on the intuitive data leads me to propose the following characterization of acceptability, at any rate as a first approximation:

> *B* is an acceptable alternative to *A if and only if B* is not worse than *A or B* (though worse than *A*) is not thoroughly bad,

with expected utility being the standard for judging courses of action good or bad. Now, in order to apply the analysis, one has to make not only comparative judgments of courses of action but also ones which are absolute *in some sense* (I shall not try to specify it): that is how I intend 'thoroughly bad'. If we were allowed only comparative judgments, we would risk concluding that whenever someone does what is unambiguously the best thing for him to do,

he is forced to do that thing. But unflaggingly rational people are not perpetually constrained.

Some consequences of the definition are worth mentioning.

First, even if *A* is an extremely desirable course, one might be forced to take it, since all the alternatives to it might be very bad. You could be forced to go to the superb and cheap restaurant because all the others are awful. It would then be unlikely that you are going to it (only) *because* you are forced to, but that is another matter. It is not true that you do everything you are forced to do *because* you are forced to do it.

Secondly, all the alternatives to *A* might be absolutely terrible, and no better than *A*, and yet one might still not be forced to do *A*, since some of the alternatives might be no worse than *A*. To be sure, there would be constraint in such a situation. One would be forced to do *A* or *B* or *C* . . ., but one would not be forced to do any given one of them. One would not, that is, be forced to do *A* or be forced to do *B* or be forced to do *C* . . . .

Thirdly, the extreme difficulty of assessing probabilities and utilities in real life means that it will often be intractably moot whether or not someone is forced to do something. But that is not an objection to this account, since the matter often is intractably moot.

We supposed that the expected utility of trying the petty-bourgeois course is less than that of remaining a worker. Then, if my account of acceptability in alternatives is correct, the substance of the Tannenbaum objection is saved if and only if trying the petty-bourgeois alternative is a particularly bad thing to do.

I cannot say whether or not it is, because the facts are hard to get at and hard to organize in an informative way, and also because of an indeterminacy in the ordinary concept of constraint, on which I have relied: when estimating the goodness and badness of courses of action with a view to judging whether or not an agent is forced to do something, should we consider his preferences only, or apply more objective criteria? The ordinary concept appears to let us judge either way. It seems to allow that neither party to the following exchange is misusing it:

'I'm forced to go to the Indian restaurant, since I hate Chinese food.'

'Since there's nothing wrong with Chinese food, you're not forced to go to the Indian restaurant.'

17. Tannenbaum accepted the premiss of argument 7—that there are exits from the proletariat through which no worker is trying to move—but denied that it showed that workers are (individually) free to leave the proletariat, on the ground that the escape routes from it are too dangerous. I now want to consider an objection to the premiss of the argument. I adduced in support of that premiss the remarkable growth in immigrant petty-bourgeois commerce in recent years. But I might be asked, 'How do you know that immigrants have taken places which would otherwise have been unfilled? Perhaps they prevented others from occupying them by getting there first.'

With respect to some instances of ascent this scepticism is justified. But not in all cases. Often enough the non-proletarian position occupied by an immigrant demands, initially, longer hours and stronger commitment than native British tend to find worth while, so that it would have gone unfilled had some non-native not filled it. And there must still be unoccupied places of that kind. (Note that an unoccupied place does not have to be describable in some such terms as 'the empty shop around the corner which someone could make a go of'. It suffices for the existence of an unoccupied place that there is a course of conduct such that if a worker engaged in it, he would become a non-proletarian, even though no one had ceased to be one.)

But I do concede that there are not as many vacancies as one might at first think. Much ascent into the petty bourgeoisie involves transfer of a secure place in the economic structure from one person to another, on the death, retirement, or collapse into the proletariat of the previous occupant. A good deal of immigrant ascent takes this form, and here it is plausible to say that the new occupant beat others to the place, and did not fill a place others would not have taken.

I argued the thesis of individual freedom to escape for the United Kingdom only. It could be that there is more crowding at the exits in other capitalist societies, and therefore less truth in the premiss of argument 7 when it is asserted of those societies. There is, after all, no 'British Dream', and in more pervasively capitalist cultures it might be only barely true that there is individual freedom to escape, and it might be, though false, nearly true that the overwhelming majority of the proletariat are forced to sell their labour power, even *in sensu diviso*, not for Tannenbaum-type reasons, but

because there are virtually no exits available at any given time.

With respect to societies, what is nearly true (though false) may be more important than what is strictly true, since what is strictly true may be only barely true.[43] When considering such theses as that workers are individually free to escape the proletariat, we should beware of arguments which might at best show them to be barely true.

[43] To get an uncontroversial illustration of the sort of truth I have in mind, suppose that each year in the past over one hundred people came to my birthday party, and you ask me whether as many as one hundred came this year; I say 'No', since in fact ninety-nine came, though I do not tell you that. It is more important that it is nearly true (though false) that one hundred came than that it is strictly true that fewer than one hundred came.

Part IV
The Legal Recognition of Rights

[18]

The Fundamental Rights Controversy: The Essential Contradictions of Normative Constitutional Scholarship*

Paul Brest†

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

—Arthur Leff**

I shall argue that the controversy over the legitimacy of judicial review in a democratic polity—the historic obsession of normative constitutional law scholarship[1]—is essentially incoherent and unresolvable.

The controversy is currently manifested in the body of scholarship that centers on substantive due process decisions such as *Griswold v.*

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† Professor of Law, Stanford University. I have benefited from the comments of various colleagues, including Louis Cohen, Thomas Grey, Gerald Gunther, Thomas Heller, Mark Kelman, Catherine MacKinnon, Michael Moore, Glen Nager, Deborah Rhode, Robin West, and especially from Iris Brest's incisive editing. Work on the article was supported by a grant from Project '87.

** Leff, *Unspeakable Ethics, Unnatural Law,* 1979 DUKE L.J. 1229, 1249.

1. Normative constitutional scholarship assesses decisionmaking authority, competence, procedures, criteria, and results, in contrast to, say, historical or sociological treatments of constitutional law. *See, e.g.,* Grey, *Eros, Civilization and the Burger Court,* LAW & CONTEMP. PROB., Summer 1980, at 83 (treating fundamental rights decisions from a psychoanalytic and sociological perspective).

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Connecticut,[2] *Eisenstadt v. Baird*,[3] *Roe v. Wade*,[4] and *Doe v. Commonwealth's Attorney*.[5] The judges and scholars who support judicial intervention usually acknowledge that the rights at stake—variously described in terms of privacy, procreational choice, sexual autonomy, lifestyle choices, and intimate association—are not specified by the text or original history of the Constitution. They argue that the judiciary is nonetheless authorized, if not duty-bound, to protect individuals against government interference with these rights, which can be discovered in conventional morality or derived through the methods of philosophy and adjudication. The critics argue that judicial review may be exercised only to enforce explicit constitutional provisions or to ensure the integrity of representative government. They deny that shared social values or fundamental rights exist or, in any case, that courts can ascertain them.

The fundamental rights controversy deserves a place in a symposium on legal scholarship: It is concerned with issues that lie at the core of contemporary constitutional discourse—judicial methodology, institutional competence, and democratic theory. My own scholarly agenda also influenced this choice of topic. Several years ago, I started work on an affirmative theory of constitutional decisionmaking based on interpretation—broadly conceived—of the history, structure, and values of American society. I began by examining, and rejecting, "originalist" constitutional interpretation (that is, interpretation rooted in the text and original understanding of the Constitution).[6] The publication of John Hart Ely's important proposals for value-neutral "representation-reinforcing" modes of judicial review[7] occasioned a detour, which confirmed my belief that such process-oriented strate-

2. 381 U.S. 479 (1965). *Griswold* held that a Connecticut statute prohibiting the use of contraceptives could not be applied to married couples. Justice Douglas's opinion for the Court relied on "penumbras" of various provisions of the Bill of Rights. Concurring Justices invoked the Ninth Amendment and the due process clause of the Fourteenth Amendment. The Court has not since recurred to penumbral analysis.

3. 405 U.S. 438 (1972). *Eisenstadt* invalidated a statute that, in effect, prohibited distributing contraceptives to unmarried persons. The Court remarked that "[i]f the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." *Id.* at 453.

4. 410 U.S. 113 (1973). *Roe* invalidated a Texas statute prohibiting abortions before as well as after viability.

5. 403 F. Supp. 1199 (E.D. Va. 1975), *aff'd mem.*, 425 U.S. 901 (1976). *Doe* sustained Virginia's sodomy statute as applied to private consensual homosexual conduct. The Supreme Court affirmed without opinion. Justices Brennan, Marshall, and Stevens voted to note probable jurisdiction and set the case for argument.

6. *See* Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. Rev. 204 (1980).

7. J. Ely, Democracy and Distrust: A Theory of Judicial Review (1980).

gies were covertly value-laden.[8] As I turned to the possibilities of non-originalist, substantive, value-oriented constitutional adjudication, I became increasingly uncertain about the criteria we[9] implicitly invoke to assess theories of judicial review. In this article I conclude that no defensible criteria exist.

Part I of the article reviews Alexander Bickel's discussion of judicial review in *The Least Dangerous Branch*,[10] which presaged the contemporary fundamental rights controversy and established its parameters. Part II describes the controversy itself and concludes with a critique of fundamental rights theories. Part III argues that the alternative strategies of judicial review proposed by the critics cannot withstand the same kinds of criticisms they levy against fundamental rights adjudication. Part IV shows how the fundamental rights controversy is generated by a liberal theory of democracy, which Part V locates in the broader context of modern liberal ideology.

I. The Legacy of Alexander Bickel

Although *The Least Dangerous Branch* was published in 1962, before the contemporary revival of substantive due process, the fundamental rights controversy cannot be understood without reference to this extraordinarily influential book. Bickel sought both to justify judicial review and to constrain it; in retrospect, he thereby embraced both sides of the controversy.

The difficulty with judicial review, Bickel wrote, is that it is a "counter-majoritarian force in our system":

> [W]hen the Supreme Court declares unconstitutional a legislative act . . . it thwarts the will of the representatives of the actual people of the here and now; it exercises control, not in behalf of the prevailing majority, but against it. That, without mystic overtones, is what actually happens.[11]

Although legislative processes are often imperfectly representative and the judiciary is not politically unresponsive, "nothing . . . can alter the essential reality that judicial review is a deviant institution in the American democracy."[12]

8. Brest, *The Substance of Process*, 42 Ohio St. L.J. 131 (1981).
9. By "we" I refer to normative constitutional law scholars, among whom I include myself, and not to the "Americans," "right-thinking Americans," "civilized peoples," etc., whom we often refer to as "we."
10. A. Bickel, The Least Dangerous Branch (1962).
11. *Id.* at 16-17.
12. *Id.* at 17-19.

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Bickel's justification for judicial review began with the premise that "the good society not only will want to satisfy the immediate needs of the greatest number but also will strive to support and maintain enduring general values."[13] He proceeded to argue that "courts have certain capacities for dealing with matters of principle that legislators and executives do not possess":[14]

> [M]any actions of government have . . . unintended or unappreciated bearing on values we hold to have more general and permanent interest . . . . [W]hen the pressure for immediate results is strong enough and emotions ride high enough, [legislators] will ordinarily prefer to act on expediency rather than take the long view . . . . Not merely respect for the rule of established principles but the creative establishment and renewal of a coherent body of principled rules—that is what our legislatures have proven themselves ill equipped to give us.
>
> Judges have, or should have, the leisure, the training, and the insulation to follow the ways of the scholar in pursuing the ends of government. This is crucial in sorting out the enduring values of a society . . . . [Courts can] appeal to men's better natures, to call forth their aspirations, which may have been forgotten in the moment's hue and cry . . . .[15]

This does not establish "full consistency with democratic theory,"[16] but it blunts the charge that judicial review is antidemocratic. "[I]f the process is properly carried out, an aspect of the current—not only the timeless, mystic—popular will will find expression in constitutional adjudication. The result may be a tolerable accommodation with the theory and practice of democracy."[17]

Despite his expansive description of the judicial function, Bickel's commitment to fundamental rights adjudication was ambivalent and coupled with a strong belief in judicial self-restraint.[18] The contemporary proponents of fundamental rights adjudication tend to embrace his most expansive views. The critics emphasize the "countermajoritarian difficulty" and the need for restraint.

13. *Id.* at 27.
14. *Id.* at 25.
15. *Id.* at 24-26.
16. *Id.* at 27.
17. *Id.* at 28.
18. *See id. passim.* Bickel's concern for judicial restraint became even more dominant in his later writings. *See* A. Bickel, The Morality of Consent (1975); A. Bickel, The Supreme Court and the Idea of Progress (1970). *See generally* Purcell, *Alexander M. Bickel and the Post-Realist Constitution*, 11 Harv. C.R.-C.L. L. Rev. 521 (1976) (tracing Bickel's work).

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II. The Controversy over Methodology and the Source of Values

This part describes the internal discourse of the fundamental rights controversy. It begins with seven representative scholars who favor one or another form of fundamental rights adjudication. Although not all of the proponents approve of all the Supreme Court's fundamental rights decisions, they share the mission of justifying the Court's willingness to engage in this mode of adjudication. I treat the advocates of fundamental rights adjudication in two groups. The first consists of consensus or conventional morality theorists. Dean Harry Wellington of Yale believes that there are no fundamental rights as such, but only a conventional morality to be judicially ascertained and enforced.[19] Michael Perry of Ohio State articulates a similar theory but reaches significantly different results from Wellington.[20] The "rights" theorists in the second group—Laurence Tribe of Harvard,[21] Kenneth Karst of U.C.L.A.,[22] J. Harvey Wilkinson and G. Edward White of Virginia,[23] and David A. J. Richards of New York University[24]—draw on a variety of sources to derive fundamental rights that enjoy some independence from conventional moral views.

In contrast to the profusion of articles supporting fundamental rights adjudication, the scholarly literature contains relatively few unsympathetic analyses.[25] I conclude by discussing the writings of the three most prominent critics of the practice: Raoul Berger, a Charles

19. Wellington, *Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication*, 83 YALE L.J. 221 (1973).

20. Perry, *Abortion, The Public Morals, and the Police Power: The Ethical Function of Substantive Due Process*, 23 U.C.L.A. L. REV. 689 (1976) [hereinafter cited as Perry, *Ethical Function*]; Perry, *Substantive Due Process Revisited: Reflections on (and Beyond) Recent Cases*, 71 NW. U.L. REV. 417 (1977) [hereinafter cited as Perry, *Reflections*]. Professor Perry has since adopted a different theory of judicial review. *See* M. Perry, The Constitution, The Courts, and Human Rights: An Inquiry into the Legitimacy of Constitutional Policymaking by the Judiciary (forthcoming 1982) (Court, constrained by Congress's power over the appellate jurisdiction, plays role in nation's moral development).

21. L. TRIBE, AMERICAN CONSTITUTIONAL LAW (1978).

22. Karst, *The Freedom of Intimate Association*, 89 YALE L.J. 624 (1980).

23. Wilkinson & White, *Constitutional Protection for Personal Lifestyles*, 62 CORNELL L. REV. 563 (1977).

24. Richards, *Sexual Autonomy and the Constitutional Right to Privacy: A Case Study in Human Rights and the Unwritten Constitution*, 30 HASTINGS L.J. 957 (1979) [hereinafter cited as Richards, *Sexual Autonomy*]; Richards, *Unnatural Acts and the Constitutional Right to Privacy: A Moral Theory*, 45 FORDHAM L. REV. 1281 (1977); D. RICHARDS, THE MORAL CRITICISM OF LAW (1977) (applying Rawlsian theory to constitutional law).

25. I do not include Richard Epstein's *Substantive Due Process by Any Other Name: The Abortion Cases*, 1973 SUP. CT. REV. 159, or similar articles criticizing particular decisions but not discussing the methodology of fundamental rights adjudication.

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Warren Senior Fellow at Harvard,[26] Robert Bork of Yale,[27] and John Hart Ely of Harvard.[28]

A. *The Proponents*

1. *Two Versions of Conventional Morality*

Harry Wellington. Dean Harry Wellington argues that proper constitutional adjudication closely resembles common-law adjudication. Both consist of reasoning from principles rooted in conventional morality and elaborated through judicial doctrine:

> [W]hen dealing with legal principles a court must take a moral point of view.[29] Yet I doubt that one would want to say that a court is entitled or required to assert *its* moral point of view. Unlike the moral philosopher, the court is required to assert *ours.* This requirement imposes constraints: Judicial reasoning in concrete cases must proceed from society's set of moral principles and ideals . . . . And that is why we must be concerned with conventional morality, for it is there that society's set of moral principles and ideals are located.[30]

Wellington defines conventional morality as "standards of conduct which are widely shared in a particular society."[31] A society's conventional moral "principles" differ from its moral "ideals." Principles impose obligations; ideals are "a guide to the virtuous, inviting him 'to carry forward beyond the limited extent which duty demands.' "[32] Although a society's ideals "help us understand how its moral principles apply in concrete situations,"[33] judges are authorized to implement only its principles. To the claim that contemporary American society is too heterogeneous to share conventional moral principles, Wellington responds:

> Although the sub-culture problem is real, too much can be made of it. Much of the cleavage that results from diversity manifests itself in interest group politics. Diverse groups can pursue different policies while sharing a basically common morality.

26. R. Berger, Government by Judiciary (1977).
27. Bork, *Neutral Principles and Some First Amendment Problems,* 47 Ind. L.J. 1 (1971).
28. J. Ely, *supra* note 7.
29. That is, it must base decisions on "principles, general in form and universal in application." Wellington, *supra* note 19, at 243.
30. *Id.* at 244.
31. *Id.* (quoting H.L.A. Hart, The Concept of Law 165 (1961)).
32. *Id.* at 245.
33. *Id.*

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> More important, the melting pot phenomenon is a real one . . . . The American people have a history and tradition which interact with their common problems to fashion attitudes, values, and aspirations that tend toward a dynamic, but nevertheless relatively cohesive, society, and that make it possible to discern a conventional morality.[34]

To discern a society's conventional morality, one must live in the society, "become sensitive to it, experience widely, read extensively, and ruminate, reflect, and analyze situations that seem to call moral obligations into play. This task may be called the *method of philosophy,"*[35] and it is not adequately performed by legislators:

> The major difficulty for the official charged with the task of determining how the moral principles bear in a particular case is in disengaging himself from contemporary prejudices which are easily confused with moral principles. He must escape the passion of the moment and achieve an appropriately historical perspective . . . .
>
> . . . . [L]egislators, of course, are often professionally concerned with morality . . . . But the environment in which legislators function makes difficult a bias-free perspective. It is often hard for law-makers to resist pressure from their constituents who react to particular events . . . with a passion that conflicts with common morality . . . . Nor is it an easy matter for legislators to find conventional morality when there are well-organized interest groups insisting upon moral positions of their own.[36]

By comparison, the process of adjudication "has some promise of filtering out the prejudices and passions of the moment, some promise of providing the judge with distance and a necessary historical perspective."[37]

Discerning conventional morality differs radically from deriving rights independent of their basis in conventional morality. Wellington characterizes "fundamental rights" as a terminological mistake because it implies that those rights have a special status derived from the Constitution or imposed by the judge "as wise philosopher":[38] "The Fourteenth Amendment, as Holmes has said, does 'not enact Mr.

34. *Id.*
35. *Id.* at 246.
36. *Id.* at 248-49.
37. *Id.* at 248. With virtually no discussion, Wellington dismisses the methods of behavioral science as too expensive and not up to the task of unpacking the complexities of moral issues. *Id.* at 247.
38. *Id.* at 299.

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Herbert Spencer's Social Statics.' Nor does it enact Mr. John Rawls's *A Theory of Justice*."[39] Rather, "[t]he Court's task is to ascertain the weight of the principle in conventional morality and to convert the moral principle into a legal one by connecting it with the body of constitutional law."[40]

Wellington applies this approach to the regulation of contraception and abortion. I pass over the first, noting only that he approves of *Griswold* because the Connecticut anticontraceptive law interfered with the conventionally rooted intimacy of the marital relationship,[41] but finds *Eisenstadt* problematic because he doubts whether a consensus protects the sexual intimacy of unmarried couples.[42]

Wellington introduces the abortion issue by establishing the principle that "every person has a right (qualified by context) to decide what happens in or to his body."[43] He posits a hypothetical statute making it a crime to remove a person's gall bladder except to save her life. The law "deprives any person with a diseased gall bladder of his or her liberty without due process of law" because it imposes physical and psychological pain.[44] Although the state has no conceivable interest in insuring the survival of diseased gall bladders, Wellington argues that this is not true of the survival of fetuses. The analogy therefore does not establish that a woman has a constitutional right to an abortion if it will cause the death of the fetus.

Wellington argues that conventional morality nonetheless permits abortion if the fetus was conceived through rape. His analysis proceeds from an example devised by the philosopher Judith Thomson:[45] You are kidnapped and taken to a hospital where a famous violinist who has a fatal kidney ailment is plugged into your circulatory system. If he is disconnected, he will die; otherwise, at the end of nine months he will be cured and you will be unplugged, inconvenienced but unharmed. "Is it morally incumbent on you to accede to that situation?"[46] Thomson answers "no," and Wellington agrees that this is "the only answer that can be defended by an appeal to our attitudes and practices."[47] He also agrees that the "example [cannot] be distinguished from abortion where pregnancy results from rape."[48]

39. *Id.* at 285.
40. *Id.* at 284.
41. *See id.* at 292-95.
42. *See id.* at 296-97.
43. *Id.* at 305.
44. *Id.*
45. Thomson, *A Defense of Abortion*, 1 PHILOSOPHY & PUB. AFF. 47, 48-49 (1971).
46. *Id.* at 49.
47. Wellington, *supra* note 19, at 307.
48. *Id.*

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The fact that a majority of states permitted abortions to preserve the mother's life shows that this practice was also supported by conventional morality. But Wellington believes that *Roe v. Wade* went too far in permitting abortions to preserve the mother's physical or mental health. To be sure, the American Law Institute's Model Penal Code would permit such abortions, and the ALI is "some evidence of society's moral position on these questions. It is indeed better evidence than state legislation, for the Institute, while not free of politics, is not nearly as subject to the pressures of special interest groups as is a legislature."[49] The Institute's recommendation does not reflect social consensus, however: "I do not understand how, by noticing commonly held attitudes, one can conclude that a healthy fetus is less important than a sick mother."[50]

Dean Wellington's source of values for constitutional adjudication is conventional morality elucidated by intuitionistic reasoning. By intuitionistic reasoning, I refer to the method of testing a posited outcome (*e.g.*, "a woman has a right to abort a fetus conceived by rape") by comparing it to seemingly analogous situations about which the decisionmaker has clear intuitions (the kidnapped person needn't stay hooked up to the violinist). Philosophers and lawyers often argue about moral and legal principles in this manner.[51] In effect, Wellington employs it as a device for interpolating between conventional moral principles to apply them to particular situations.

Michael Perry. For Professor Perry, as for Dean Wellington, the Court's task is limited to ascertaining and enforcing conventional morality.[52] Judicial review is designed "to correct the occasional myopia, to moderate the occasional excesses of the political processes":[53]

49. *Id.* at 311.
50. *Id.*
51. Of course, the writer takes the chance that the reader will not share her intuition or that, because the mind-experiment is so far removed from the reader's experience, he will not feel much confidence in the validity of the intuition. *See also* Hare, *Abortion and the Golden Rule*, 4 PHILOSOPHY & PUB. AFF. 201 (1975) (criticism of intuitionistic moral reasoning).
52. "[T]he Court should not function as an antimajoritarian agency . . . . Thus, when an individual Justice knows that his own views diverge from those of conventional moral culture, his responsibility is to defer to the public morals." Perry, *Ethical Function*, *supra* note 20, at 731. Perry criticizes Judge Merhige for basing his dissent in Doe v. Commonwealth's Attorney, 403 F. Supp. 1199 (E.D. Va. 1975), *aff'd mem.*, 425 U.S. 901 (1976) on a libertarian principle not rooted in conventional morality:

> The dimensions of the right of privacy are determined by conventional morality. Whether or not the sodomy statute challenged in *Doe* violates the right of privacy is a question to be answered not by deductions from a Millian philosophical principle, but by a careful (if inevitably imprecise) inquiry into the contemporary character of conventional American attitudes toward homosexuality.

Perry, *Reflections*, *supra* note 20, at 439 (footnotes omitted).
53. Perry, *Ethical Function*, *supra* note 20, at 716 (footnotes omitted).

> A law may remain on the books for so long that it no longer reflects contemporary moral culture . . . . Or a piece of legislation might have been put on the books only because a sufficiently interested minority has lobbied—and perhaps bartered—for it . . . .
>
> Fervent minority lobbying and bartering is not wrong in a pluralist democracy. But when trying to ascertain the content of the public morals, it simply will not do to pretend that minority success is a conclusive index of conventional moral culture.[54]

In performing its function, the Court should look to "cases establishing relevant 'first principles'; cases involving related or analogous issues; evidence indicating a shift in the moral culture, such as recently enacted legislation dealing with an aspect of the issue before the Court; or credible studies of shifts in contemporary social attitudes":[55]

> Ultimately, however, each individual Justice . . . must ask whether particularized claims about that culture resonate with him or her. The Justices, after all, are not unfamiliar with conventional mores and attitudes; in truth it is unlikely that a very unconventional person would become a Justice of the Supreme Court. The collectivity which is the Supreme Court is, in this sense, a jury, and as a matter of political reality the Court is a jury that generally will reflect and mediate the temper of the dominant political and moral culture.[56]

Perry's inquiry differs from Wellington's in two significant respects. First, Perry is explicitly concerned with "public morality": The relevant question is "not whether the conduct is disapproved by conventional morality, but whether conventional morality supports state enforcement of its disapproval through criminal and civil sanctions."[57] Second, Perry's Court holds the legislature to society's moral ideals,[58] while Wellington's enforces only lower level conventional moral principles.

54. *Id.* at 727-28.
55. *Id.* at 730 (footnotes omitted).
56. *Id.* at 730-31 (footnotes omitted).
57. Perry, *Reflections, supra* note 20, at 447. For example, "the issue is not whether conventional morality disfavors sodomy, but only whether it supports treating sodomy as an issue implicating the *public* morals, by criminalizing consensual sodomous conduct by adults in private." *Id.*
58. "American society, though committed to certain politico-philosophical principles and ideals . . . often finds it difficult to order its affairs consistently with those ideals. . . . The courts can serve society well by keeping these ideals in focus, or by bringing them back into focus." *Id.* at 431-32 (footnote omitted).

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The two scholars' conclusions differ widely. Unlike Wellington, Perry finds Eisenstadt entirely unproblematic[59] and *Roe v. Wade* quite an easy case.[60] Although Wellington does not discuss antihomosexual legislation, his analysis of the contraception and abortion cases indicates that he would sustain laws prohibiting sodomy. Perry easily concludes that the punishment of homosexual conduct is not grounded in conventional morality. He relies on the widespread nonenforcement of sodomy laws, resolutions of various professional associations calling for the decriminalization of private consensual sexual behavior, and the American Psychiatric Association's decision to remove homosexuality from its list of mental diseases.[61]

2. *Rights Theories*

a. *The Theories.* Laurence Tribe devotes one hundred pages of his treatise to elaborating broadly defined "rights of privacy and personhood,"[62] with the ultimate objective of identifying "those attributes of an individual which are irreducible in his selfhood."[63] In contrast to Wellington and Perry, Tribe explicitly rejects the limitations of social consensus:

> [A]ttempts to ground constitutional rights of privacy or personhood in conventional morality . . . are helpful but have inherently limited power. For we are talking, necessarily, about rights of individuals or groups *against* the larger community, and against the majority . . . . Subject to all of the perils of antimajoritarian judgment, courts—and all who take seriously their constitutional oaths—must ultimately define and defend rights against government in terms independent of consensus or majority will.[64]

Kenneth Karst seeks to establish a freedom of "intimate association," which he defines as "a close and familiar personal relationship with another that is in some significant way comparable to a marriage or a family relationship."[65] Karst links the freedom of intimate association to other domains of constitutional doctrine, especially to the equal protection clause:

59. Perry, *Ethical Function, supra* note 20, at 732.

60. *Id.* at 733. Public opinion polls indicate "that the Court's implicit evaluation of conventional moral culture vis-a-vis restrictive abortion legislation was essentially accurate." *Id.*

61. Perry, *Reflections, supra* note 20, at 447-48.

62. L. Tribe, *supra* note 21, at 886-990.

63. *Id.* at 889 (quoting 52d A.L.I. Ann. Mtg. 42-43 (remarks of Paul Freund)).

64. *Id.* at 896 (footnotes omitted); *cf.* Tribe, *supra* note 21, at 573-74 (discussing sources of constitutional rights).

65. Karst, *supra* note 22, at 629.

> The substantive heart of the Fourteenth Amendment . . . is a principle of equal citizenship, a presumptive guarantee of the right to be treated by the organized society as a respected, responsible, participating member. Some of the values in intimate association are closely bound up with a person's sense of self: caring, commitment, intimacy, self-identification. When the state seriously impairs those values by restricting intimate association, the equal protection clause is at its most demanding, insisting on justifications of the highest order if the state is to be allowed to persist.[66]

Wilkinson and White argue for a freedom of "lifestyle choices," which they expressly limit to matters of "domestic companionship, sexual conduct, and personal appearance."[67] These "choices themselves are intimate"; "for the most part [they] involve little prospect of direct or intentional harm to others"; and they are indispensable "in fulfilling individuality."[68] Although the authors acknowledge that "lifestyle freedoms are not expressly safeguarded" by the Constitution, they write that "the spirit of the Constitution operates to protect them":[69]

> A compelling mission of the Constitution has been to protect sanctuaries of individual behavior from the hands of the state . . . . [T]he Bill of Rights teaches that human dignity is meaningless without a proper measure of personal freedom from governmental interference.
>
> That dignity is seriously diminished unless it includes those choices that most express our uniqueness and individuality. By our style of dress and appearance, our personal associations, our manner of speech, and our sexual behavior we seek to express our uniqueness as humans and to realize our destinies as individual beings . . . . [N]othing is more central to self-realization and fulfillment than these very personal decisions.
>
> . . . The Constitution, as interpreted by the Supreme Court,

66. *Id.* at 663. *See also* Karst, *The Supreme Court, 1976 Term—Foreword: Equal Citizenship Under the Fourteenth Amendment,* 91 Harv. L. Rev. 1 (1977) (deriving constitutional rights from concept of citizenship).

67. Wilkinson & White, *supra* note 23, at 614.

68. *Id.* at 615. The authors grant that choices involving education and career also express one's individuality; but those "depend greatly upon economic means or personal ability," while "there is a greater universality to lifestyle choices." *Id.* at 615.

> Thus it is ultimately irrelevant to our analysis that the right to choose a career seems easily more important than the right to wear long hair. Career choices simply lack, in our view, the degree of personal intimacy necessary to characterize them as lifestyle choices. Expanding the concept of lifestyle freedom to include all important marketplace decisions having some personal element would eventually weaken the force of a lifestyle right and dilute the protection our most intimate choices ought to receive.

Id. at 615-16 (footnote omitted).

69. *Id.* at 611.

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> has increasingly served to protect powerless minorities—casualties of the majoritarian political process . . . . [T]he subjects of lifestyle protection are likely to be persons unable to gain redress through the political process . . . .
>
> The purposes served by protection of lifestyle choices are also strikingly similar to those served by the first amendment. In personal behavior as well as in ideas, protection of individual choices preserves dissent from the tastes of the majority.[70]

David Richards poses the question: "What is the constitutionally permissible content of the legal enforcement of morals?"[71] His answer invokes a liberal theory of human rights traced from Milton, Locke, Rousseau, and Kant, to Ronald Dworkin and John Rawls. Richards asserts that underlying any concept of human rights are "two crucial assumptions: first, that persons have the *capacity* to be autonomous in living their life; second, that persons are entitled, as persons, to equal concern and respect in exercising their capacities for living autonomously."[72] He argues that "[c]ontemporary understanding of the strategic importance to self-respect and personhood of sexual autonomy requires that we . . . guarantee full liberty to enjoy and express love."[73] And he invokes Ronald Dworkin's "rights thesis"[74] to translate these observations into principles of constitutional law: "Under the constitutional order, certain human rights are elevated into legally enforceable rights, so that if a law infringes on these moral rights, the law is not valid."[75] The rights thesis treats rights as "trump cards that, by definition, outweigh utilitarian or quasi-utilitarian considerations and can legitimately only be weighed against other rights":[76]

> This principle explains and justifies the sense in which the constitutional right to privacy is a *right*. The constitutional concept expresses an underlying moral principle resting on the enhancement of sexual autonomy, the self-determination of the role of sexuality in one's life which protects the values foundational to the concept of human rights, equal concern and respect for autonomy. Accordingly, in the absence of countervailing moral argument, laws which determine how one will have sex and with what consequences are constitutionally invalid.[77]

70. *Id.* at 611-13.
71. Richards, *Sexual Autonomy, supra* note 24, at 976.
72. *Id.* at 964.
73. *Id.* at 1001.
74. *See* R. Dworkin, Taking Rights Seriously 81-90 (1978).
75. Richards, *Sexual Autonomy, supra* note 24, at 958.
76. *Id.* at 959.
77. *Id.* at 1006.

Our "constitutional morality" incorporates these principles and, by contrast to conventional morality, is subject to the metaethical constraints of moral reasoning. It follows that

> not everything invoked by democratic majorities as justified by "public morality" is, in fact, morally justified. From the moral point of view, we must always assess such claims by whether they can be sustained by the underlying structure of moral reasoning . . . . In this regard, constitutional morality is at one with the moral point of view.[78]

b. *Competing Interests.* The Court and proponents of fundamental rights adjudication do not regard constitutional rights as absolutely protected under every conceivable circumstance; they are defeasible by strong legitimate governmental interests. Wellington and Perry do not engage in the accommodation or balancing of interests, for the conventional moral view on any particular issue already reflects the balance of competing interests. By contrast, the rights theorists directly address the legitimacy and strength of justifications for interfering with fundamental rights. The two most prominent justifications are promoting public morality and protecting the institutions of marriage and the family.

Tribe's only comment on promoting morality is that "*no* unconventional form of consensual human sexuality can be excluded from the protected sphere *solely* on the ground that it is thought by the majority not to draw on the historically deepest wellsprings of human emotions and instincts."[79] Although he assumes that the state may legitimately seek to protect and strengthen marriages, he doubts that this interest suffices to sustain most regulations of sexual conduct.[80]

78. *Id.* at 977. In discussing Rawls's concept of a "reflective equilibrium," Dworkin emphasizes that where a particular intuition conflicts with general principles to which one adheres, one must act on principle and not ignore the contradiction in the faith that a more sophisticated set of principles will eventually be discovered that will reconcile the conflict. *See* R. Dworkin, *supra* note 74, at 159-68.

79. L. Tribe, *supra* note 21, at 947.

80. *Id.* at 946. Tribe is unusually sensitive to the potential threat that fundamental rights adjudication poses to intermediate forms of association:

> [T]he stereotypical "family unit" that is so much a part of our constitutional rhetoric is becoming decreasingly central to our constitutional reality. Such "exercises of familial rights and responsibilities" as remain prove to be *individual* powers to resist governmental determination of who shall be born, with whom one shall live, and what values shall be transmitted.
>
> This shift might well represent an irresistible corollary of changes in the structure of American family life and social and cultural existence. Whatever its cause, the issue it raises most sharply is the recurring puzzle of liberal individualism: Once the State, whether acting through its courts or otherwise, has "liberated" the child—and the adult—from the shackles of such intermediate groups as family, what is to defend

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Karst writes that, although freedom of intimate association "does not imply that the state is wholly disabled from promoting majoritarian views of morality,"[81] the state may not invoke this legitimate objective as an excuse to "prevent the expression of a particular idea, or . . . some harm that it fears will flow from the expressive aspects of the conduct . . . ."[82] Karst suggests that most laws regulating intimate association are impermissibly concerned "to regulate the content of messages about sexual preference."[83] He also implies that the state has no significant interest in protecting the family beyond the wishes of its members.

Wilkinson and White find the general promotion of morality a weak justification for regulating lifestyles:

> The privilege of living in a free and open society entails . . . some obligation to tolerate ideas and moral choices with which one disagrees . . . . Moreover, to uphold legal proscriptions on grounds of abstract morality would permit the state to ferret out and ultimately to try and punish offenders upon the assertion, not that the given behavior was socially harmful, but that it was revolting and unnatural. Such a rule of law would invite the majority to act upon its least noble and most prejudiced impulses.[84]

On the other hand, they urge that

> [f]amily life has been a central unifying experience throughout American society. Preserving the strength of this basic, organic unit is a central and legitimate end of the police power. The state ought to be concerned that if allegiance to traditional family arrangements declines, society as a whole may well suffer.[85]

The state's "proper concern derives from the basic functions performed by 'family' units in society: from sexual fulfillment and reproduction, to education and rearing of the young, to economic support and emotional security."[86]

the individual against the combined tyranny of the state and her own alienation? *Id.* at 987-88 (footnotes omitted). *See also id.* at 892 (need for flexibility in defining fundamental rights of personhood).

81. Karst, *supra* note 22, at 627.
82. *Id.* at 657.
83. *Id.* at 658 (referring to anti-homosexual legislation). *See also id.* at 672-73 (incest and cohabitation).
84. Wilkinson & White, *supra* note 23, at 618 (footnote omitted). *But see id.* at 568 ("Law is a vehicle by which democratic majorities reaffirm shared moral aspirations and summon society's allegiance to a common set of behavioral goals.")
85. *Id.* at 595. *See also id.* at 569 (marriage as "a cornerstone of American society").
86. *Id.* at 623.

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Richards believes that there is "no constitutional objection to prohibiting clearly immoral acts that threaten the existence of society."[87] But enforcing mere *conventional* morality "is incompatible with the moral theory of human rights implicit in the constitutional order."[88] For the same reason, Richards believes that the state may not require conformity to any particular notion of the family unit.[89]

c. *Applications*. All of the rights theorists find *Griswold* and *Eisenstadt* easy cases, and they ultimately approve of *Roe v. Wade*. Their treatment of laws punishing homosexual conduct illuminates some differences in their approaches.

Tribe believes that private consensual homosexual conduct should be protected because it "is central to the personal identities of those singled out by the state's law."[90] He concedes that the "history of homosexuality has been largely a history of disapproval and disgrace." However,

> it makes all the difference in the world what level of generality one employs to test the pedigree of an asserted liberty claim . . . . It is crucial, in asking whether an alleged right forms part of a traditional liberty, to define the liberty at a high enough level of generality to permit unconventional variants to claim protection along with mainstream versions of protected conduct . . . . [T]he tradition of respecting the intimate noncoercive sexual actions of others . . . provides an umbrella capacious enough to subsume homosexual as well as heterosexual variants.[91]

For Karst, "[a]ll of the values of intimate association are potentially involved in homosexual relationships . . . ."[92] "[A]ny effort by the state to forbid intimate homosexual association must be justified by the same sort of heroic state interests that would be necessary to justify forbidding heterosexual marriage or other forms of heterosexual association."[93] Indeed, "the freedom of intimate association demands some important justification for the state's offering the marital status to heterosexuals and denying *any* comparable status to homosexuals."[94]

87. Richards, *Sexual Autonomy*, *supra* note 24, at 991.
88. *Id.* at 992.
89. *Id.* at 993-96.
90. L. Tribe, *supra* note 21, at 943.
91. *Id.* at 944-46.
92. Karst, *supra* note 22, at 682.
93. *Id.* at 685. Karst suggests that a state could justify laws penalizing homosexual conduct only by showing that it caused noticeable damage; for example, "that a lesbian mother . . . was unfit to have custody of her child," or that a "male homosexual teacher . . . created special risk of seduction of children assigned to his classes." *Id.* at 685.
94. *Id.* at 684.

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Wilkinson and White are troubled by the punishment of homosexual conduct, because the "autonomy right to freely engage in sex combines with a seclusion right not to be disturbed in the private practice of intimate sex to produce a constitutional lifestyle claim of some power."[95] Nonetheless, "state interests of significant strength support a prohibition of homosexuality."[96] Of these, the most significant is protecting the family by preventing homosexuality from becoming a viable alternative to heterosexual intimacy.[97] The authors disagree about the ultimate resolution:

> Mr. Wilkinson would uphold the state's interest in the preservation of the traditional family; Mr. White would desire stronger empirical proof that the state interest is truly put in jeopardy by homosexual practices among consenting adults. Both authors acknowledge the intuitive elements in their judgments.[98]

Richards argues that homosexual conduct is not immoral[99] and doubts that its legalization would have any significant effect on normal family life.[100] "In any event," he concludes, "it is difficult to understand how the state has the right, on moral grounds, to protect heterosexual love at the expense of homosexual love. Equal concern and respect for autonomous choice seem precisely to forbid the kind of calculation that this sort of sacrifice contemplates."[101]

The rights theorists invoke many of the same sources of values that the consensus theorists employ to ascertain conventional morality. A consensus theorist, however, is more immediately constrained by conventional morality. If Wellington's Court determines that conventional morality permits the punishment of homosexual conduct, it must uphold the legislation. A rights theorist looks to conventional morality as a nonexclusive guide to defining the breadth and contours of higher level moral principles. Once articulated, these prin-

95. Wilkinson & White, *supra* note 23, at 593.
96. *Id.*
97. *Id.* at 595.
98. *Id.* at 596.
99. Richards, *Sexual Autonomy, supra* note 24, at 981-89.
100. *Id.* at 994-95. Richards adds that "there is reason to believe that the argument for protecting marriage and the family is hypocritically proposed. If the argument were meant seriously, state laws against fornication and adultery would be vigorously pressed in addition to the anti-homosexuality laws." *Id.* at 996.
101. *Id.* at 996.

ciples operate independently of particular conventional views and may even invalidate laws that are supported by a strong contrary consensus.[102] Although Perry characterizes himself as a conventional moralist, his willingness to hold society to its relatively abstract conventional "ideals" aligns him more with the rights theorists than with Wellington.

B. *The Critics*

In *Democracy and Distrust*,[103] John Hart Ely criticizes seven possible approaches to fundamental rights adjudication: the judge's own values, neutral principles, predicting progress, natural law, reason, consensus, and tradition.[104] Because no contemporary proponent of fundamental rights adjudication relies on the first three approaches,[105] I restrict my comments to Ely's discussions of natural law and reason, directed mainly against the rights theorists, and his critiques of theories based on consensus and tradition. I then consider two other criticisms of fundamental rights adjudication: Robert Bork's argument that the choice of the level of abstraction on which to discern rights is inherently arbitrary, and Raoul Berger's claim that fundamental rights adjudication is prohibited by the text and original understanding of the Constitution.

1. *The Critique of Rights Theories*

Ely's critique of rights theories begins with two historical points. He disputes the claim, made by some proponents, that fundamental rights adjudication is heir to a natural law tradition that has been virtually unbroken since the eighteenth century;[106] and he shows

102. *See, e.g.*, p. 1073 *supra*.
103. J. Ely, *supra* note 7.
104. *Id.* at 43-72.
105. Ely argues against the view that the judge "should use his or her *own values* to measure the judgment of the political branches." *Id.* at 44. Although this position is "seldom endorsed in so many words," he suggests that the application of supposedly objective methodologies often comes down to the imposition of the judge's own values.

Ely also argues that the concept of neutral principles, proposed by Herbert Wechsler as a constraint on all modes of constitutional decisionmaking, does "not provide a source of substantive content." *Id.* at 55.

Finally, in *The Supreme Court and the Idea of Progress*, Alexander Bickel suggested that the Warren Court had tried, and failed, to decide cases according to values it believed would be accepted in the future. *See* A. Bickel, *supra* note 18. Ely suggests that "there was a good deal of prescription folded into Bickel's description," and comments that the Court is incompetent to predict the future and that there is no justification for "[c]ontrolling today's generation by the values of its grandchildren." J. Ely, *supra* note 7, at 69-70.

106. *See, e.g.*, Perry, *Ethical Function*, *supra* note 20, at 695-700.

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how natural law "has been summoned in support of all manner of causes in this country—some worthy, others nefarious—and often on both sides of the same issue."[107] Ely's main argument, however, is a metaethical one: Natural law does not exist in a form that is useful for resolving constitutional disputes:

> "[A]ll the many attempts to build a moral and political doctrine upon the conception of a universal human nature have failed. Either the allegedly universal ends are too few and abstract to give content to the idea of the good, or they are too numerous and concrete to be truly universal. One has to choose between triviality and implausibility . . . ." [O]ur society does not, rightly does not, accept the notion of a discoverable and objectively valid set of moral principles.[108]

Although few contemporary fundamental rights theorists invoke "natural law" as such, some have suggested that judges seek values in "the writings of good contemporary moral philosophers."[109] Ely responds:

> Some moral philosophers think utilitarianism is the answer; others feel just as strongly it is not. Some regard enforced economic redistribution as a moral imperative; others find it morally censurable. What may be the two most renowned recent works of moral and political philosophy, John Rawls's *A Theory of Justice* and Robert Nozick's *Anarchy, State and Utopia,* reach very different conclusions.[110]

And he sardonically proposes a Supreme Court opinion that reads: "We like Rawls, you like Nozick. We win six to three. Statute invalidated."[111]

Although he denies the existence of absolute ethical truths, Ely believes that "we *can* reason about moral issues . . . [by proceeding] from ethical principles or conclusions it is felt the reader is likely already to accept to other conclusions or principles he or she might not previously have perceived as related in the way the writer suggests."[112] But he disputes the claim that "moral judgments are sounder if made dispassionately, and that because of their comparative insulation judges are more likely so to make them."[113]

107. J. Ely, *supra* note 7, at 50.
108. *Id.* at 51-54 (quoting R. Unger, Knowledge and Politics 241 (1975)).
109. *Id.* at 58.
110. *Id.*
111. *Id.*
112. *Id.* at 54.
113. *Id.* at 57.

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First, he doubts the "alleged incompatibility between popular input on moral questions and 'correct' moral judgment."[114] On the contrary, "our moral sensors function *best* under the pressure of experience. Most of us did not fully wake up to the immorality of our most recent war until we were shown pictures of Vietnamese children being scalded by American napalm."[115]

I find this argument unpersuasive. Granting that a moral judgment is sounder when informed by experience, it also seems more secure after we assimilate the events—after we recollect them in tranquillity —than in their very midst. In any case, Ely's example is not equivalent to the experience of either legislatures or courts. If, however, his point is that our moral sensors respond better to the plights of actual individuals than to abstractions, why are legislators, prescribing the conduct of anonymous people, better situated than courts hearing actual cases?[116]

Second, Ely argues that judicial reasoning results in a "systematic bias in . . . [the] choice of fundamental values, unsurprisingly in favor of the values of the upper-middle, professional class," which constitutes the "reasoning class":[117]

> Thus, the list of values the Court and the commentators have tended to enshrine as fundamental . . . [includes] expression, association, education, academic freedom, the privacy of the home, personal autonomy . . . . But watch most fundamental-rights theorists start edging toward the door when someone mentions jobs, food, or housing: those are important, sure, but they aren't *fundamental*.[118]

This may overstate the case against some scholarly proponents of fundamental rights adjudication,[119] but it accurately describes others[120] and, more important, perhaps fits the Court itself.[121]

114. *Id.*
115. *Id.*
116. Bickel argued that, while legislatures typically address "abstract or dimly foreseen problems . . . , courts are concerned with the flesh and blood of an actual case. This tends to modify, perhaps to lengthen, everyone's view. It also provides an extremely salutory proving ground for all abstractions . . . ." A. BICKEL, *supra* note 10, at 26.
117. J. ELY, *supra* note 7, at 59 & n.**.
118. *Id.* at 59.
119. *See* D. RICHARDS, *supra* note 24, at 135-91; L. TRIBE, *supra* note 21, at 1116-36; Karst, *supra* note 66, at 59-64 (1977). *But see* Tushnet, *Dia-Tribe* (Book Review), 78 MICH. L. REV. 694 (1980) (criticizing Tribe for not acknowledging socialist implications of constitutional theory). The seminal argument for the constitutional guarantee of material security is Michelman, *The Supreme Court, 1968 Term—Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7 (1969).
120. *See* Wilkinson & White, *supra* note 23.
121. *See* Tushnet, *". . . And Only Wealth Will Buy You Justice"—Some Notes on the*

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2. *The Critique of Consensus- and Tradition-Based Theories*

Ely writes that the "idea that society's 'widely shared values' should give content to the Constitution's open-ended provisions . . . turns out to be at the core of most 'fundamental values' positions."[122] Certainly it is at the core of Wellington's and Perry's and plays a role in most rights theories as well.

Ely doubts that American society shares a conventional morality,[123] and argues that even if it did, the consensus is "not reliably discoverable, at least not by courts":[124]

> "The more concrete the allusions to this allegedly timeless moral agreement, the less convincing they become. Therefore, to make their case the proponents of objective value must restrict themselves to a few abstract ideals whose vagueness allows almost any interpretation . . . ." [B]y viewing society's values through one's own spectacles . . . one can convince oneself that some invocable consensus supports almost any position a civilized person might want to see supported.[125]

Ely makes a similar point about the indeterminacy and manipulability of tradition, which "can be invoked in support of almost any cause."[126] He cites the competing American traditions regarding both malign and benign racial discrimination and quotes Garry Wills's pithy remark that "Running men out of town on a rail is at least as much an American tradition as declaring unalienable rights."[127]

Supreme Court, 1972 Term, 1974 Wis. L. Rev. 177 (arguing that the Supreme Court favors the well-off). *Compare* Roe v. Wade, 410 U.S. 113 (1973) (state may not punish abortion) *with* Maher v. Roe, 432 U.S. 464 (1977) (state need not fund nontherapeutic abortions for the poor) *and* Harris v. McRae, 100 S. Ct. 2671 (1980) (state need not fund therapeutic abortions for the poor).

122. J. Ely, *supra* note 7, at 63 (footnote omitted).

123. *Id.* at 63, 64.

124. *Id.* at 64.

125. *Id.* at 65-67 (quoting R. Unger, *supra* note 108, at 78). Ely specifically finds unpersuasive Wellington's analysis of abortions to protect the mother's physical and mental health, *see* pp. 1070-71 *supra*, and cites public opinion polls that contradict the asserted distinction. J. Ely, *supra* note 7, at 66 & 218 n.112.

126. *Id.* at 60.

127. *Id.* He also comments that the "overtly backward-looking character [of tradition] highlights its undemocratic nature: it is hard to square with the theory of our government the proposition that yesterday's majority . . . should control today's." *Id.* at 62. That does not seem responsive to the role that tradition plays in most fundamental rights theories, where it is seldom if ever employed as an independent, or even as the primary, basis for decision, but rather as ancillary support for the existence and stability of a putative *present* consensus. *See* Lupu, *Untangling the Strands of the Fourteenth Amendment*, 77 Mich. L. Rev. 981, 1037-41 (1979); Tushnet, *The Newer Property: Suggestions for a Revival of Substantive Due Process*, 1975 Sup. Ct. Rev. 261.

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3. *The Levels-of-Abstraction Problem and the Balancing of Competing Interests*

Ely underscores his argument against tradition as a source for constitutional values by noting the "understandable temptation to vary the relevant tradition's level of abstraction to make it come out right."[128] The levels-of-abstraction problem is pervasive, infecting theories of adjudication based on rights and consensus as well as tradition.

For example, Professor Bork criticizes *Griswold* on the ground that the Court's choice of the level on which to define the protected liberty was necessarily arbitrary. He notes that the Court surely did not adopt the very broad principle that "government may not interfere with any acts done in private."[129] On the other hand, for the Court to define the principle narrowly—"government may not prohibit the use of contraceptives by married couples"—presents problems of "neutral definition":[130]

> Why does the principle extend only to married couples? Why, out of all forms of sexual behavior, only to the use of contraceptives? Why, out of all forms of behavior, only to sex? . . .
>
> To put the matter another way, if a neutral judge must demonstrate why principle *X* applies to cases *A* and *B* but not to case *C* . . ., he must, by the same token, also explain why the principle is defined as *X*, rather than as *X minus*, which would cover *A* but not cases *B* and *C*, or as *X plus*, which would cover all cases, *A*, *B*, and *C*.[131]

This is a powerful criticism. For example, does Judith Thomson's tale of the violinist[132] establish an absolute right to terminate all nonconsensual life-supporting dependencies under all conceivable circumstances? Or does the right depend on the unwilling benefactor's particular relationship to the beneficiary (*e.g.*, strangers, mother-child) and on the severity of the imposition? Does Karst's and Richards's principle of equal respect protect all consensual sexual activity or only sex within a loving intimate association?[133] Why does Wilkinson's

128. J. Ely, *supra* note 7, at 61; *see id.* at 215 n.86 (quoting Tribe's discussion of homosexuality, *see* p. 1078 *supra*).
129. Bork, *supra* note 27, at 7.
130. *Id.*
131. *Id.* at 7.
132. *See* p. 1070 *supra*.
133. Karst would protect casual sexual relationships because, among other things, "they may ripen into durable intimate associations." Karst, *supra* note 22, at 633.

and White's theory extend protection to some lifestyle choices but not others?[134]

The indeterminacy and manipulability of levels of generality is closely related, if not ultimately identical, to the arbitrariness inherent in accommodating fundamental rights with competing government interests. For example, rights theorists must not only speculate about the long-range social consequences of granting various sexual and associational freedoms, but must choose how much *weight* to accord asserted state interests such as protecting the traditional family unit. As Wilkinson and White acknowledge, these judgments are essentially intuitive.[135]

4. *The Ghost of* Lochner *and The Court's Substantive Record*

For critics and proponents alike, *Lochner v. New York*[136] symbolizes the dark side of fundamental rights adjudication. Wellington concedes that the language of the Constitution does not justify "a different scope of review . . . of legislation restricting personal or civil as distinguished from economic liberties";[137] nor does Justice Stone's *Carolene Products* footnote.[138] And the notion that "personal liberties are more important, and in that sense more fundamental, than economic liberties" is simply elitist.[139] Rather, Wellington asserts, the Court's equation of laissez faire economics with personal liberty did not reflect the conventional morality.[140] Perry shares this view,[141] as does Tribe, who writes that if *Lochner* was wrong,

> the reason can *only* be that, in twentieth century America, minimum wage laws, as a substantive matter, are *not* intrusions upon human freedom in any meaningful sense, but are instead entirely reasonable and just ways of attempting to combat economic subjugation and human domination. . . . What was wrong was simply that, as a picture of freedom in industrial society, the one painted by the Justices badly distorted the character and needs of the human condition and the reality of the economic situation. . . . [But] *there is no escape* from the difficult task of painting a better—a morally and economically truer—picture . . . .[142]

134. *See* Wilkinson & White, *supra* note 23, at 614-17 (limits on lifestyle rights); note 68 *supra* (same).
135. *See* p. 1079 *supra*.
136. 198 U.S. 45 (1905).
137. Wellington, *supra* note 19, at 277 (footnote omitted).
138. United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938).
139. Wellington, *supra* note 19, at 279.
140. *Id.* at 282-83.
141. Perry, *Ethical Function, supra* note 20, at 702-04.
142. L. Tribe, *supra* note 21, at 453, 455 n.37.

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For John Ely, *Lochner* illustrates the Court's intrinsic perceptual limitations:

> It may be . . . that the "right to an abortion," or noneconomic rights generally, accord more closely with "this generation's idealization of America" than the "rights" asserted in . . . *Lochner* . . . . But that attitude, of course, is *precisely* the point of the *Lochner* philosophy, which would grant unusual protection to those "rights" that somehow *seem* most pressing, regardless of whether the Constitution suggests any special solicitude for them.[143]

Lochner is so evocative because we think the Court enforced the wrong values. (It is difficult to imagine *Griswold* playing the same symbolic role.) Implicit in Ely's charge of "Lochnering"[144] is the claim that "the closer the Court has come to overt fundamental-values reasoning the less impressively it has performed."[145] To pursue this critique would require reference to criteria—which Ely and Bork deny exist[146]—for determining the correctness of judicially enforced values. Whether or not the Court's record can be evaluated, however,[147] *Lochner* remains an embarrassment for proponents of fundamental rights adjudication and cause for skepticism about the practice. Tribe writes:

> *Part* of what was wrong with *Lochner* was the Court's overconfidence, both in its own factual *notions* about working conditions and perhaps also in its own normative convictions about the meaning of liberty; at least by the 1920's, if not yet in 1905, the Court should probably have paid more heed to the mounting agreement, if not the consensus, that the economic "freedom" it was protecting was more myth than reality.[148]

But if, in retrospect, the *Lochner* Court was overconfident about its notion of economic liberty in the face of a mounting agreement to

143. Ely, *The Wages of Crying Wolf: A Comment on* Roe v. Wade, 82 YALE L.J. 920, 939 (1973) (footnote omitted).

144. *Id.* at 944.

145. J. ELY, *supra* note 7, at 213 n.66.

146. *See* pp. 1081, 1085 *supra*.

147. One scholar's recent attempt to assess the "record of judicial review" simply relies on the reader's intuitions of what constitute "advances" and "retreats." *See* J. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS 79-122 (1980). For an earlier review of the Court's work, see Commager, *Judicial Review and Democracy*, 19 VA. Q. REV. 417 (1943).

148. L. TRIBE, *supra* note 21, at 454.

the contrary, how should the proponents' Court respond to the apparent ascendency of a "moral majority"?

5. *The Text and Original Understanding*

Fundamental rights adjudication is open to the criticisms that it is not *authorized* and not *guided* by the text and original history of the Constitution. Among the critics, only Raoul Berger rests his case exclusively on the lack of authorization. Explaining the scope of his argument, Berger writes:

> Nor will I deal with whether or not judicial review is antidemocritarian, for if judicial review of the Warrenite scope was "authorized" by the Constitution, its antidemocratic nature has constitutional sanction. . . . What is of paramount importance . . . is that the Court "is under obligation to trace its premises to the charter from which it derives its authority . . . ." [T]he "subjectivity" involved in making value choices plays no role in my view of the meaning of the Fourteenth Amendment . . . .[149]

Berger's condemnation of fundamental rights adjudication is incidental to an attack on virtually every significant decision under the Fourteenth Amendment—including *Brown v. Board of Education*[150]—as inconsistent with the adopters' limited intent to incorporate the Civil Rights Act of 1866 into the Constitution. The academic response to Berger has focused on his analysis of the equal protection clause, arguing that it is methodologically and factually problematic.[151] If the Court's race decisions are deeply rooted in the text and original history of the Constitution, however, fundamental rights adjudication seems less secure. Indeed, the proponents' originalist claims tend to be perfunctory at best.[152]

149. R. BERGER, *supra* note 26, at 284-85 (quoting Ely, *supra* note 143, at 949) (footnotes omitted).

150. 347 U.S. 483 (1954).

151. *See, e.g.*, Soifer, *Protecting Civil Rights: A Critique of Raoul Berger's History* (Book Review), 54 N.Y.U. L. REV. 651 (1979). *See generally Symposium*, 6 HASTINGS CONST. L.Q. 403 (1979) (symposium on Raoul Berger's theory of the Fourteenth Amendment); *cf.* Brest, *supra* note 6 (discussing problems of originalist constitutional interpretation).

152. For example, though Wellington writes that "the power of judicial review can be exercised only when the principle the Court employs is related to constitutional text," Wellington, *supra* note 19, at 267, he never discloses the textual basis for his consensus theory. Richards also implies that fundamental rights adjudication is grounded in the text of the Constitution, but does not specify its textual basis. Richards, *Sexual Autonomy*, *supra* note 24, at 963-64. The proponents' claims of authority from the original understanding tend to be conclusory and oblique. For example, Perry writes:

> The Founding Fathers and, "perhaps by emulation," those who were responsible for the fourteenth amendment, intended that the specific content of the vague, ethical norms of the Constitution, including due process, remain to some extent an open question to be answered by each generation, for each generation . . . . [I]t

Ironically, Ely is quite ready to acknowledge the originalist credentials of fundamental rights adjudication:

> [T]he most plausible interpretation of the Privileges or Immunities Clause is, as it must be, the one suggested by its language—that it was a delegation to future constitutional decision-makers to protect certain rights that the document neither lists, at least not exhaustively, nor even in any specific way gives directions for finding.[153]
>
> . . . [T]he Ninth Amendment was intended to signal the existence of federal constitutional rights beyond those specifically enumerated in the Constitution . . . .[154]

For Ely, however, this is "[not] a question on which history can have the last word":[155]

> If a principled approach to judicial enforcement of the Constitution's open-ended provisions cannot be developed, one that is not hopelessly inconsistent with our nation's commitment to representative democracy, responsible commentators must consider seriously the possibility that courts simply should stay away from them.[156]

Bork likewise is concerned with the absence of guidance. From the premise that all values are intrinsically subjective, he concludes:

> Where constitutional materials do not clearly specify the value to be preferred, there is no principled way to prefer any claimed human value to any other. The judge must stick close to the text and the history, and their fair implications, and not construct new rights.[157]

* * *

This, then, is the controversy over the sources of fundamental rights and the methods for ascertaining them. The critics are, of course, right

> simply will not do to suggest that those who choose to maintain and apply the [public welfare] limit . . . are acting without any constitutional basis. . . . [T]he idea that due process imposes a public welfare limit on the police power is a recurrent, basic theme of American constitutional theory, and one with eminently respectable credentials.

Perry, *Ethical Function*, *supra* note 20, at 706-07 (footnotes omitted). *See also* L. TRIBE, *supra* note 21, at 569-72 (Constitution guarantees rights not specified in text); Richards, *Sexual Autonomy*, *supra* note 24, at 960 (same).

153. J. ELY, *supra* note 7, at 28; *cf. id.* at 14 (Ninth and Fourteenth Amendments invite non-textually-based decisionmaking).

154. *Id.* at 38.

155. *Id.* at 41.

156. *Id.*

157. Bork, *supra* note 26, at 8.

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that fundamental rights adjudication is not guided by the text or original history of the Constitution. The interesting question is whether the Court has access to other defensible sources of values.

Even assuming that general principles can be found in social consensus or derived by moral reasoning, the application of those principles is highly indeterminate and subject to manipulation. The point is partly illustrated by disagreements among theorists employing essentially the same methodology: Wilkinson would uphold sodomy laws, while White, Karst, Tribe, and Richards would strike them down; both Wilkinson and White would uphold adultery laws,[158] while Tribe finds them constitutionally doubtful.[159] Even when the scholars are in substantial agreement, however, their conclusions are not obviously determined by their sources and methods. And, ironically, the more sensitive a judge is to the complexities of the social values at stake, the greater the indeterminacy, the scope of discretion, and opportunity for manipulation.[160]

III. The Critics Against Themselves

The critics are not merely critics. They have their own theories, which encompass a range of alternatives to fundamental rights adjudication: Raoul Berger and Robert Bork are both originalists—the former a "strict intentionalist," the latter a constrained "moderate originalist."[161] John Ely proposes a substantially nonoriginalist approach to judicial review, limited to the purpose of ensuring the integrity and representativeness of the legislative process.

I shall argue that none of the critics' affirmative theories can withstand the force of his own criticisms. This casts a somewhat different light on the conclusions of the preceding section and begins to il-

158. *See* Wilkinson & White, *supra* note 23, at 599.
159. *See* L. Tribe, *supra* note 21, at 946.
160. Consider, for example, the difficulties of heeding Tribe's caution that

> a court must decide, in this society and at this time, whether a person's choice to act or think in a certain way should be fundamentally protected against coercion by law, recognizing that the alternative in some situations may be coercion by economic or peer pressure and, in others, more meaningfully undominated choice. And to add to the difficulty of the task: neither judges nor legislators nor citizens should permit decisions of this kind, focused as each must be upon its precise context, to be taken without attention to the drift of their cumulative result. Those charged with the responsibility of choice must avoid too myopic an adherence to the matter at hand, recognizing that the ultimate results of incremental change might be wholly alien, and perhaps profoundly objectionable, to those who acquiesce step by step.

Id. at 892.
161. *See* Brest, *supra* note 6, at 222-24 (defining these terms).

luminate the contradictions inherent in the fundamental rights controversy.

A. *Raoul Berger's Strict Intentionalism*

For Berger, the only relevant question is how the adopters of the Fourteenth Amendment would have decided a particular case had it arisen in 1868.[162] He is not concerned with their interpretive intentions (the canons of construction by which they intended their provisions to be interpreted) or with the level of abstraction on which they intended their provisions to be read—for example, whether they intended only to establish general principles or, at the other extreme, to bind future interpreters to their particular views on each issue that might arise under the provision.[163]

Berger's indifference to interpretive intent and the intended level of abstraction undermines the very premise of his theory—the obligation of fidelity to the adopters' intentions—by confusing their intentions with their mere personal *views*.[164] There is no reason to suppose that the adopters of the Fourteenth Amendment intended its provisions to be interpreted by Berger's strict intentionalist canons. If they adverted to the matter at all, the adopters more likely intended a textualist approach such as the "plain meaning rule."[165] Thus, fidelity to their intentions may require an interpreter to eschew detailed inquiry into the adopters' particular views and look instead to the text, perhaps understood in the light of their general purposes in enacting the provision.[166]

In fact, we cannot determine the adopters' interpretive intent and often cannot even discover their substantive views with much particularity. Like other formalist strategies, strict intentionalism pretends to constrain constitutional decisionmaking while inviting, if not demanding, arbitrary manipulation of sources and outcomes.

B. *Robert Bork's Constrained Moderate Originalism*

Robert Bork believes that all constitutional adjudication must proceed from the text and purposes of particular provisions, but his approach is more expansive than Berger's. For example, Bork approves of *Brown*. He writes that, although the Court cannot ascertain the

162. R. Berger, *supra* note 26, at 1-19.
163. *See* Brest, *supra* note 6, at 212, 215-17.
164. *See id.* at 220, 227 n.87.
165. *See id.* at 215-16.
166. *See, e.g.*, p. 1091 *infra*.

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precise intentions of the adopters of the Fourteenth Amendment, there is

> one thing the Court does know: it was intended to enforce the core idea of black equality against government discrimination. And the Court, because it must be neutral, cannot pick and choose between competing gratifications and, likewise, cannot write the detailed code the framers omitted, requiring equality in this case but not in another. The Court must, for that reason, choose a general principle of equality that applies to all cases.[167]

Bork requires the Court to adopt a "general principle of equality," not because the text and history of the Fourteenth Amendment require it—they obviously don't—but to prevent the Justices from imposing their own value choices. The very adoption of such a principle, however, demands an arbitrary choice among levels of abstraction. Just what *is* "the general principle of equality that applies to all cases"? Is it the "core idea of *black* equality" that Bork finds in the original understanding (in which case Alan Bakke did not state a constitutionally cognizable claim),[168] or a broader principle of *"racial* equality" (so that, depending on the precise content of the principle, Bakke might have a case after all), or is it a still broader principle of equality that encompasses discrimination on the basis of gender (or sexual orientation) as well?[169] Why, as Bork asks in his discussion of *Griswold, X* rather than *X minus* or *X plus?*[170]

Bork encounters the same difficulty in his attempt to limit the protection of the First Amendment to "explicitly political speech" rather than, say, "speech."[171] The fact is that all adjudication requires

167. Bork, *supra* note 26, at 14-15.

168. Regents of University of Cal. v. Bakke, 438 U.S. 265 (1978). *But see* Bork, *The Unpersuasive Bakke Decision,* Wall St. J., July 21, 1978, at 8, cols. 3-6.

169. *See, e.g.,* Craig v. Boren, 429 U.S. 190 (1976).

170. Curiously, although Bork wishes to adopt a per se equal protection standard to assure neutrality of application, he prefers Justice Stewart's highly discretionary "systematic frustration of the will of a majority" standard in the reapportionment cases, *e.g.,* Reynolds v. Sims, 377 U.S. 533 (1964), to the Court's one-person-one-vote standard. Bork, *supra* note 27, at 18-19. *Compare* M. SHAPIRO, LAW AND POLITICS IN THE SUPREME COURT 245-47 (1964) (Court should take account of realities of political contexts) *with* Deutsch, *Neutrality, Legitimacy, and the Supreme Court: Some Intersections Between Law and Political Science,* 20 STAN. L. REV. 169, 246-47 (1968) (political realities beyond judiciary's institutional competence).

171. *See* Bork, *supra* note 27, at 20-35. He notes that the text and history of the Amendment provide scant guidance, but finds a rationale implicit in the structure of the Constitution: A representative democracy "would be meaningless without freedom to discuss government and its policies." *Id.* at 23. He then considers Alexander Meiklejohn's and Harry Kalven's view that this rationale extends to all "[f]orms of thought and expression within the range of human communications from which the voter derives the

making choices among the levels of generality on which to articulate principles, and all such choices are inherently non-neutral. No form of constitutional decisionmaking can be salvaged if its legitimacy depends on satisfying Bork's requirements that principles be "neutrally derived, defined and applied."[172]

C. *Ely's "Participation-Oriented, Representation-Reinforcing" Judicial Review*

John Ely's theory of constitutional adjudication also aspires to judicial neutrality in the choice and application of values. Although Ely claims originalist support for his theory, it is essentially unconstrained by the text and original understanding. His theory builds on Justice Stone's suggestion, in footnote 4 of *Carolene Products*,[173] that the judiciary should actively scrutinize legislation (1) "which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation" or (2) which is based on "prejudice against discrete and insular minorities . . . which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities." Ely's thesis is that,

> unlike an approach geared to the judicial imposition of "fundamental values," the representation-reinforcing orientation . . . is not inconsistent with, but on the contrary is entirely suppor-

knowledge, intelligence, sensitivity to human values: the capacity for sane and objective judgment which, so far as possible, a ballot should express." *Id.* at 26 (quoting Meiklejohn, *The First Amendment is an Absolute,* 1961 Sup. Ct. Rev. 245, 255). Bork rejects Kalven's "invitation to follow a dialectic progression from public official to government policy to public policy to matters in the public domain":

> I agree that there is an analogy between criticism of official behavior and the publication of a novel like *Ulysses,* for the latter may form attitudes that ultimately affect politics. But it is an analogy, not an identity. Other human activities and experiences also form personality, teach and create attitudes just as much as does the novel . . . . If the dialectical progression is not to become an analogical stampede, the protection of the first amendment must be cut off when it reaches the outer limits of political speech.

Id. at 27. Bork therefore would draw the line at "explicitly political speech." But if there exist plausible alternative theories of free expression, or alternative applications of his theory, then his criterion fails his own test of neutrality. Professor Scanlon offers an alternative theory premised on a notion of individual autonomy that treats each person as sovereign in deciding what to believe. Scanlon, *A Theory of Freedom of Expression,* 1 Philosophy & Pub. Aff. 204 (1972). Dean Wellington argues that *only* a nonconsequentialist theory of this sort can be neutrally applied. Wellington, *On Freedom of Expression,* 88 Yale L.J. 1105, 1120-21 (1979). Even if one adopts Bork's instrumental rationale, however, there are alternative standards no less *neutral* than "explicitly political speech"—for example, just plain "speech."

172. Bork, *supra* note 27, at 23.

173. United States v. Carolene Prods. Co., 304 U.S. 144 (1938).

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> tive of, the American system of representative democracy. It . . . [is devoted] to policing the mechanisms by which the system seeks to ensure that our elected representatives will actually represent.[174]

Ely approves of the Court's reapportionment and other voting-rights decisions; he urges the broad protection of political expression; and he argues for vigorous scrutiny of classifications that disadvantage politically powerless minorities.

Ely's theory of suspect classifications, the book's most significant affirmative contribution, is vulnerable to the same criticisms that he finds fatal to fundamental rights adjudication—vulnerable precisely because it turns out to be a fundamental rights theory, albeit somewhat disguised.[175]

Under Ely's theory, essentially any law disadvantaging a discrete and insular minority that is the object of prejudice is "suspect" and therefore invalid unless it closely "fits" legitimate governmental objectives.[176] This strict scrutiny is justified by two features of prejudice: (1) prejudice is intrinsically wrong—"[t]o disadvantage a group essentially out of dislike is surely to deny its members equal concern and respect";[177] and (2) prejudice distorts legislators' assessments of the costs and benefits of proposed decisions because it induces them to overestimate both the validity of stereotypes disfavoring minorities and the costs of more individualized treatment.[178] Ely asserts that judicial intervention in these cases promotes "participation." He grudgingly concedes that participation may be a value but claims that it

174. J. ELY, *supra* note 7, at 101-02. Curiously, he criticizes consensus theories, which are also designed to remedy defects of representative process, on the ground that "it makes no sense to employ the value judgments of the majority as the vehicle for protecting minorities from the value judgments of the majority." *Id.* at 69.

175. Note that Ely's Court must make some value choices even apart from the suspect classification theory, simply in order to protect electoral participation and freedom of expression. For example, it must decide just how representative a government must be and who should be included in the political community. *Compare* Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966) (Douglas, J.) (striking down poll tax) *with id.* at 686 (Harlan, J., dissenting). The Court must also balance representation-reinforcing interests against competing social interests, such as preventing riots and espionage, and ensuring that voters possess adequate maturity, loyalty, and interest in the outcome. *Compare, e.g.*, Kramer v. Union Free School Dist. No. 15, 395 U.S. 621 (1969) (invalidating statute restricting vote in school district elections to owners of taxable property and parents of school children) *with* Salyer Land Co. v. Tulare Lake Basin Water Storage Dist., 410 U.S. 719 (1973) (upholding apportionment of vote in public water district in proportion to property ownership). These decisions require assessing the strength of the competing interests, and it is not evident how a Court can do that without relying on social consensus or fundamental values.

176. *See* J. ELY, *supra* note 7, at 145-48.

177. *Id.* at 157.

178. *Id.* at 155-57.

is quite different from the substantive values involved in the theories he criticizes.[179]

Even assuming that participation is a privileged value, however,[180] Ely's theory still requires the court to make unprivileged value choices.[181] Ely asserts that a legislature may not disadvantage people merely because it dislikes them. This sounds like fundamental rights talk. Certainly, a hard-core utilitarian could not distinguish gratifying the majority's hostile (or altruistic) desires from gratifying their aesthetic, moral, or any other kinds of desires.[182] Ely's equal protection theory would collapse, however, if gratifying the majority's dislike for a racial minority were treated as legitimate. At the same time, Ely wishes to permit the legislature to act hostilely toward groups such as burglars.[183] To maintain this distinction. Ely argues that, although gratifying the majority's *dislike* is not a legitimate goal, satisfying its *moral beliefs* is perfectly permissible.

This is where things get tricky. For example, Ely believes that laws disadvantaging homosexuals are suspect because homosexuals are the objects of widespread prejudice.[184] But he would permit a legislature to punish homosexual conduct "due to a bona fide feeling that it is immoral":[185]

> This doesn't mean that simply by incanting "immorality" a state can be permitted successfully to defend a law that in fact was motivated by a desire simply to injure a disfavored group of persons.

179.

> If the objection is . . . that one might well "value" certain decision procedures for their own sake, of course it is right: one might. And to one who insisted on that terminology, my point would be that the "values" the Court should pursue are "participational values" of the sort I have mentioned, since those are the "values" (1) with which our Constitution has preeminently and most successfully concerned itself, (2) whose "imposition" is not incompatible with, but on the contrary supports, the American system of representative democracy, and (3) that courts set apart from the political process are uniquely suited to "impose."

Id. at 75 n.* *See also* pp. 1102-04 *infra* (constrained utilitarian argument for representation-reinforcing judicial review).

180. I am not persuaded by the arguments quoted in the preceding footnote. The claim that the Constitution is preeminently concerned with participational values is based on a selective and idiosyncratic reading of the document. *See* Lynch, Book Review, 80 COLUM. L. REV. 857, 859-62 (1980). In any case, participation is only half the story of democracy, the other half being the protection of individual rights. *See* pp. 1096-1105 *infra*.

181. For a more detailed discussion of some of the points that follow, see Brest, *supra* note 8.

182. Indeed, Ely criticizes Dworkin for excluding "external preferences" from his utilitarian calculus. Ely, *Constitutional Interpretivism: Its Allure and Impossibility*, 53 IND. L.J. 399, 407 & n.32 (1978).

183. J. ELY, *supra* note 7, at 154.

184. *Id.* at 163.

185. *Id.* at 256 n.92.

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> . . . The question . . . reduces to whether the claim is credible that the prohibition in question was generated by a sincerely held moral objection to the act (or anything else that transcends a simple desire to injure the parties involved).[186]

Ely forgets that racial segregation and antimiscegenation laws, as well as stereotypical gender classifications, have often been based—perhaps often sincerely—on the supposed immorality of racial intermingling and intermarriage, or of women not fulfilling their missions as mothers and wives. In short, a "conscientious objection" exception for discrimination based on our moral beliefs poses nearly the same threat to Ely's theory as treating dislike and hostility as legitimate objectives.

The theory also presents methodological difficulties. When the government defends a law on moral grounds, the Court must determine whether the belief is actually "moral" and, if so, how "sincerely" it is held. Ely does not suggest how this can be done, and for good reason: In his critique of fundamental rights adjudication he denies that consensus exists on such questions and asserts that a court can identify moral beliefs only by employing dubious "laundering devices."[187]

* * *

Although the fundamental rights proponents' and critics' theories of constitutional adjudication presented in this article are not exhaustive, they are broadly representative. The proponents span the range of nonoriginalist adjudication; Berger and Bork typify the strategies of strict and moderate originalism; and Ely's representation-reinforcing theory lies within a tradition of process-oriented modes of judicial review.[188]

186. *Id.*

187.

> Such techniques are evident in the work of consensus theorists generally, and are sometimes made explicit. Ronald Dworkin argues that community values must be refined by the judge in a way that removes prejudice, emotional reaction, rationalization, and "parroting," and in addition should be tested for sincerity and consistency . . . . [Wellington writes that] courts "must be reasonably confident that they draw on conventional morality and screen out contemporary bias, passion, and prejudice, or indeed, that they distinguish cultivated taste from moral obligation."

Id. at 67 n.* (citations omitted).

188. *See, e.g.*, L. Lusky, By What Right? (1975); Bennett, *"Mere" Rationality in Constitutional Law: Judicial Review and Democratic Theory*, 67 Calif. L. Rev. 1049 (1979); Bice, *Rationality Analysis in Constitutional Law*, 65 Minn. L. Rev. 1 (1980); Brest, Palmer v. Thompson: *An Approach to the Problem of Unconstitutional Legislative Motive*, 1971 Sup. Ct. Rev. 95; Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 Harv. L. Rev. 1 (1972); Tribe, *Structural Due Process*, 10 Harv. C.R.-C.L. L. Rev. 269 (1975).

My point so far is not that any of these theories are untenable, but that all are vulnerable to similar criticisms based on their indeterminacy, manipulability, and, ultimately, their reliance on judicial value choices that cannot be "objectively" derived from text, history, consensus, natural rights, or any other source. No theory of constitutional adjudication can defend itself against self-scrutiny. Each critic's assessment of the alternative theories seems rather like an aesthetic judgment issued from the Warsaw Palace of Culture.[189]

At this point, a partisan of representative democracy might be tempted to discard judicial review entirely, or retreat to the extraordinarily permissive standards of the minimum rationality tests.[190] The following section argues, however, that abandoning a rights-oriented theory of judicial review is as problematic as any alternative.

IV. The Contradictions of Madisonian Democracy

In discussing what he terms the dilemma of Madisonian democracy,[191] Professor Bork brings us closer to the central issue of the fundamental rights controversy:

> A Madisonian system is not completely democratic, if by "democratic" we mean completely majoritarian. It assumes that in wide areas of life majorities are entitled to rule for no better reason [than] that they are majorities. . . . The model also has a countermajoritarian premise, however, for it assumes that there are some areas of life a majority should not control. There are some things a majority should not do to us no matter how democratically it decides to do them. These are areas properly left to individual freedom, and coercion by the majority in these aspects of life is tyranny.
>
> Some see the model as containing an inherent, perhaps an insoluble, dilemma. Majority tyranny occurs if legislation invades the areas properly left to individual freedom. Minority tyranny occurs if the majority is prevented from ruling where its power is legitimate. Yet, quite obviously, neither the majority nor minority can be trusted to define the freedom of the other.[192]

189. A (genuine) Polish joke goes: "Why is the best view of Warsaw from the Palace of Culture?" "Because that's the only place in Warsaw where you can't *see* the Palace of Culture."

190. *See* Bennett, *supra* note 188 (discussing rationality standards). This path is not open to an originalist. *See* Linde, *Without "Due Process": Unconstitutional Law in Oregon*, 49 Or. L. Rev. 125 (1970).

191. *See* R. Dahl, A Preface to Democratic Theory (1956).

192. Bork, *supra* note 27, at 2-3.

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The parties to the fundamental rights controversy resolve the tension between majority rule and minority rights in divergent ways. This section argues that their resolutions are determined by the ways they frame the issues in the first instance, and that the Madisonian dilemma is in fact unresolvable.

Ely echoes Alexander Bickel's characterization of judicial review as a "deviant institution in the American democracy,"[193] while some proponents treat the state's infringement of individual rights as at least as deviant in a constitutional democracy. For example, David Richards applauds the "intrinsically countermajoritarian" nature of judicial review as an acknowledgment of "ideas of human rights that, by definition, government has no moral title to transgress."[194]

Their different premises explain why Ely and Richards reach opposite conclusions. But what underlies the premises themselves? Ely and Bork profess to be Madisonian democrats, not populist majoritarians. Why, then, do they view judicial review as "deviant" rather than as integral to the democratic order? And why do the proponents ignore or give so little weight to majoritarian decisionmaking? Jesse Choper's recent book, *Judicial Review and the National Political Process*,[195] makes transparent some recurring confusions about democracy, and thus helps illuminate these questions.

Professor Choper's "major theme is that although judicial review is incompatible with a fundamental precept of American democracy—majority rule—the Court must exercise this power in order to protect individual rights, which are not adequately represented in the political processes."[196] Initially, he equates democracy with pure majoritarianism;[197] he asserts that "the federal judiciary . . . is the least democratic of the three branches"[198] and that judicial review is "[n]ot merely anti-majoritarian . . . [but] seems to cut directly against the grain of traditional democratic philosophy."[199] Choper then acknowledges a Madisonian concept of democracy, which includes some restraints on majority rule.[200] One might hence argue that the Court "constitutes 'a working part of the democratic political life of the nation' because the power of judicial review has been historically exercised to

193. A. Bickel, *supra* note 10, at 18; *see* J. Ely, *supra* note 7, at 4-5, 67.
194. Richards, *Sexual Autonomy*, *supra* note 24, at 958.
195. J. Choper, *supra* note 147.
196. *Id.* at 2.
197. *Id.* at 5.
198. *Id.*
199. *Id.* at 6.
200. *Id.* at 6-7.

restrain the majority from impinging on the constitutionally designated liberties of the individual, thus to assure those ultimate values that are integral to democracy."[201] Choper counters:

> The difficulty with this position is that it commingles substance with procedure. The Supreme Court does advance democratic values by rejecting political action that threatens individual liberty. . . . But irrespective of the *content* of its decisions, the *process* of judicial review is not democratic because the Court is not a politically responsible institution. . . . Although the Supreme Court may play a vital role in the preservation of the American democratic system, the procedure of judicial review is in conflict with the fundamental principle of democracy —majority rule under conditions of political freedom.[202]

Choper also rejects the "most sophisticated" argument, that "the so-called political branches . . . are by no means as democratic as standard belief would hold and that the Court is much more subject to the popular will than conventional wisdom would grant."[203] All things considered, "the Supreme Court is not as democratic as the Congress or President, and the institution of judicial review is not as majoritarian as the lawmaking process."[204]

A. *The Choice Between a Systemic and a Particularistic Perspective and Some Problems of the Second Best*

Choper is pervasively ambiguous about whether the criterion of "being democratic" is applicable to an entire political system or to particular institutions within it. Although he suggests that judicial review might promote democracy by protecting individual rights, he continues to voice the concern that "the Court" and "judicial review" are "the least democratic" of our political institutions. (It is as if, having concluded that the Federal Reserve Bank contributes to the overall efficiency of the economy, one continued to worry that the Fed, as such, is "uneconomic.")

This vacillation between systemic and particularistic perspectives responds to a fantasy most of us hold, that each isolated actor and action within a complex social system will reflect the essence of the

201. *Id.* at 9 (quoting Rostow, *The Supreme Court and the People's Will*, 33 Notre Dame Law. 573, 576 (1958).

202. *Id.* at 9-10.

203. *Id.* at 10.

204. *Id.* at 58. Choper goes on to argue that the Court should nonetheless review "claimed violations of individual rights." *Id.* at 65.

system—as each fragment of a hologram contains the entire image. Phenomenologically, we find it difficult to grasp the whole and its parts simultaneously; so we move back and forth between them, denying one as we embrace the other. And we maintain a strong normative skepticism about systemic justifications for acts that are troubling when viewed in isolation. This is what makes the problems of "role-differentiated behavior"[205] in professional ethics interesting and troublesome. Choper seems to regard judicial review with the same ambivalence that we might view the successful defense of a guilty criminal or the acquittal of an innocent defendant through perjured testimony.

If these observations do not fully explain the confusing legal discourse about democracy, they at least provide a background against which another, more specific, factor may operate—the psychological and empirical difficulties we confront if we take seriously the political analogue of the "second-best." In economics, the theory of the second best holds that a regulatory scheme that is intrinsically inefficient when viewed in isolation may actually contribute to the overall efficiency of an economy because of the way it interacts with apparent inefficiencies elsewhere in the system. By analogy, as Martin Shapiro has observed,[206] a nonmajoritarian institution may contribute to the democratic functioning of an imperfect system.

The very possibility of second best often seems counterintuitive, however. The empirical uncertainty it engenders disturbs the intellectual repose and formal order we crave. And as applied to judicial review, it requires confronting the conceptual difficulties underlying any definition of "democracy."

Constitutional scholars typically respond by acknowledging the complexity of the issues and immediately offering their intuitive, common sense conclusion for or against judicial review. For example, Ely writes:

> Sophisticated commentary never tires of reminding us that legislatures are only imperfectly democratic. Beyond the fact that the appropriate answer is to make them more democratic, however, the point is one that may on analysis backfire. The existing antimajoritarian influences in Congress and the state legislatures, capable though they may be of *blocking* legislation, are not well

205. *See* Wasserstrom, *Lawyers and Professionals: Some Moral Issues*, 5 HUMAN RIGHTS L. REV. 1, 3 (1975).

206. M. SHAPIRO, FREEDOM OF SPEECH: THE SUPREME COURT AND JUDICIAL REVIEW 5-45 (1966).

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> situated to get legislation passed in the face of majority opposition. That makes all the more untenable the suggestion . . . that courts should invalidate legislation in the name of a supposed contrary consensus. Beyond that, however, we may grant until we're blue in the face that legislatures aren't wholly democratic, but that isn't going to make courts more democratic than legislatures.[207]

Ely's point is that, because the Court can only strike down legislation, not enact it, substantive judicial review is not responsive to antimajoritarian defects in the legislative process. He qualifies the assertion somewhat, but only in a note at the back of the book: "There may of course exist situations in which a majority cannot pass a law repealing old legislation because of minority resistance. But surely antiquity alone does not suggest the existence of a disapproving majority . . . ."[208] The tone and placement of the passage leave no doubt about what Ely believes to be the main truth and what a minor qualification of it. Yet he offers little to persuade the reader who does not already share his intuition. The question, I suppose, is not whether legislatures are *generally* representative, but how their processes function on the particular kinds of issues that come before courts in individual rights litigation.[209]

While the critics' analysis of the "countermajoritarian difficulty" of judicial review seems incomplete, the proponents of fundamental rights adjudication scarcely address the issue. Tribe adopts what Choper and Ely label as the "sophisticated" position—that we have "an imperfectly antidemocratic judicial process and an imperfectly democratic political process."[210] Perry asserts that "[i]t simply will not do to assume that the character of our national commitment to majoritarianism is clear and admits only of a severely restricted judicial function."[211]

207. J. Ely, *supra* note 7, at 67 (citing Choper, *The Supreme Court and the Political Branches: Democratic Theory and Practice*, 122 U. Pa. L. Rev. 810, 830-32 (1974)) (footnote omitted).

208. *Id.* at 219 n.118. Choper makes the same point, offers the same qualifications, and then similarly abandons the systemic perspective to focus on the isolated institution-actor. *See* J. Choper, *supra* note 147, at 27.

209. Many of the laws challenged in fundamental rights litigation *are* old. And the abortion funding laws, upheld in Maher v. Roe, 432 U.S. 464 (1977) (nontherapeutic), and Harris v. McRae, 100 S. Ct. 2671 (1980) (therapeutic), suggest that an intense interest group may exercise powers to carve exceptions out of even new legislation.

210. L. Tribe, *supra* note 21, at 51.

211. Perry, *Ethical Function, supra* note 20, at 712.

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B. *The Justification for Democracy*

The critics' shifts of focus between the system and individual actor, and their use of "majoritarianism" and "democracy" sometimes as synonyms and sometimes in contradistinction, manifest the dilemma of Madisonian democracy. Any hope for resolution lies in understanding how the scholars justify their commitment to democracy. As it turns out, the very justifications create and sustain both horns of the dilemma.

1. *Consent*

Professor Bork asserts that the Madisonian dilemma is resolved

> by the model of government embodied in the structure of the Constitution, a model upon which popular consent to limited government by the Supreme Court also rests. . . . Society consents to be ruled undemocratically within defined areas by certain enduring principles believed to be stated in, and placed beyond the reach of majorities by, the Constitution.[212]

His allusions to consent imply a justification for democracy: In the words of the Declaration of Independence, democracy is the means by which governments derive "their just powers from the consent of the governed."

"Consent" refers either to the actual consent of members of the American polity or the "hypothetical consent" invoked by political philosophers such as Locke and Rawls.[213] Neither concept helps resolve the Madisonian dilemma. If actual consent means mere acquiescence, then the tradition of fundamental rights adjudication, however picaresque, establishes our consent to the practice. If consent must be informed and knowingly and freely given, then it is doubtful that any particular institutional practice can claim consent.[214] And if consent is a heuristic metaphor that allows theorists to speculate about what people under certain circumstances *might* have consented to, one faces the problem that different philosophers have found hypothetical consent for schemes ranging from Hobbes's monarchy to Locke's democratic minimal state to Rawls's welfare state. Consent

212. Bork, *supra* note 27, at 2-3.
213. *See generally* Pitkin, *Obligation and Consent* (pt. 1), 59 AM. POL. SCI. REV. 990 (1965); Pitkin, *Obligation and Consent* (pt. 2), 60 AM. POL. SCI. REV. 39 (1966) (analyzing consent theories).
214. *See* J. TUSSMAN, OBLIGATION AND THE BODY POLITIC (1960). *See also* D. HUME, *Of the Original Contract*, in PHILOSOPHICAL WORKS 443 (T. Green & T. Grose eds. 1964).

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cannot ultimately resolve the Madisonian dilemma because the institutional arrangements involved—what kind of judicial review under what circumstances, or indeed, whether there should be *any* judicial review at all—are too detailed to be derived from any general theory. Consent may get you in the right ballpark, but once there it cannot distinguish among blades of grass. As Owen Fiss has written:

> Consent goes to the system, not the particular institution; it operates on the whole rather than each part. The legitimacy of particular institutions, such as courts, depends not on the consent —implied or otherwise—of the people, but rather on their *competence,* on the special contribution they make to the quality of our social life.[215]

Consent theories simply cannot resolve questions of institutional authority and competence.

2. *Utilitarianism*

Bork alternatively suggests a utilitarian rationale for democracy and for rejecting fundamental rights adjudication. He observes that every action individuals take to gratify themselves potentially impinges on the gratifications of others—there are no wholly "private" gratifications: "Every clash between a minority claiming freedom and a majority claiming power to regulate involves a choice between the gratifications of the two groups."[216] And he implies that majority rule, subject to constitutional limitations imposed by the majority itself, maximizes the net gratifications of society. John Ely makes this utilitarian justification even more explicit:

> The way [utilitarianism] connects with democracy is fairly obvious. It is possible to assert, I suppose, that the best way to find out what makes the most people happy is to appoint someone to make an estimate, but no one could really buy this idea. The more sensible way, quite obviously, is to let everyone register her own preference . . . . Thus democracy is a sort of applied utilitarianism . . . .[217]

215. Fiss, *The Supreme Court, 1978 Term—Foreword: The Forms of Justice,* 93 Harv. L. Rev. 1, 38 (1979) (footnote omitted). Of course, one can still argue that judicial review is likely to do more harm than good—for example, that courts will "overprotect" some individual rights at a cost to the majority's right to govern as it sees fit. But this position—or, for that matter, its opposite—calls, not merely for empirical study, but for criteria that determine the content of individual rights. And that is just what the critics argue cannot be done.

216. Bork, *supra* note 27, at 9.

217. Ely, *supra* note 182, at 407. Although this article became a chapter of *Democracy and Distrust,* the article's brief discussion of utilitarianism is not included. Early in the

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Ely goes on to argue that the political process emulates an economic market by reflecting intensities of preference.[218]

Leaving aside problems of intensity and other complexities suggested by social-choice theorists,[219] a utilitarian justification for democracy faces the liminal problem that utilitarianism is a highly controversial ethical theory.[220] One source of controversy arises because, as Ely notes, "[m]any, perhaps most, of us will feel so strongly about certain things that we will at some point be moved to qualify the utilitarian balance with a set of Thou Simply Shall Not's called 'rights,' 'side constraints,' or perhaps something else."[221] To qualify utilitarianism in this way, however, makes the Madisonian dilemma manifestly intractable, and Ely treats the qualification with obvious distaste. He does, however, wish to modify utilitarianism to deal with the following concern:

> An ethical system that was serious in demanding only the greatest good for the greatest number would have to count as moral a world in which 75% of the people systematically promoted their own happiness at the expense of the other 25% in circumstances where no one could say there was a relevant difference between the two classes. Now this is more than a little troubling, in fact if uncorrected it is fatal . . . .[222]

To remedy this defect, he proposes the equitable constraint of "representation-reinforcing" judicial review—the strict scrutiny of laws that are likely to reflect prejudice against minority groups.

Recall that Ely's Court must count as legitimate such goals as promoting morality and protecting the family, while discounting prejudice and dislike.[223] He implicitly defends the distinction in terms of an individual's right to "equal concern and respect"—the same impulse that presumably leads him both to adopt utilitarianism and to qualify it with the equitable constraint. This concern for the individual, however, ultimately renders indefensible a preference for a rep-

book Ely remarks that "nothing in the ensuing analysis depends on it." J. Ely, *supra* note 7, at 187 n.14.

218. Ely, *supra* note 182, at 408.

219. *See, e.g.*, J. Buchanan & G. Tullock, The Calculus of Consent (1962); A. Sen, Collective Choice and Social Welfare (1970); Barry, *Is Democracy Special?* in 5 Philosophy, Politics and Society 155 (P. Laslett & J. Fishkin eds. 1979); Feldman, *A Very Unsubtle Version of Arrow's Impossibility Theorem*, 12 Econ. Inquiry 534 (1974).

220. *See, e.g.*, D. Hodgson, Consequences of Utilitarianism (1967); D. Lyons, Forms and Limits of Utilitarianism (1965); J. Smart & B. Williams, Utilitarianism: For and Against (1973).

221. J. Ely, *supra* note 7, at 406.

222. *Id.* at 406 (footnote omitted).

223. *See* pp. 1094-95 *supra*.

resentation-reinforcing rather than fundamental rights model of judicial review.

First, a relatively minor point: Imagine a judge who is skeptical about high-sounding justifications for legislation disadvantaging unpopular minorities (say, homosexuals), who believes that such justifications are often rationalizations for, or at least infected by, prejudice,[224] and who doubts that courts can readily distinguish between prejudice and "sincere" moral beliefs.[225] Assuming that the judge believes that courts should ever restrain the majority from imposing their prejudices on minorities, she would have to choose between erring on the majority's or the minority's side. If she doubted that she could successfully employ Ely's strategy (scrutinize the law and uphold it if the majority's moral beliefs are sincere), she might, prophylactically, just invalidate laws that she thought did not accord "equal concern and respect" to members of the minority group. The choice between Ely's approach and hers depends partly on one's intuitions about legislative psychology and judicial competence, and partly on the weight one gives the majority-gratification and individual-respect horns of the Madisonian dilemma. Utilitarian theory cannot determine the choice.

Ely's theory of democracy is much more fundamentally flawed, however. If utilitarian considerations determine the structure of constitutional government, the constitution must be blind to a *non*utilitarian public morality. Although a utilitarian-based constitution surely does not prohibit a legislature from promoting morality, it has no basis for according that objective *privileged* status over giving vent to dislike. Both are simply gratifications. Thus, by introducing the distinction between morality and dislike or prejudice—a distinction essential to any equitable constraint upon utilitarianism and certainly necessary for representation-reinforcing judicial review—Ely creates a self-contradictory political theory. The short of it is that Ely's *equitable* constraint is utterly meaningless in the absence of an extra-utilitarian theory of *rights*. But as he well recognizes, to admit such a theory is to admit of fundamental rights adjudication.[226]

Doubtless, much more can be said about democracy, majoritarian-

224. *See* G. ALLPORT, THE NATURE OF PREJUDICE 374-76 (1979 ed.).

225. *See* note 187 *supra*.

226. Faced with this reality, one might, of course, opt for a pure, unconstrained utilitarianism. But for the same reason that Ely rejects such a theory—it allows for intuitively horrible results—most readers would probably reject it as well. *See* note 220 *supra* (ethical problems of utilitarianism).

ism, and judicial review to pull us in one direction or another—toward the interests of the majority or of individuals oppressed by the majority. But there can be no point of equipoise. The Madisonian dilemma is intrinsic to the liberal state—it springs into existence at the moment the state is created to mediate among individuals pursuing their self-interest—and is not susceptible to resolution within its own terms.

V. Our World, and Welcome To It?

The world of the fundamental rights controversy is inhabited by various institutions and actors, including the "majority,"[227] state legislatures, the United States Supreme Court, individuals, and families.[228]

The fundamental rights controversy is concerned with constraining the majority acting through their legislatures. Yet the scholars address neither legislatures nor the citizenry. They address only the Court—and, of course, each other. This is so typical of the genre as hardly to seem worth mentioning. But I would like to pause to ask why constitutional scholarship is so court-centered.[229]

One explanation is that argument aimed at the people or legislatures is "political" and therefore not within the constitutional scholars' domain; but how does talk about sexual behavior, abortions, and the like become less political as it moves from public forums and

227. Some of the scholars acknowledge that "majority" is an oversimplification. *See, e.g.*, A. Bickel, *supra* note 10, at 18-19; J. Ely, *supra* note 7, at 4. None treats the concept as seriously problematic, however. Some scholars outside the fundamental rights controversy are more skeptical. *See, e.g.*, note 219 *supra* (problems of social choice); Barron, *Access to the Press—A New First Amendment Right*, 80 Harv. L. Rev. 1641, 1647-48 (1967) (media domination of public discourse); H. Marcuse, *Repressive Tolerance*, in R. Wolff, B. Moore, & H. Marcuse, A Critique of Pure Tolerance 95 (1965) (domination).

228. The absence of some other regulars from this world is easy enough to explain. Congress and administrative agencies seldom make policies in the areas challenged in fundamental rights cases. *But see* Maher v. Roe, 432 U.S. 464 (1977); Harris v. McRae, 100 S. Ct. 2671 (1980). And despite the increasing activism of some courts, the state judiciary remains at the periphery of the scholars' vision.

229. Because the scholars focus on the Supreme Court it is worth considering how they view that institution. The proponents' Court is essentially Bickel's, described at the beginning of this article. *See* pp. 1065-66 *supra*. Their faith in the Court's ability to discern fundamental rights, as well as the critics' belief that the Court can carry out *their* affirmative agendas, are based not on the qualities of the individual Justices—who are not presented as extraordinarily wise, insightful, or virtuous—but on the Court's structure and processes. Curiously, none of the scholars looks behind the eloquent descriptions of the Court's processes with the eye of a political scientist or sociologist to consider how the institution actually operates. Curiously also, because it seems difficult to reconcile with the proponents' apparent confidence in the process, almost no one seems interested in the Court's opinions—in its explanations for what it is doing and why—as distinguished from its results. (Dean Wellington's detailed examination of the opinions in *Griswold* and *Roe v. Wade* is unique among the works reviewed above.)

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legislative lobbies to the courtroom? Another explanation is that the scholars' expertise lies in the *procedures* for deciding these issues; but then one might expect procedural advice to be offered to other decisionmakers as well. A more plausible explanation lies in our professionalization and profession. We learned and we teach the law from cases. Many of us were law clerks—demi-judges—who (we would like to believe) shared in the power of judicial decision and who (in our innermost fantasies) aspire to our adopted fathers'[230] seats. For the present, our exercise of public power rests in the hope that some Justice will follow our advice.

Beneath these phenomena lies a more basic fact, however: We simply do not believe that "majorities" and legislatures are willing or able to engage in serious, reflective moral discourse. To be sure, Bickel and Wellington speak only of the judiciary's *relative* competence to engage in moral discourse,[231] and other commentators refer to a moral "dialogue" between the Court and other political institutions.[232] But if Bickel actually believed that the Justices are "teachers in a vital national seminar,"[233] the contemporary literature evokes not a graduate symposium but an unruly classroom. The scholars' implicit message is that if the Supreme Court does not take rights seriously, no one will. This view of the legislative process as one of "public choice" rather than "social good"[234] is expressed most explicitly by Owen Fiss, a fundamental rights theorist:

> Legislatures . . . are not ideologically committed or institutionally suited to search for the meaning of constitutional values, but instead see their primary function in terms of registering the actual, occurrent preference of the people—what they want and what they believe should be done. Indeed, the preferred status of legislatures under footnote four [of *Carolene Products*] is largely derived from this conception of their function. The theory of legislative failure, much like the theory of market failure, ultimately rests on a view that declares supreme the people's preferences.[235]

The critics do not disagree with this assessment of legislative and popular processes. Ely describes representation-reinforcing adjudica-

230. Who knows how our world might appear if one could honestly add "or mothers"?

231. *See* A. BICKEL, *supra* note 10, at 24-28; Wellington, *supra* note 19, at 246-49.

232. *See* Fiss, *supra* note 215, at 15-16; Perry, *Ethical Function*, *supra* note 20, at 718; Brest, Book Review, N.Y. Times, Dec. 11, 1977, § 7 (Book Review), at 10, 44.

233. A. BICKEL, *supra* note 10, at 26 (quoting Rostow, *The Democratic Character of Judicial Review*, 66 HARV. L. REV. 193, 208 (1952)).

234. *See* Michelman, *Political Markets and Community Self-Determination: Competing Judicial Models of Local Government Legitimacy*, 53 IND. L.J. 145, 148-57 (1977) (public choice and public interest models of legislative action).

235. Fiss, *supra* note 215, at 10.

tion as an "antitrust" model that "intervenes only when the 'market,' in our case the political market, is systematically malfunctioning."[236] For Bork, "[t]here is no principled way to decide that one man's gratifications are more deserving of respect than another's or that one form of gratification is more worthy than another. . . . Legislation requires value choice and cannot be principled . . . ."[237]

In sum, the scholars on both sides of the fundamental rights controversy share a profound skepticism about the possibility of public discourse about issues of principle, and ultimately, therefore, about the possibility of shared, reflectively held public values.[238]

For a citizen of this world, "participation"—Ely's central and only acknowledged fundamental value[239]—is not participation in public discourse or community. It is, to use Bork's stark utilitarian language, the opportunity to vote to maximize one's gratifications. The citizens of this world lack the power—perhaps the only power that *citizens*, as distinguished from *constituents*, can exercise—of participating in meaningful debate over public values.[240] The proponents of fundamental rights adjudication relegate that function to the exclusive jurisdiction of the Court. The critics either deny the very existence of public values or at most allow them on those rare occasions—1787, 1866—of constitutional revolution.

In this world—*our* world—the proponents of fundamental values adjudication seek to protect individuals against the force of an alien majority by cordoning off areas of personal privacy and autonomy, while in the absence of any principles that demand otherwise, the critics let the majority have its head. Wilkinson's and White's almost frantic concern to protect the family against threats from both sides[241] becomes comprehensible as an attempt to salvage the only extant intermediate association of any significance—that "haven in a heartless world"[242]—while other proponents see the traditional family as an institution readily available to the state as an instrument of social control.[243]

These are not competing political stances. They reflect the con-

236. J. ELY, *supra* note 7, at 103.

237. Bork, *supra* note 27, at 10.

238. To be sure, Wellington's and Perry's methodologies depend on consensus; but they treat conventional morality as a sociological datum, making no warrant for its reflectiveness, let alone its validity.

239. *See* pp. 1093-94 *supra*.

240. *See* ARISTOTLE, THE POLITICS 2-8 (E. Barker trans. 1946); H. ARENDT, ON REVOLUTION (1965); Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1059, 1067-73 (1980).

241. *See* pp. 1077-79 *supra*.

242. C. LASCH, HAVEN IN A HEARTLESS WORLD (1977).

243. *See* Karst, *supra* note 22 (*passim*).

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tradiction embraced by any one of us—what Duncan Kennedy has described as the "fundamental contradiction—that relations with others are both necessary to and incompatible with our freedom":

> [I]ndividual freedom is at the same time dependent on and incompatible with the communal coercive action that is necessary to achieve it. Others (family, friends, bureaucrats, cultural figures, the state) are necessary if we are to become persons at all —they provide us the stuff of our selves and protect us in crucial ways against destruction. . . .
>
> But at the same time that it forms and protects us, the universe of others . . . threatens us with annihilation and urges upon us forms of fusion that are quite plainly bad rather than good. A friend can reduce me to misery with a single look. Numberless conformities, large and small abandonments of self to others, are the price of what freedom we experience in society. And the price is a high one. Through our existence as members of collectives, we impose on others and have imposed on us hierarchical structures of power, welfare, and access to enlightenment that are illegitimate . . . .
>
> The kicker is that the abolition of these illegitimate structures, the fashioning of an unalienated collective existence, appears to imply such a massive increase of collective control over our lives that it would defeat its purpose. Only collective force seems capable of destroying the attitudes and institutions that collective force has itself imposed. Coercion of the individual by the group appears to be inextricably bound up with the liberation of that same individual. . . .
>
> Even this understates the difficulty. It is not just that the world of others is intractable. The very structures against which we rebel are necessary within us as well as outside of us. We are implicated in what we would transform, and it in us.[244]

This is the world within which the fundamental rights controversy takes place. The Madisonian tension—between majority and minority, legislature and court—is just a partial image of the essential and irreconcilable tension between self and other, between self and *self*. This world is not entirely of our own making. In the broadest sense, Kennedy's description is of the human predicament; more narrowly, of a society we have inherited and over which we exercise little control. But if it would be arrogant to think that we could change the world, it would be even more irresponsible to act as if we couldn't. To continue the controversy over judicial review and democracy in

244. Kennedy, *The Structure of Blackstone's Commentaries*, 28 Buffalo L. Rev. 205, 211-12 (1979). *See also* L. Tribe, *supra* note 21, at 987-88 (quoted in note 80 *supra*).

the terms in which it has been framed is, in effect, to deny the contradiction and thus to limit both our vision and the possibilities for social change.

For those who share this sense, what then? I do not have an agenda, but I would like to mention several alternative strategies. One, which requires the least dislocation, is simply to acknowledge that most of our writings are not political theory but advocacy scholarship—amicus briefs ultimately designed to persuade the Court to adopt our various notions of the public good. In one or another form this has been the staple of legal scholarship and at least has the claims of tradition. Alternatively, we might turn to history and a broader sort of legal theory to understand where we are and how we got here.[245] That is also a respected academic tradition, though somewhat less familiar in legal scholarship.

Finally, the truly courageous—or the most foolhardy—among us might go the next step and, grasping what we understand of our situation, work toward a genuine reconstitution of society—perhaps one in which the concept of freedom includes citizen participation in the community's public discourse and responsibility to shape its values and structure.[246] Those who explore this route may discover that in escaping one set of contradictions they have just found themselves in another. But we will not know, until despair or hope impels us to explore alternatives to the world we currently inhabit.

245. *See, e.g.*, E. Purcell, The Crisis of Democratic Theory (1973); Tushnet, *Truth, Justice, and the American Way: An Interpretation of Public Law Scholarship in the Seventies*, 57 Tex. L. Rev. 1307 (1979).

246. *See, e.g.*, H. Arendt, *supra* note 240; J. Mansbridge, Beyond Adversary Democracy (1980); C. Pateman, Participation and Democratic Theory (1970); Frug, *supra* note 240.

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Legal Paternalism[1]

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The principle of legal paternalism justifies state coercion to protect individuals from self-inflicted harm, or in its extreme version, to guide them, whether they like it or not, toward their own good. Parents can be expected to justify their interference in the lives of their children (e.g. telling them what they must eat and when they must sleep) on the ground that "daddy knows best." Legal paternalism seems to imply that since the state often can know the interests of individual citizens better than the citizens know them themselves, it stands as a permanent guardian of those interests *in loco parentis*. Put in this blunt way, paternalism seems a preposterous doctrine. If adults are treated as children they will come in time to be like children. Deprived of the right to choose for themselves, they will soon lose the power of rational judgment and decision. Even children, after a certain point, had better not be "treated as children," else they will never acquire the outlook and capability of responsible adults.

Yet if we reject paternalism entirely, and deny that a person's own good is *ever* a valid ground for coercing him, we seem to fly in the face both of common sense and our long established customs and laws. In the criminal law, for example, a prospective victim's freely granted consent is no defense to the charge of mayhem or homicide. The state simply refuses to permit anyone to agree to his own disablement or killing. The law of contracts, similarly, refuses to recognize as valid, contracts to sell oneself into slavery, or to become a mistress, or a second wife. Any ordinary citizen is legally justified in using reasonable force to prevent another from mutilating himself or committing suicide. No one is allowed to purchase certain drugs even for

[1] The Phi Beta Kappa lecture at Franklin and Marshall College, 1970; also presented to the Pacific Division of the American Philosophical Association, April, 1970, to the Summer Workshop at the Catholic University of America, June, 1970, and to "Philosopher's Holiday" at Vassar College, November, 1970.

therapeutic purposes without a physician's prescription (Doctor knows best). The use of other drugs, such as heroin, for pleasure merely, is permitted under no circumstances whatever. It is hard to find any plausible rationale for all such restrictions apart from the argument that beatings, mutilations, and death, concubinage, slavery, and bigamy are always bad for a person whether he or she knows it or not, and that antibiotics are too dangerous for any non-expert, and heroin for anyone at all, to take on his own initiative.

The trick is stopping short once we undertake this path, unless we wish to ban whiskey, cigarettes, and fried foods, which tend to be bad for people too, whether they know it or not. The problem is to reconcile somehow our general repugnance for paternalism with the apparent necessity, or at least reasonableness, of some paternalistic regulations. My method of dealing with this problem will not be particularly ideological. Rather, I shall try to organize our elementary intuitions by finding a principle that will render them consistent. Let us begin, then, by rejecting the views both that the protection of a person from himself is *always* a valid ground for interference in his affairs, and that it is *never* a valid ground. It follows that it is a valid ground only under certain conditions, and we must now try to state those conditions.[2]

I

It will be useful to make some preliminary distinctions. The first distinction is between harms or likely harms that are produced directly by a person upon himself and those produced by the actions of another person to which the first party has consented. Committing suicide would be an example of self-inflicted harm; arranging for a person to put one out of one's misery would be an example of a "harm" inflicted by the action of another to which one has consented. There is a venerable legal maxim traceable to the Roman Law that *"Volenti non fit inuria,"* sometimes translated, misleadingly, as: "To one who consents no harm is done." Now, I suppose that the notion of consent applies, strictly speaking, only to the actions of another person

[2] The discussion that follows has two important unstated and undefended presuppositions. The first is that in some societies, at least, and at some times, a line can be drawn (as Mill claimed it could in Victorian England) between other-regarding behaviour and behaviour that is primarily and directly self-regarding and only indirectly and remotely, therefore trivially, other-regarding. If this assumption is false, there is no interesting problem concerning legal paternalism since all "paternalistic" restrictions, in that case, could be defended as necessary to protect persons other than those restricted, and hence would not be (wholly) paternalistic. The second presupposition is that the spontaneous repugnance toward paternalism (which I assume the reader shares with me) is well-grounded and supportable

that affect oneself. If so, then, consent to one's *own* actions is a kind of metaphor. Indeed, to say that I consented to my own actions, seems just a colorful way to saying that I acted voluntarily. My involuntary actions, after all, are, from the moral point of view, no different from the actions of someone else to which I have not had an opportunity to consent. In any case, it seems plainly false to say that a person cannot be *harmed* by actions, whether his own or those of another, to which he has consented. People who quite voluntarily eat an amount that is in fact too much cause themselves to suffer from indigestion; and girls who consent to advances sometimes become pregnant.

One way of interpreting the *Volenti* maxim is to take it as a kind of presumptive principle. A person does not generally consent to what he believes will be, on balance, harmful to himself, and by and large, an individual is in a better position to appraise risks to himself than are outsiders. Given these data, and considerations of convenience in the administration of the law, the *Volenti* maxim might be understood to say that for the purposes of the law (whatever the actual facts might be) nothing is to count as harm to a given person that he has freely consented to. If this presumption is held to be conclusive, then the *Volenti* maxim becomes a kind of "legal fiction" when applied to cases of undeniable harm resulting from behavior to which the harmed one freely consented. A much more likely interpretation, however, takes the *Volenti* maxim to say nothing at all, literal or fictional, about *harms*. Rather, it is about what used to be called "injuries," that is, injustices or wrongs. To one who freely consents to a thing no *wrong* is done, no matter how harmful to him the consequences may be. "He cannot waive his right," says Salmond, "and then complain of its infringement."[3] If the *Volenti* maxim is simply an expression of Salmond's insight, it is not a presumptive or fictional principle about harms, but rather an absolute principle about wrongs.

The *Volenti* maxim (or something very like it) plays a key role in the argument for John Stuart Mill's doctrine about liberty. Characteristically, Mill seems to employ the maxim in both of its interpretations, as it suits his purposes, without noticing the distinction between them. On the one hand, Mill's argument purports to be an elaborate application of the calculus of harms and benefits to the problem of political liberty. The state can rightly restrain a man to prevent harm to others. Why then can it not

[3] See Glanville Williams (ed.), *Salmond on Jurisprudence*, Eleventh Edition (London: Sweet & Maxwell, 1957), p. 531.

restrain a man to prevent him from harming himself? After all, a harm is a harm whatever its cause, and if our sole concern is to minimize harms all round, why should we distinguish between origins of harm? One way Mill answers this question is to employ the *Volenti* maxim in its first interpretation. For the purposes of his argument, he will presume conclusively that "to one who consents no *harm* is done." Self-inflicted or consented-to harm simply is not to count as harm at all; and the reasons for this are that the coercion required to prevent such harm is itself a harm of such gravity that it is likely in the overwhelming proportion of cases to outweigh any good it can produce for the one coerced; and moreover, individuals themselves, in the overwhelming proportion of cases, can know their own true interests better than any outsiders can, so that outside coercion is almost certain to be self-defeating.

But as Gerald Dworkin has pointed out,[4] arguments of this merely statistical kind at best create a strong but rebuttable presumption against coercion of a man in his own interest. Yet Mill purports to be arguing for an absolute prohibition. Absolute prohibitions are hard to defend on purely utilitarian grounds, so Mill, when his confidence wanes, tends to move to the second interpretation of the *Volenti* maxim. To what a man consents he may be harmed, but he cannot be wronged; and Mill's "harm principle," reinterpreted accordingly, is designed to protect him and others only from wrongful invasions of their interest. Moreover, when the state intervenes on any other ground, its *own* intervention is a wrongful invasion. What justifies the absolute prohibition of interference in primarily self-regarding affairs is *not* that such interference is self-defeating and likely (merely likely) to cause more harm than it prevents, but rather that it would itself be an injustice, a wrong, a violation of the private

[4] See his excellent article, "Paternalism" in *Morality and the Law*, ed. by R. A. Wasserstrom (Belmont, Calif: Wadsworth Publishing Co., 1971)

[5] Mill's rhetoric often supports this second interpretation of his argument. He is especially fond of such political metaphors as independence, legitimate rule, dominion, and sovereignty. The state must respect the status of the individual as an independent entity whose "sovereignty over himself" (in Mill's phrase), like Britain's over its territory, is absolute. In self-regarding affairs, a person's individuality ought to "reign uncontrolled from the outside" (another phrase of Mill's). Interference in those affairs, whether successful or self-defeating, is a violation of *legitimate boundaries*, like trespass in law, or aggression between states. Even self-mutilation and suicide are permissible if the individual truly chooses them, and other interests are not directly affected. The individual person has an absolute right to choose for himself, to be wrong, to go to hell on his own, and it is nobody else's proper *business* or *office* to interfere. The individual owns (not merely possesses) his life; he has *title* to it. He alone is *arbiter* of his own life and death. See how legalistic and un-utilitarian these terms are! The great wonder is that Mill could claim to have foregone any benefit in argument from the notion of an abstract right. Mill's intentions aside, however, I can not conceal my own preference for this second interpretation of his argument

sanctuary which is every person's self; and this is so whatever the calculus of harms and benefits might show.[5]

The second distinction is between those cases where a person directly produces harm to himself, where the harm is the certain upshot of his conduct and its desired end, on the one hand, and those cases where a person simply creates a *risk* of harm to himself in the course of activities directed toward other ends. The man who knowingly swallows a lethal dose of arsenic will certainly die, and death must be imputed to him as his goal in acting. Another man is offended by the sight of his left hand, so he grasps an ax in his right hand and chops his left hand off. He does not thereby "endanger" his interest in the physical integrity of his limbs or "risk" the loss of his hand. He brings about the loss directly and deliberately. On the other hand, to smoke cigarettes or to drive at excessive speeds is not directly to harm oneself, but rather to increase beyond a normal level the probability that harm to oneself will result.

The third ditinction is that between reasonable and unreasonable risks. There is no form of activity (or inactivity either for that matter) that does not involve some risks. On some occasions we have a choice between more and less risky actions and prudence dictates that we take the less dangerous course; but what is called "prudence" is not always reasonable. Sometimes it is more reasonable to assume a great risk for a great gain than to play it safe and forfeit a unique opportunity. Thus it is not necessarily more reasonable for a coronary patient to increase his life expectancy by living a life of quiet inactivity than to continue working hard at his career in the hope of achieving something important even at the risk of a sudden fatal heart attack at any moment. There is no simple mathematical formula to guide one in making such decisions or for judging them "reasonable" or "unreasonable." On the other hand, there are other decisions that are manifestly unreasonable. It is unreasonable to drive at sixty miles an hour through a twenty mile an hour zone in order to arrive at a party on time, but it may be reasonable to drive fifty miles an hour to get a pregnant wife to the maternity ward. It is foolish to resist an armed robber in an effort to protect one's wallet, but it may be worth a desperate lunge to protect one's very life, or the life of a loved one.

In all of these cases a number of district considerations are involved.[6] If there is time to deliberate one should consider: (1)

[6] The distinctions in this paragraph are borrowed from: Henry T. Terry, "Negligence," *Harvard Law Review*, Vol. 29 (1915).

the degree of probability that harm to oneself will result from a given course of action, (2) the seriousness of the harm being risked, i.e. "the value or importance of that which is exposed to the risk," (3) the degree of probability that the goal inclining one to shoulder the risk will in fact result from the course of action, (4) the value or importance of achieving that goal, that is, just how worthwhile it is to one (this is the intimately personal factor, requiring a decision about one's own preferences, that makes the reasonableness of a risk-assessment on the whole so difficult for the *outsider* to make), and (5) the necessity of the risk, that is, the availability or absence of alternative, less risky, means to the desired goal. Certain judgments about the reasonableness of risk-assumptions are quite uncontroversial. We can say, for example, that the greater are considerations (1)—the probability of harm to self, and (2)—the magnitude of the harm risked, the *less* reasonable the risk; and the greater considerations (3) —the probability the desired goal will result, (4)—the importance of that goal to the actor, and (5)—the necessity of the means, the *more* reasonable the risk. But in a given difficult case, even where questions of "probability" are meaningful and beyond dispute, and where all the relevant facts are known, the risk-decision may defy objective assessment because of its component personal value judgments. In any case, if the state is to be given the right to prevent a person from risking harm to himself (and only himself) this must not be on the ground that the prohibited action is risky, or even that it is extremely risky, but rather on the ground that the risk is extreme and, in respect to its objectively assessable components, manifestly *unreasonable*. There are very good reasons, sometimes, for regarding even a person's judgment of personal worthwhileness (consideration 4) to be "manifestly unreasonable," but it remains to be seen whether (or when) that kind of unreasonableness can be sufficient grounds for interference.

The fourth and final distinction is between fully voluntary and not fully voluntary assumptions of a risk. One assumes a risk in a fully voluntary way when one shoulders it while fully informed of all relevant facts and contingencies, with one's eyes wide open, so to speak, and in the absence of all coercive pressure of compulsion. There must be calmness and deliberateness, no distracting or unsettling emotions, no neurotic compulsion, no misunderstanding. To whatever extent there is compulsion, misinformation, excitement or impetuousness, clouded judgment (as e.g. from alcohol), or immature or defective

faculties of reasoning, to that extent the choice falls short of perfect voluntariness. Voluntariness then is a matter of degree. One's "choice" is *completely involuntary* either when it is no choice at all, properly speaking—when one lacks all muscular control of one's movements, or when one is knocked down, or pushed, or sent reeling by a blow, or a wind, or an explosion—or when through ignorance one chooses something other than what one means to choose, as when one thinks the arsenic powder is table salt, and thus chooses to sprinkle it on one's scrambled eggs. Most harmful choices, as most choices generally, fall somewhere in between the extremes of perfect voluntariness and complete involuntariness.

Now, the terms "voluntary" and "involuntary" have a variety of disparate but overlapping uses in philosophy, law, and ordinary life, and some of them are not altogether clear. I should point out here that my usage does not correspond with that of Aristotle, who allowed that infants, animals, drunkards, and men in a towering rage might yet act voluntarily if only they are undeceived and not overwhelmed by external physical force. What I call a voluntary assumption of risk corresponds more closely to what Aristotle called "deliberate choice." Impulsive and emotional actions, and those of animals and infants are voluntary in Aristotle's sense, but they are not *chosen*. Chosen actions are those that are decided upon by *deliberation*, and that is a process that requires time, information, a clear head, and highly developed rational faculties. When I use such phrases then as "voluntary act," "free and genuine consent," and so on, I refer to acts that are more than "voluntary" in the Aristotelian sense, acts that Aristotle himself would call "deliberately chosen." Such acts not only have their origin "in the agent," they also represent him faithfully in some important way: they express his settled values and preferences. In the fullest sense, therefore, they are actions for which he can take responsibility.

II

The central thesis of John Stuart Mill and other individualists about paternalism is that the fully voluntary choice or consent of a mature and rational human being concerning matters that affect only his own interests is such a precious thing that no one else (and certainly not the state) has a right to interfere with it simply for the person's "own good." No doubt this thesis was also meant to apply to almost-but-not-quite fully

voluntary choices as well, and probably also even to some substantially non-voluntary ones (e.g. a neurotic person's choice of a wife who will satisfy his neurotic needs but only at the price of great unhappiness, eventual divorce, and exacerbated guilt); but it is not probable that the individualist thesis was meant to apply to choices near the bottom of the scale of voluntariness, and Mill himself left no doubt that he did *not* intend it to apply to completely involuntary "choices." Nor should we *expect* anti-paternalistic individualism to deny protection to a person from his own nonvoluntary choices, for insofar as the choices are not voluntary they are just as alien to him as the choices of someone else.

Thus Mill would permit the state to protect a man from his own ignorance at least in circumstances that create a strong presumption that his uninformed or misinformed choice would not correspond to his eventual one.

> If either a public officer or anyone else saw a person attempting to cross a bridge which had been ascertained to be unsafe, and there were no time to warn him of his danger, they might seize him and turn him back, without any real infringement of his liberty; for liberty consists in doing what one desires, and he does not desire to fall into the river.[7]

Of course, for all the public officer may know, the man on the bridge does desire to fall into the river, or to take the risk of falling for other purposes. If the person is then fully warned of the danger and wishes to proceed anyway, then, Mill argues, that is his business alone; but because most people do *not* wish to run such risks, there was a solid presumption, in advance of checking, that this person did not wish to run the risk either. Hence the officer was justified, Mill would argue, in his original interference.

On other occasions a person may need to be protected not from his ignorance but from some other condition that may render his informed choice substantially less than voluntary. He may be "a child, or delirious, or in some state of excitement or absorption incompatible with the full use of the reflecting faculty."[8] Mill would not permit any such person to cross an objectively unsafe bridge. On the other hand, there is no reason why a child, or an excited person, or a drunkard, or a mentally ill person should not be allowed to proceed on his way home across a perfectly safe thoroughfare. Even substantially nonvoluntary choices deserve protection unless there is good reason to judge them dangerous.

[7] J. S. Mill, *On Liberty* (New York: Liberal Arts Press, 1956), p. 117.

[8] *Loc. cit.*

Now it may be the case, for all we can know, that the behaviour of a drunk or an emotionally upset person would be exactly the same even if he were sober and calm; but when the behaviour seems patently self-damaging and is of a sort that most calm and normal persons would not engage in, then there are strong grounds, if only a statistical sort, for inferring the opposite; and these grounds, on Mill's principle, would justify interference. It may be that there is no kind of action of which it can be said "No mentally competent adult in a calm, attentive mood, fully informed, etc. would *ever* choose (or consent to) *that*." Nevertheless, there are actions of a kind that create a powerful *presumption* that any given actor, if he were in his right mind, would not choose them. The point of calling this hypothesis a "presumption" is to require that it be completely overridden before legal permission be given to a person, who has already been interfered with, to go on as before. So, for example, if a policeman (or anyone else) sees John Doe about to chop off his hand with an ax, he is perfectly justified in using force to prevent him, because of the presumption that no one could voluntarily choose to do such a thing. The presumtion, however, should always be taken as rebuttable in principle; and now it will be up to Doe to prove before an official tribunal that he is calm, competent, and free, and that he still wishes to chop off his hand. Perhaps this is too great a burden to expect Doe himself to "prove," but the tribunal should require that the presumption against voluntariness be overturned by evidence from some source or other. The existence of the presumption should require that an objective determination be made, whether by the usual adversary procedures of law courts, or simply by a collective investigation by the tribunal into the available facts. The greater the presumption to be overridden, the more elaborate and fastidious should be the legal paraphernalia required, and the stricter the standards of evidence. (The law of wills might prove a model for this.) The point of the procedure would not be to evaluate the wisdom or worthiness of a person's choice, but rather to determine whether the choice really is his.

This seems to lead us to a form of paternalism that is so weak and innocuous that it could be accepted even by Mill, namely, that the state has the right to prevent self-regarding harmful conduct only when it is substantially nonvoluntary or when temporary intervention is necessary to establish whether it is voluntary or not. When there is a strong presumption that

no normal person would voluntarily choose or consent to the kind of conduct in question, that should be a proper ground for detaining the person until the voluntary character of his choice can be established. We can use the phrase "the standard of voluntariness" as a label for the considerations that mediate the application of the principle that a person may properly be protected from his own folly. (Still another ground for forcible delay and inquiry that is perfectly compatible with Mill's individualism is the possibility that important third party interests might be involved. Perhaps a man's wife and family should have some say before he is permitted to commit suicide—or even to chop off his hand.)

III

Working out the details of the voluntariness standard is far too difficult to undertake here, but some of the complexities, at least, can be illustrated by a consideration of some typical hard cases. Consider first of all the problem of harmful drugs. Suppose Richard Roe requests a prescription of drug X from Dr. Doe, and the following discussion ensues:

Dr. Doe: I cannot prescribe drug X to you because it will do you physical harm.

Mr. Roe: But you are mistaken. It will not cause me physical harm.

In a case like this, the state, of course, backs the doctor. The state deems medical questions to be technical matters subject to expert opinions. This entails that a non-expert layman is not the best judge of his own medical interests. If a layman disagrees with a physician on a question of medical fact the layman can be presumed wrong, and if nevertheless he chooses to act on his factually mistaken belief, his action will be substantially less than fully voluntary in the sense explained above. That is to say that the action of *ingesting a substance which will in fact harm him* is not the action he voluntarily chooses to do. Hence the state intervenes to protect him not from his own free and voluntary choices, but from his own ignorance.

Suppose however that the exchange goes as follows:

Dr. Doe: I cannot prescribe drug X to you because it will do you physical harm.

Mr. Roe: Exactly. That's just what I want. I want to harm myself.

In this case Roe *is* properly apprised of the facts. He suffers from no delusions or misconceptions. Yet his choice is so odd that there exists a reasonable presumption that he has been

deprived somehow of the "full use of his reflecting faculty." It is because we know that the overwhelming majority of choices to inflict injury for its own sake on oneself are not fully voluntary that we are entitled to presume that the present choice too is not fully voluntary. If no further evidence of derangement, or illness, or severe depression, or unsettling excitation can be discovered, however, and the patient can convince an objective panel that his choice is voluntary (unlikely event!) and further if there are no third party interests, for example those of wife or family, that require protection, then our "voluntariness standard" would permit no further state constraint.

Now consider the third possibility:

Dr. Doe: I cannot prescribe drug *X* to you because it is very likely to do you physical harm.

Mr. Roe: I don't care if it causes me physical harm. I'll get a lot of pleasure first, so much pleasure in fact, that it is well worth running the risk of physical harm. If I must pay a price for my pleasure I am willing to do so.

This is perhaps the most troublesome case. Roe's choice is not patently irrational on its face. He may have a well thought-out philosophical hedonism as one of his profoundest convictions. He may have made a fundamental decision of principle committing himself to the intensely pleasurable, even if brief life. If no third party interests are directly involved, the state can hardly be permitted to declare his philosophical convictions unsound or "sick" and prevent him from practicing them, without assuming powers that it will inevitably misuse disastrously.

On the other hand, this case may be very little different from the preceding one, depending of course on what the exact facts are. If the drug is known to give only an hour's mild euphoria and then cause an immediate violently painful death, then the risks incurred appear so unreasonable as to create a powerful presumption of nonvoluntariness. The desire to commit suicide must always be presumed to be both nonvoluntary and harmful to others until shown otherwise. (Of course is some cases it *can* be shown otherwise.) On the other hand, drug *X* may be harmful in the way nicotine is now known to be harmful; twenty or thirty years of heavy use may create a grave risk of lung cancer or heart disease. Using the drug for pleasure merely, when the risks are of this kind, may be to run unreasonable risks, but that is no strong evidence of nonvoluntariness. Many perfectly normal, rational persons voluntarily

choose to run precisely these risks for whatever pleasures they find in smoking.[9] The way for the state to assure itself that such practices are truly voluntary is continually to confront smokers with the ugly medical facts so that there is no escaping the knowledge of what the medical risks to health exactly are. Constant reminders of the hazards should be at every hand and with no softening of the gory details. The state might even be justified in using its taxing, regulatory, and persuasive powers to make smoking (and similar drug usage) more difficult or less attractive; but to prohibit it outright for everyone would be to tell the voluntary risk-taker that even his informed judgments of what is worthwhile are less reasonable than those of the state, and that therefore, he may not act on them. This is paternalism of the strong kind, unmediated by the voluntariness standard. As a principle of public policy, it has an acrid moral flavour, and creates serious risks of governmental tyranny.

IV

Another class of hard cases are those involving contracts in which one party agrees to restrict his own liberty in some respect. The most extreme case is that in which one party freely sells himself into slavery to another, perhaps in exchange for some benefit that is to be consumed before the period of slavery begins, perhaps for some reward to be bestowed upon some third party. Our point of departure will be Mill's classic treatment of the subject:

> In this and most other civilized countries... an engagement by which a person should sell himself, or allow himself to be sold, as a slave would be null and void, neither enforced by law nor by opinion. The ground for *thus limiting his power of voluntarily disposing of his own lot in life* is apparent, and is very clearly seen in this extreme case. The reason for not interfering, unless for the sake of others, with a person's voluntary acts is consideration for his liberty. His voluntary choice is evidence that what he so chooses is desirable, or at least endurable to him, and his good is on the whole best provided for by allowing him to take his own means of pursuing it. But by selling himself for a slave, he abdicates his liberty; he foregoes any future use of it beyond that single act. He therefore defeats, in his own case, the very purpose which is the justification of allowing him to dispose of himself. He is no longer free, but is thenceforth in a position which has no longer the presumption in its favour that would be afforded by his voluntarily remaining in it. The principle of freedom cannot require that he should be free not to be free.[10] [my italics]

It seems plain to me that Mill, in this one extreme case,

[9] Perfectly rational men can have 'unreasonable desires' as judged by other perfectly rational men, just as perfectly rational men (e.g. great philosophers) can hold 'unreasonable beliefs' or doctrines as judged by other perfectly rational men. Particular unreasonableness, then, can hardly be strong evidence of general irrationality.

[10] Mill, *op. cit.*, p. 125

has been driven to embrace the principle of paternalism. The "harm-to-others principle," as mediated by the *Volenti* maxim[11] would permit a competent, fully informed adult, who is capable of rational reflection and free of undue pressure, to be himself the judge of his own interests, no matter how queer or perverse his judgment may seem to others. There is, of course, always the presumption, and a very strong one indeed, that a person who elects to "sell" himself into slavery is either incompetent, unfree, or misinformed. Hence the state should require very strong evidence of voluntariness—elaborate tests, swearings, psychiatric testifying, waiting periods, public witnessing, and the like—before validating such contracts. Similar forms of official "making sure" are involved in marriages and wills, and slavery is even more serious a thing, not to be rashly undertaken. Undoubtedly, very few slavery contracts would survive such procedures, perhaps even none at all. It may be literally true that "no one in his right mind would sell himself into slavery," but if this is a truth it is not an *a priori* one but rather one that must be tested anew in each case by the application of independent, non-circular criteria of mental illness.

The supposition is at least intelligible, therefore, that every now and then a normal person in full possession of his faculties would voluntarily consent to permanent slavery. We can imagine any number of intelligible (if not attractive) motives for doing such a thing. A person might agree to become a slave in exchange for a million dollars to be delivered in advance to a loved one or to a worthy cause, or out of a religious conviction requiring a life of humility or penitence, or in payment for the prior enjoyment of some supreme benefit, as in the *Faust* legend. Mill, in the passage quoted above, would disallow such a contract no matter how certain it is that the agreement is fully voluntary, apparently on the ground that the permanent and irrevocable loss of freedom is such a great evil, and slavery so harmful a condition, that no one ought ever to be allowed to choose it, even voluntarily. Any person who thinks that he can be a gainer, in the end, from such an agreement, Mill implies, is simply wrong whatever his reasons, and can be known *a priori* to be wrong. Mill's earlier argument, if I understand it correctly, implies that a man should be permitted to mutilate

[11] That is, the principle that prevention of harm to others is the sole ground for legal coercion, and that what is freely consented to is not to count as harm. These are Mill's primary normative principles in *On Liberty*.

his body, take harmful drugs, or commit suicide, provided only that his decision to do these things is voluntary and no other person will be directly and seriously harmed. But voluntarily acceding to slavery is too much for Mill to stomach. Here is an evil of another order, he seems to say; so the "harm to others" principle and the *Volenti* maxim come to their limiting point here, and paternalism in the strong sense (unmediated by the voluntariness test) must be invoked, if only for this one kind of case.

There are, of course, other ways of justifying the refusal to enforce slavery contracts. Some of these are derived from principles not acknowledged in Mill's moral philosophy but which at least have the merit of being non-paternalistic. One might argue that what is odious in "harsh and unconscionable" contracts, even when they are voluntary on both sides, is not that a man should suffer the harm he freely risked, but rather that another party should "exploit" or take advantage of him. What is to be prevented, according to this line of argument, is one man exploiting the weakness, or foolishness, or recklessness of another. If a weak, foolish, or reckless man freely chooses to harm or risk harm to himself, that is all right, but that is no reason why another should be a party to it, or be permitted to benefit himself at the other's expense. (This principle, however, can only apply to extreme cases, else it will ban all competition.) Applied to voluntary slavery, the principle of non-exploitation might say that it isn't aimed at preventing one man from being a slave so much as preventing the other from being a slave-owner. The basic principle of argument here is a form of legal moralism. To own another human being, as one might own a table or a horse, is to be in a relation to him that is inherently immoral, and therefore properly forbidden by law. That, of course, is a line of argument that would be uncongenial to Mill, as would also be the Kantian argument that there is something in every man that is not his to alienate or dispose of, *viz.*, the "humanity" that we are enjoined to "respect, whether in our own person or that of another." (It is worth noting, in passing, that Kant was an uncompromising foe of legal paternalism.)

There are still other ways of arguing against the recognition of slavery contracts, however, that are neither paternalistic (in the strong sense) nor inconsistent with Mill's primary principles. One might argue, for example, that weakening respect for human dignity (which is weak enough to begin with) can lead

in the long run to harm of the most serious kind to non-consenting parties. Or one might use a variant of the "public charge" argument commonly used in the nineteenth century against permitting even those without dependents to assume the risk of penury, illness, and starvation. We could let men gamble recklessly with their own lives, and then adopt inflexibly unsympathetic attitudes toward the losers. "They made their beds," we might say in the manner of some proper Victorians, "now let them sleep in them". But this would be to render the whole national character cold and hard. It would encourage insensitivity generally and impose an unfair economic penalty on those who possess the socially useful virtue of benevolence. Realistically, we just can't let men wither and die right in front our eyes; and if we intervene to help, as we inevitably must, it will cost us a lot of money. There are certain risks then of an *apparently* self-regarding kind that men cannot be permitted to run, if only for the sake of others who must either pay the bill or turn their backs on intolerable misery. This kind of argument, which can be applied equally well to the slavery case, is at least not *very* paternalistic.

Finally, a non-paternalistic opponent of voluntary slavery might argue (and this the argument to which I wish to give the most emphasis) that while exclusively self-regarding and fully voluntary "slavery contracts" are unobjectionable in principle, the legal machinery for testing voluntariness would be so cumbersome and expensive as to be impractical. Such procedures, after all, would have to be paid for out of tax revenues, the payment of which is mandatory for taxpayers. (And psychiatric consultant fees, among other things, are very high.) Even expensive legal machinery might be so highly fallible that there could be no sure way of determining voluntariness, so that some mentally ill people, for example, might become enslaved. Given the uncertain quality of evidence on these matters, and the enormous general presumption of nonvoluntariness, the state might be justified simply in *presuming nonvoluntariness conclusively in every case as the least risky course.* Some rational bargain-makers might be unfairly restrained under this policy, but on the alternative policy, even more people, perhaps, would become unjustly (mistakenly) enslaved, so that the evil prevented by the absolute prohibition would be greater than the occasional evil permitted. The principles involved in this argument are of the following two kinds: (1) It is better (say) that one hundred people be wrongly denied permission to be en-

slaved than that one be wrongly permitted, and (2) If we allow the institution of "voluntary slavery" at all, then no matter how stringent our tests of voluntariness are, it is likely that a good many persons *will* be wrongly permitted.

V

Mill's argument that leads to a (strong) paternalistic conclusion in this one case (slavery) employs only calculations of harms and benefits and the presumptive interpretation of *Volenti non fit inuria*. The notion of the inviolable sovereignty of the individual person over his own life does not appear in the argument. Liberty, he seems to tell us, is one good or benefit (though an extremely important one) among many, and its loss, one evil or harm (though an extremely serious one) among many types of harm. The aim of the law being to prevent harms of all kinds and from all sources, the law must take a very negative attitude toward forfeitures of liberty. Still, by and large, legal paternalism is an unacceptable policy because in attempting to impose upon a man an external conception of his own good, it is very likely to be self-defeating. "His voluntary choice is *evidence* (emphasis added) that what he so chooses is desirable, or at least endurable to him, and his good is *on the whole* (more emphasis added) best provided for by allowing him to take his own means of pursuing it." On the whole, then, the harm of coercion will outweigh any good it can produce for the person coerced. But when the person chooses slavery, the scales are clearly and necessarily tipped the other way, and the normal case against intervention is defeated. The ultimate appeal in this argument of Mill's is to the prevention of personal harms, so that permitting a person voluntarily to sell all his freedom would be to permit him to be "free not to be free", that is, free to inflict an *undeniable* harm upon himself, and this (Mill would say) is as paradoxical as permitting a legislature to vote by a majority to abolish majority rule. If, on the other hand, our ultimate principle expresses respect for a person's voluntary choice *as such*, even when it is the choice of a loss of freedom, we can remain adamantly opposed to paternalism even in the most extreme cases of self-harm, for we shall be committed to the view that there is something more important (even) than the avoidance of harm. The principle that shuts and locks the door leading to strong paternalism is that every man has a human right to "voluntarily dispose of his own lot in life" whatever the effect on his own net balance of benefits (including "freedom") and harms.

What does Mill say about less extreme cases of contracting away liberty? His next sentence (but one) is revealing: "These reasons, the force of which is so conspicuous in this particular case [slavery], are evidently of far wider application, yet a limit is everywhere set to them by the necessities of life, which continually require, not indeed that we should resign our freedom, but that we should consent to this and the other limitation of it."[12] Mill seems to say here that the same reasons that justify preventing the total and irrevocable relinquishment of freedom also militate against agreements to relinquish lesser amounts for lesser periods, but that unfortunately such agreements are sometimes rendered necessary by practical considerations. I would prefer to argue in the very opposite way, from the obvious permissibility of limited resignations of freedom to the permissibility in principle even of extreme forfeitures, except that in the latter case (slavery) the "necessities of life"—administrative complications in determining voluntariness, high expenses, and so on—forbid it.

Many perfectly reasonable employment contracts involve an agreement by the employee virtually to abandon his liberty to do as he pleases for a daily period, and even to do (within obvious limits) whatever his boss tells him, in exchange for a salary that the employer, in turn, is not at liberty to withhold. Sometimes, of course, the terms of such agreements are quite unfavourable to one of the parties, but when the agreements have been fairly bargained, with no undue pressure or deception (i.e. when they are fully voluntary) the courts enforce them even though lopsided in their distribution of benefits. Employment contracts, of course, are relatively easily broken; so in that respect they are altogether different from "slavery contracts." Perhaps better examples for our purposes, therefore, are contractual forfeitures of some extensive liberty for long periods of time or even forever. Certain contracts "in restraint of trade" are good examples. Consider contracts for the sale of the "good will" of a business:

> Manifestly, the buyer of a shop or of a practice will not be satisfied with what he buys unless he can persuade the seller to contract that he will not immediately set up a competing business next door and draw back most of his old clients or customers. Hence the buyer will usually request the seller to agree not to enter into competition with him . . . . Clauses of this kind are [also] often found in written contracts of employment, the

[12] *Loc cit*

> employer requiring his employee to agree that he will not work for a competing employer after he leaves his present work.[13]

There are limits, both spatial and temporal, to the amount of liberty the courts will permit to be relinquished in such contracts. In general, it is considered reasonable for a seller to agree not to reopen a business in the same neighborhood or even the same city for several years, but not reasonable to agree not to re-enter the trade in a distant city, or for a period (say) of fifty years. The courts insist that the agreed-to-self-restraint be no wider "than is reasonably necessary to protect the buyer's purchase;"[14] but where the buyer's interests are very large the restraints may cover a great deal of space and time:

> For instance, in the leading case on the subject, a company which bought an armaments business for the colossal sum of £287,000 was held justified in taking a contract from the seller that he would not enter into competition with this business anywhere in the world for a period of twenty-five years. In view of the fact that the business was world-wide in its operations, and that its customers were mainly governments, any attempt by the seller to re-enter the armament business anywhere in the world might easily have affected the value of the buyer's purchase.[15]

The courts then do permit people to contract away extensive liberties for extensive periods of time in exchange for other benefits in reasonable bargains. Persons are even permitted to forfeit their future liberties in exchange for cash. Sometimes such transactions are perfectly reasonable, promoting the interests of both parties. Hence there would appear to be no good reason why they should be prohibited. Selling oneself into slavery is forfeiting *all* one's liberty for the rest of one's life in exchange for some prized benefit, and thus is only the extreme limiting case of contracting away liberty, but not altogether different in principle. Mill's argument that liberty is not the sort of good that by its very nature can properly be traded, then, does not seem a convincing way of arguing against voluntary slavery.

On the other hand, a court does not permit the seller of a business freely to forfeit any more liberty than is reasonable or necessary, and reserves to *itself* the right to determine the question of reasonableness. This restrictive policy *could* be an expression of paternalism designed to protect contracters from their own foolishness; but in fact it is based on an entirely different ground—the public interest in maintaining a competi-

[13] P. S. Atiyah, *An Introduction to the Law of Contracts* (Oxford: Clarendon Press, 1961), p. 176

[14] *Ibid.*, pp. 176-77

[15] *Ibid.*, p. 177

tive system of free trade. The consumer's interests in having prices determined by a competitive marketplace rather than by uncontrolled monopolies requires that the state make it difficult for wealthy businessmen to buy off their competitors. Reasonable contracts "in restraint of trade" are a limited class of exceptions to a general policy designed to protect the economic interests of third parties (consumers) rather than the expression of an independent paternalistic policy of protecting free bargainers from their own mistakes.

There is still a final class of cases that deserve mention. These too are instances of persons voluntarily relinquishing liberties for other benefits; but they occur under such circumstances that prohibitions against them could not plausibly be justified except on paternalistic grounds, and usually not even on those grounds. I have in mind examples of persons who voluntarily "put themselves under the protection of rules" that deprive them and others too of liberties, when those liberties are unrewarding and burdensome. Suppose all upperclass undergraduates are given the option by their college to live either in private apartment buildings entirely unrestricted or else in college dormitories subject to the usual curfew and parietal rules. If one chooses the latter, he or she must be in after a certain hour, be quiet after a certain time, and so on, subject to certain sanctions. In "exchange" for these forfeitures, of course, one is assured that the other students too must be predictable in their habits, orderly, and quiet. The net gain for one's interests as a student over the "freer" private life could be considerable. Moreover, the curfew rule can be a great convenience for a girl who wishes to "date" boys very often, but who also wishes: (a) to get enough sleep for good health, (b) to remain efficient in her work, and (c) to be free of tension and quarrels when on dates over the question of when it is time to return home. If the rule requires a return at a certain time then neither the girl nor the boy has any choice in the matter, and what a boon that can be! To invoke these considerations is *not* to resort to paternalism unless they are employed in support of a prohibition. It is paternalism to *forbid* a student to live in a private apartment "for his own good" or "his own safety." It is not paternalism to *permit* him to live under the governance of coercive rules when he freely chooses to do so, and the other alternative is kept open to him. In fact it would be paternalism to deny a person the liberty of trading liberties for other benefits when he voluntarily chooses to do so.

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In summary: There are weak and strong versions of legal paternalism. The weak version is hardly an independent principle and can be entirely acceptable to the philosopher who, like Mill, is committed only to the "harm to others" principle as mediated by the *Volenti* maxim, where the latter is more than a mere presumption derived from generalizations about the causes of harm. According to the strong version of legal paternalism, the state is justified in protecting a person, against his will, from the harmful consequences even of his fully voluntary choices and undertakings. Strong paternalism is a departure from the "harm to others" principle and the strictly interpreted *Volenti* maxim that Mill should not, or need not, have taken in his discussion of contractual forfeitures of liberty. According to the weaker version of legal paternalism, a man can rightly be prevented from harming himself (when other interests are not directly involved) only if his intended action is substantially nonvoluntary or can be presumed to be so in the absence of evidence to the contrary. The "harm to others" principle, after all, permits us to protect a man from the choices of other people; weak paternalism would permit us to protect him from "nonvoluntary choices," which, being the choices of no one at all, are no less foreign to him.

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Article

Rethinking the Theory of Legal Rights

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In the economic approach to law, legal rights are designed, in part, to overcome the conditions under which markets fail. In correcting for market failure, economic analysis endorses two rules for assigning legal rights.

The first specifies the allocation of rights under conditions of rational cooperation, full information and zero transaction costs. Provided that exchange is available and that obstacles to exercising it are insignificant, rational cooperators will negotiate around inefficiencies. Under these conditions, legal rights are not assigned in order to establish optimal levels of resource deployment directly; rather, they establish well-defined entitlements or negotiation points which create a framework in which mutually advantageous bargains leading to optimal outcomes can be realized. This role of legal rights in securing optimal outcomes is suggested by the Coase Theorem.[1]

The second rule for assigning legal rights specifies the procedures to be followed in the event the conditions of full information, rational cooperation and zero transaction costs are inadequately satisfied. Where impediments to successful negotiations are substantial, inefficiencies in the initial allocation may not be overcome through mutually advantageous exchange. Unable to rely upon the exchange process to overcome inefficiencies, a

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1. Coase, *The Problem of Social Cost*, 3 J.L. & Econ. 1 (1960).

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court must allocate entitlements efficiently from the outset. In doing so, the court continues to rely upon the exchange process, though in a different manner. Instead of relying upon exchange to *rectify* inefficiencies, including inefficient judicial decisions, the court relies upon the market paradigm to help it *identify* the efficient outcome it seeks to replicate.

Let's refer to an exchange market in which the conditions of the Coase Theorem are met or approximated as a "Coasean" market. When a court cannot avail itself of the Coasean market, it is left to imagine what the parties would have agreed to in a *hypothetical*-Coasean market. In this market, the right to use a resource would have been secured ultimately by that party who would have paid the most for it. The court then mimics the outcome of the idealized, but unrealized Coasean market by "auctioning" entitlements to those who value them most—as judged by each litigant's willingness to pay.[2]

Once assigned, entitlements need to be secured. In their seminal piece which sets out the accepted framework for securing legal entitlements, Calabresi and Melamed distinguish among three ways of protecting entitlements: (1) property rules, (2) liability rules, and (3) inalienability rules.[3] In their view, property rules protect entitlements by enabling the right bearer to enjoin others from reducing the level of protection the entitlement affords him, except as he may be willing to forgo it at a mutually acceptable price. If a right is protected by a liability rule, a nonentitled party may reduce the value of the entitlement without regard to the right holder's desires, provided he compensates *ex post* for the reduction in value. The value of the reduction, that is, damages, is set by a collective body, usually a court; it need not coincide with what the entitled party would have been willing to accept for a reduction in the value of his entitlement.

If transaction costs are high, a property rule is likely to prove inefficient because transfer to more valued use requires negotiations. Consequently, property rules may lead to entitlements being held by individuals who value them less. Under a liability rule, individuals who value entitlements more than those on whom the rights are initially conferred can secure the entitlements without *ex ante* negotiations: they can compel transfers to themselves and pay damages. In such cases, the entitlement is secured by the party who most values it, thus duplicating the outcome of the Coasean market exchange process. When transaction costs are high, therefore, effi-

2. *See* R. Posner, Economic Analysis of Law (3d ed. 1986); Coleman, *Economics and the Law: A Critical Review of the Foundations of the Economic Approach to Law*, 94 Ethics 649 (1984).

3. Calabresi & Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 Harv. L. Rev. 1089, 1105-15 (1972).

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ciency considerations may necessitate the foregoing of property rules in favor of liability rules.

If damages under a liability rule set by a court are equal to the reduction in the value of the entitlement to the injured party, the optimal outcome is secured through a Pareto superior, or mutually beneficial, *forced transfer*. If damages are set below the value of the entitlement to the injured party, the forced transfer is not Pareto superior, even if it is Pareto optimal. Property rules, therefore, induce optimal transfers through Pareto improvements, whereas whether liability rules involve Pareto improvements depends on the level of compensation, and on the transaction costs of administering them.

When a right is protected by an inalienability rule, transfers of any sort are prohibited. The right to one's freedom from servitude and the right to vote are examples of rights protected by inalienability rules. On first blush, protecting a right by an inalienability rule appears to be a decision foregoing efficiency in favor of promoting some other social good. After all, some people might well wish to exchange their rights, and their doing so might be efficient; blocking such transfers might then seem inefficient. However, a willingness to exchange a right, like freedom from servitude, for money may indicate a lack either of full information or of rationality. Presumably such transfers would not occur in a costless market populated by fully informed, rational persons. Inalienability rules, therefore, may also be explained (justified) in efficiency terms.

WHOM TO ENTITLE	HOW TO PROTECT: Property Rule	HOW TO PROTECT: Liability Rule
B	(1) Injunction for *B*	(3) Damages for *B*; Liberty for *A*
A	(2) Injunction for *A*	(4) Damages for *A*; Liberty for *B*

In encouraging the efficient distribution of resources, a court actually has four options. Suppose a polluter, *A*, claims an entitlement to continue

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polluting; and the victim-plaintiff, *B*, seeks an injunction to prohibit *A* from polluting further. The court's options are represented in the above matrix.

The court can, as it does in cells (2) and (4), decide in favor of the polluter; or it can, as it does it cells (1) and (3), decide in favor of the plaintiff. In the usual jargon, this constitutes the court's "entitlement decision." The court's decision in favor of the plaintiff, represented in (1) and (3), can differ in the nature of the protection it affords the plaintiff. If the entitlement is protected by a property rule, then *A* is enjoined from polluting *B* unless *A* can reach an accord with *B* that would permit it to pollute at a price *B* finds acceptable. In contrast, if the court opts to protect *B*'s entitlement by the use of a liability rule, as in cell (3), then *A* may pollute *B* and pay damages at a price set *ex post*.

Similarly, if the court decides in favor of the polluter, it may protect its right to pollute by a property rule, as it does in (2), which enjoins *B* from reducing *A*'s pollution without first securing *A*'s consent. The court may alternatively protect *A*'s right to pollute by a liability rule, as it does in (4), which grants *B* the liberty to reduce the level of *A*'s output provided he compensates *A ex post*.

Each of these four options have in fact been employed by courts in establishing and securing legal entitlements. The celebrated *Spur Industries* case was resolved by use of the last, and least obvious, option.[4] The Calabresi-Melamed framework and the *Spur* case are widely viewed as mutually supportive. The theoretical framework locates and legitimates the decision—one which might otherwise have seemed to lack a foundation. At the same time, the decision suggests the usefulness of the framework. This is not to say that the decision itself cannot be or has not been criticized.[5] Still, whatever objections to the decision have been made, it remains true that no commentator has thought to criticize it on the grounds that the decision is deeply paradoxical, this is surprising. The *Spur* case, and the Calabresi-Melamed framework that encompasses it, suggest that it is possible to protect a person's right by giving *others* the liberty to invade it provided they compensate for the invasion. *Ex post* compensation can sometimes be adequate both to legitimate forced transfer and to secure or protect a legal right. It is surely odd to claim that an individual's right is protected when another individual is permitted to force a transfer at a price set by third parties. Isn't the very idea of a

4. Spur Indus., Inc., v. Del E. Webb Dev. Co., 108 Ariz. 178, 494 P.2d 700 (1972) (court enjoined cattle feeding but required real estate developer to pay relocation or termination costs).

5. For example, one could argue, given that there were only two litigants and the costs of the transactions were low, it is surprising the court did not choose to take a property, rather than a liability, rule approach.

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forced transfer contrary to the autonomy or liberty thought constitutive of rights?

A perfectly natural way of characterizing what it means to have a right to a resource or to property is in terms of autonomy or control. Rights, in this view, demarcate a realm of liberty or control. Rights are secured or protected liberties.[6] But how can my liberty or control over a resource or over a set of choices be protected by denying me autonomy or control, and instead by conferring control on others, even on the condition that they compensate me for whatever *diminution in the value* of my resources their conduct occasions? The point of conferring an entitlement arguably is to secure a domain of control, *not* to guarantee a particular level of welfare or utility. One who conceives of rights as securing a sphere of liberty does not believe that the concept of a right is reducible to or otherwise identifiable with a point on a right bearer's indifference curve. The liberty attendant rights ownership is not equivalent to any particular level of welfare: certainly, not if one wants to maintain the distinction between autonomy and utility.[7]

If rights entail or secure liberties, then it is hard to see how liability rules protect them. Let's refer to the thesis that part of what it means to have a (legal) right to a resource is to have a secured domain of autonomy as the classical liberal theory of legal rights.[8] Faced with a conflict between his understanding of rights and the property-liability rule framework, the classical liberal may simply give up the latter, that is, deny that liability rules *protect* entitlements.

It is important that we not misunderstand this response. Someone who denies that liability rules protect rights does not deny either that liability rules play a role in reducing the incidence of "takings," or that they protect something. Of course liability rules can deter, and for an obvious reason. Rendering compensation *ex post* imposes a cost on potential "takers," hopefully adequate to reduce the level of forced transfers. Moreover, liability rules protect something. Compensation under a liability rule is for harm done and loss suffered. The loss is the diminution in value of one's resources or, loosely speaking, one's property. In this sense the "objective" value of one's holdings is protected by liability rules; the value of the interest is left intact. But a liability rule confers no liberty or autonomy on an entitled party, and therefore secures no such liberty. Quite the contrary. In the classical liberal view, the right is the liberty, not the value

6. J. Feinberg, Social Philosophy 55-59 (1973).

7. Coleman, *The Foundations of Constitutional Economics*, in Containing the Economic Powers of Government (R. McKenzie ed. 1984).

8. This is the view, for example, of Charles Fried: "The regime of contract law, which respects the dispositions individuals make of their rights, carries to its natural conclusion the liberal premise that individuals have rights." C. Fried, Contract as Promise 2 (1981) (footnote omitted).

(i.e., utility) to anyone of having or exercising that liberty. Thus, in the view that rights entail liberties, the most liability rules can secure is a level of welfare equal to the value of the right bearer's interest, including even his interest in his autonomy. However, because utility is *not* autonomy, and because liability rules neither confer nor respect a domain of lawful control, liability rules cannot, in this view, protect rights. The "cannot" here is a conceptual one. The very idea of a "liability rule entitlement," that is of a right secured by a liability rule, is inconceivable.

We have, then, at least two alternative conceptual frameworks for thinking about the relationship between rights and the property-liability rule scheme. The discussion to this point suggests that in the framework within which economic analysis operates, rights can be secured by liability rules if rights are not thought of as entailing autonomy or liberty. Rights secure a level of well-being or utility. Liability rules protect rights by compensating for diminutions in the level of well-being owing to the conduct of others. In the classical liberal framework, rights entail a realm of control which cannot be secured by liability rules. Rights secure a domain of autonomy. Liability rules permit others to act without regard to the right holder's autonomy over his holdings. The tension between the two frameworks appears to require that we give up one or another plausible claim: either that a right is a domain of protected control, or that liability rules protect rights. Both claims are plausible, but apparently incompatible. Which ought we abandon?

Answering this question, we believe, requires a theory of legal rights, meaning an account of what it means to have a legal right, as well as an account of the role of property and liability rules within any such theory. In what follows, we take up the challenge of providing a conceptual theory of legal rights whose point of departure is a reinterpretation of the Calabresi-Melamed framework. One consequence of our analysis is that once the concept of right is properly understood, it is necessary to give up both the claim that rights entail liberties *and* the claim that liability rules protect rights. The correct theory of legal rights, in other words, demonstrates the inadequacies of both the economic and classical liberal theories of rights.

I. A Theoretical Framework for Institutional Rights

A. *The Basic Questions*

An adequate theory of institutional (e.g., legal) entitlements must address three different sorts of questions:

(1) What is the *foundation* of rights? What goals or aims are institutions which create rights designed to promote? A foundational theory of

institutional rights provides their *normative basis*. Among the possible foundational views are those which are liberty-based and those which are, in some sense, welfare-based. In these views, institutions which create rights are designed either to promote individual liberty or to promote welfare (individual, average, or general). Justificatory questions—for example, why confer upon individuals a right to freedom of speech, to a speedy and fair trial, or to private property—are answered by reference to the "foundational" theory.

(2) What is the correct *analysis* of rights? Theories of the correct analysis of rights typically assert that rights are or entail, for example, interests, liberties, or claims. But these theories conflate two distinct questions concerning the proper analysis of rights. A correct analysis of rights distinguishes between the *logical form* and the *content* of rights.

A theory of the logical form of rights seeks to specify the necessary features or properties of rights. These properties hold of rights analytically; that is, all institutional rights possess them necessarily. Further, these properties, whatever they are, remain constant across foundational theories. In contrast, the content of rights may vary depending on the foundational or normative theory of rights advanced. A theory of the content of rights is a theory of their *constitutive elements*. And these elements are not constitutive of rights as a matter of logical form, but rather as a matter of contingent fact. In any overall theory of institutional rights, the constitutive elements of rights are a function of the foundational theory.

The difference between the logical form and the content of rights is analogous to the distinction between syntax and semantics.[9] We might say, then, that a proper analysis of rights addresses both the syntax and the semantics of rights. By separating the logical form from the content of rights, we seek to draw attention to an important point: different views of the purpose of institutional rights may require different theories of their content, while maintaining that certain features of rights may be necessary features of them which obtain irrespective of the range of various foundational theories.[10]

(3) How might or ought a system of institutional rights be *enforced*?

9. *See generally* A. CHURCH, INTRODUCTION OF MATHEMATICAL LOGIC (1956).

10. The content of particular legal rights will always be contingent upon the foundational theory, whereas the syntax of rights is independent of any commitment at the foundational level. This means that even if rights necessarily entail claims, the specific claims entailed would always depend on the foundational theory. Moreover, even a commitment to a utilitarian or welfare theory at the foundational level would not strictly entail that rights marked *interests*. Sometimes, the best way to promote utility is to secure by rights a domain of autonomous control. Even within a utilitarian framework, institutional rights may sometimes mark *liberties*. Whether rights mark liberties or interests in this theory will depend on contingent features of the world and the structure of interaction. This is the kind of utilitarian theory of rights currently being pursued by Russell Hardin, and, to some extent, by Jon Elster, Richard Epstein and Jules Coleman.

How should the claims given by rights be vindicated? What institutions are available to enforce rights, and which are appropriate to use and why? This is the question of institutional enforcement. At this level, we want to know, for example, whether we ought to enforce or vindicate a particular set of claims by providing injunctive relief, tort liability, some combination of the two or, perhaps, by imposing criminal sanctions.

B. *The Basic Answers*

In keeping with the distinction we draw between the logical form and the content of rights, we shall argue first that, regarding their logical form, rights are best understood as "conceptual markers," or "place-holders," used to designate a subset of legitimate interests or liberties to be accorded special protection by law.[11] Once chosen, the relevant interest or liberty enjoys a privileged status by being labeled a right or entitlement. Secondly, property, liability and inalienability rules are best understood as devices for generating or specifying the *content* or *meaning* of such rights. Because property and liability rules specify the meaning of rights, they enter into the overall theory of institutional rights at the level of providing an *analysis* of them. This is the point at which our conception of the property, liability and inalienability framework departs from previous work which, following Calabresi-Melamed, locates the transaction structure squarely within what we are calling the domain of institutions for securing or protecting entitlements.

Finally, because the property-liability-inalienability rule framework concerns only transactional aspects of institutional entitlements, we conclude that part of the content of a right is a claim specifying the conditions of legitimate transfer. These claims must be respected in order for transfers governed by rights to be legitimate.

Putting these points together, our thesis is as follows: (1) All institutional rights are *necessarily* conceptual markers designating certain legitimate interests or liberties as warranting a privileged status. (2) The privileged status is to be spelled out as follows: Each legitimate interest, for example, that is marked as a right is *necessarily* associated with, and in fact entails, some legitimate claims.[12] In contrast, whether or not a legitimate interest that is not marked as a right generates enforceable claims is a contingent matter.[13] Rights, however, entail legitimate claims. (3) The

11. To say that legal rights are "markers" is to treat them as place-holders. When interests or liberties are marked as rights, it is only as if an asterisk is placed by them. The right which secures them is as yet (analytically) content free. The content is to be given in terms of claims.

12. For a lucid discussion of what it means to have a legitimate claim, see J. FEINBERG, *supra* note 6, at 64-67.

13. Jones has an interest in a job, but no right to it. That is, he cannot prevent others from

specific content of these claims is a function of the rule—property, liability or inalienability—applied to them. Therefore, we say that property and liability rules specify the content of rights by generating specific legitimate claims from them. (4) The claims property and liability rules generate specify conditions of legitimate transfer. Thus, we refer to them, following Alvin Klevorick,[14] as constituting a "transaction structure." Though the claims given rise to by rights within the domain of transactions are a function of the transaction rules applied to them, (5) the choice of which rule or rules to apply depends on the foundational theory. That is, we cannot say whether a right's content should be given by a property or a liability rule or by some combination of the two until we know what general purpose we want institutional rights to serve. (6) Finally, besides providing the basis for determining the content of rights, the foundational theory specifies the appropriate institutions for enforcing the claims these rights create. In this way, the foundational theory fuels the complete theory of institutional rights. A commitment at the foundational level will suggest, though it will not strictly entail, certain views about the content and enforcement of rights. We should, therefore, expect that different foundational or normative theories will endorse different institutional arrangements, confer somewhat different institutional rights, and suggest different mechanisms for their enforcement.

C. *Rights and the Transaction Framework*

The goal of every theory of institutional rights is to specify a set of rights which will create claims which, when respected, will best promote the goals set forth by the foundational theory. We can understand the process of designing a system of institutional rights by imagining a temporal progression beginning with the endorsement of a foundational theory. For ease of exposition, let us assume that the purpose of a system of institutional rights is to maximize net welfare. In seeking to promote this goal, we might begin by designating a set of legitimate interests as rights, which at this level of analysis just means "conceptually marking" them. In choosing among the set of legitimate interests for demarcation, we would select those which, if protected, would maximize overall welfare. Of course, whether elevating these interests to the level of legal rights would in fact maximize net welfare depends on the specific content or meaning given to them; that is, the claims they give rise to, as well as the mechanisms by which those claims are to be vindicated or enforced.

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seeking the same job. But his interest in securing the job can be protected if he is given a claim against others that they not prevent him from pursuing it.

14. Klevorick, *The Economics of Crime*, in NOMOS XXVII: CRIMINAL JUSTICE 289, 301-04 (J. Pennock & J. Chapman eds. 1985).

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The next order of business is to specify more completely the content of the rights, which means associating particular legitimate claims over various domains with them. Prior to specifying the content or meaning of a right, we know only that the entitled party has a legitimate claim or set of such claims, but we have no idea of the precise nature of the claims. Property, liability and inalienability rules enter at this juncture as devices for generating particular, fully specified, legitimate claims from rights or entitlements.

The general point is really rather straightforward. We begin by supposing that a community has chosen to design its legal institutions to maximize welfare. (Our choice to focus on welfare maximization is, in this context, based purely on expository considerations.) In order to maximize welfare, some interests, but not others, are accorded the status of rights. At this point in the analysis rights are just place-holders: each right has yet to be filled in, given specific content. The content of rights is then given in terms of claims. The claims entailed by rights range over several domains, including the domain of transfer or transaction.

The specific claims given rise to by rights are in turn derived from norms or rules governing the terms of legitimate transfer. Again, the idea is simple enough. Once a community settles on a set of legitimate holdings (or entitlements), it needs to specify the uses to which these holdings might be lawfully or otherwise legitimately put. Among the uses to which right-holders may wish to put their entitlements are those which involve or require transactions. Consequently, a community requires a set of norms that specify the conditions of lawful or legitimate transfer. These rules constitute a community's transaction framework. The transaction framework is a normative one specifying legitimacy conditions.

We can imagine a wide range of norms comprising a transaction framework, from those conferring liberties in setting the conditions of transfer to those imposing duties on the bearers of rights. Consider some examples. One possible rule would give right-holders complete autonomy to alienate their claims; another might prohibit alienation altogether. Still others would impose a duty to give up part or all of that to which one is lawfully entitled, either at one's discretion—as in the duty to be charitable—or at the command of the state—as in the obligation to pay taxes. The terms of transfer can vary widely and in many respects. Different communities, pursuing different social goals through their legal institutions, facing different socio-economic and other conditions, will employ and emphasize different rules from the general category of transaction norms. The point we are anxious to emphasize is that property, liability and inalienability rules are best thought of as constituting a subset of the set of norms governing the transfer of lawful holdings. They are transaction-norms. By

generating claims entailed by rights ownership, property, liability and inalienability rules (as well as combinations of them) specify the *content* of rights over the domain of transfer.

A useful way to think about the role played by property, liability and inalienability rules in our theory is to view them as mathematical functions whose domains are the set of institutional rights specified, and whose ranges are a subset of legitimate claims. Thus, these rules act like functions which take rights or entitlements as their *arguments* and generate particular legitimate claims as their values. These claims in turn specify the content of an entitlement *over a certain domain*: the domain of transfer. Property, liability and inalienability rules constitute a transaction structure specifying the range of legitimate claims individuals have with respect to the transfer of the objects of their entitlements, such as resources or property.

The particular claims associated with property, liability and inalienability rules are as follows:[15]

(1) If the content of an entitlement is given by a property rule, then the entitled party has a legitimate claim to *ex ante* agreement as both *necessary* and *sufficient* to the justifiable transfer of that to which he is entitled.

(2) If the content of an entitlement is given by a liability rule, then the entitled party has a legitimate claim to *ex post compensation*, as both *necessary* and *sufficient* to the justifiable transfer of that to which he is entitled.

(3) If the content of entitlement is given by an inalienability rule, then the entitled party has a *non-relinquishable* or non-transferable legitimate claim to that to which he is entitled.

Two points need to be emphasized. First, whether legitimate transfer is governed by property or liability rules only, or by some combination of the two depends entirely upon the foundational theory *and* the facts of the world: that is, by a theory of what is desirable as constrained by what is feasible (and at what cost). There is absolutely nothing in the meaning of rights that entails or requires that the conditions of transfer be set by any one rule or other, or by any combination of them. This is important, for it means that someone's liberty to dispose of his property as he sees fit, far from being a logical implication of what it means to have a right, is a contestable normative assertion connecting a particular normative theory about the point of legal rights with a particular conception of the constitu-

15. The following characterization of the claims conferred by transaction rules follows closely their standard meaning since Calabresi-Melamed, with the important qualification that in our view transaction rules specify the content of particular rights.

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tive elements of rights. The rule of liberty of transfer is thus a ***normative*, *not an analytic***, one supportable, if at all, by substantive argument, not linguistic convention.[16]

Secondly, there is an important difference between conceiving of property and liability rules as partially specifying the terms of legitimate transfer and conceiving of them as entitlement-securing devices. In the latter view, entitlements "come" to the property-liability rule or transaction structure fully specified, their content somehow otherwise given. But how? Either the claims of rights-ownership follow analytically from the very concept of a right or they derive from normative rules. If we say that Jones has a right to his watch which we "protect" by a liability rule, what does the expression "right to his watch" mean? What is the right's content? That is, just what is it that the liability rule is protecting? What are the claims that liability rules enforce or vindicate? What does the claim that Jones has a right to his watch tell us about the scope of his entitlement, in particular, about the conditions under which he might transfer it to others, or the conditions under which the interests of others in the use of Jones' watch will be recognized? Marking a legitimate interest as a right does not, by itself, give content to the right. It does not specify in any detail the claims entailed by rights-ownership. Put another way, if liability and property rules *protect* rights by enforcing or vindicating the claims entailed by rights, as traditionally thought, then what rules give rise to the claims enforceable by them? Once one recognizes that the content of rights is not given *a priori*, then it is clear that the specific content of any right is a function of a set of norms. If liability and property rules are not among these norms, what are?

Giving the meaning to rights, at least over the domain of transfer, is the task of property, liability, and inalienability rules. That is all the transaction rules do. That is why it is unhelpful to think of them as tools or

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16. Contemporary communitarians are quick to contrast the community conception of a legal order with a rights-based order. But in fact, the contrast is too quick, as this analysis of transaction rules reveals. One possible norm of transfer might be that no one can exchange or trade without *everyone's* consent. Thus, the content of particular legal rights can be given in communitarian terms. We might then understand communitarianism not as an alternative to rights-theory but as specifying a particular foundational view with implications for how the content of particular rights is to be given.

One trouble with the new communitarianism is that one never knows at what level of analysis communitarian ideals are supposed to enter. The problem is not insignificant. Consider that late in his life Frank Knight held the view that markets were desirable not because they are efficient (they may not be) but because free and equal persons recognizing the importance of social consensus to the community would desire above all else to restrict the occasions on which broad consensus was necessary for any form of social interaction. Consensus is hard to come by and fragile once reached. Nevertheless it is the ultimate foundation of social communities. That is why it is important to minimize the extent to which our institutional life relies upon it. If Knight is right, then communitarianism at the level of institutional design could lead to many non-communitarian institutions, like markets. For a general discussion of Knight's view, see J. Coleman, Libertarian and Rational Choice Contractarianism: Consensus and the Market, (unpublished manuscript) (on file with authors).

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instruments for protecting entitlements. Thus, we insist upon a distinction between the rules by which claims are generated and the rules that create the institutions for enforcing those claims: a distinction all too often blurred in previous work on the property-liability rule distinction. Conflating this distinction between right and remedy is commonplace within the Realist tradition that so dominates American Jurisprudence. However commonplace the conflation, it is a mistake, and in conceiving of property and liability rules as we do, we mean to be taking issue with Legal Realist strands within the accepted interpretation of the Calabresi-Melamed framework.[17]

D. *Deepening the Property-Liability Rule Distinction*

So far we have a skeletal version of the property-liability-inalienability rule distinction, and an account of the role it is to play in the larger theory of institutional rights. We also have presented some reason for thinking ours is an appropriate way of thinking about the distinction. Having come this far, we now turn our attention to developing more fully the distinctions between property, liability, inalienability rules.

1. *Two Versions of the Liability Rule*

We can distinguish between two understandings of liability rules. In our view, if the content of someone's entitlement is specified by a liability rule *only*, then he is *not* at liberty to seek a voluntary exchange with others. In a plausible alternative view, if the content of someone's entitlement is given by a liability rule, he *is* at liberty to negotiate the transfer of

17. First, not every lawful claim is in fact enforceable by law, so that an entitlement cannot be analyzed entirely in terms of the forms of remedial relief available in the event of noncompliant behavior. Secondly, entitlements specify the conduct others must exhibit if they seek to conform to the relevant norms, not just the sanctions or liabilities they are likely to incur in the event their conduct fails to conform. Finally, it is unlikely, but possible, that the legitimate claims created by the transaction structure may be enforceable by an enlightened conscience or even by a constrained self-interest. More likely, it will be necessary to create formal institutions of enforcement. In doing so, distinguishing analytically between claims and the institutions that enforce them permits us to employ the claims as premises in arguments for the creation of appropriate institutions. By separating the enforcement mechanisms, like injunctions, from the claims being enforced, like those generated by property rules, we allow the maximal theoretical flexibility required to construct the system of institutions that most efficiently promotes the ends specified at the foundational level. For example, by treating as analytic the relationship between property rules and injunctions or that between liability rules and tort-like compensation schemes, (both of which are contingent and in need of substantive argument), the Realist interpretation of property and liability rules inadequately reflects the actual degree of flexibility available in creating institutions to enforce claims. At the same time, the Realist argument obscures the important point that the institutions created to enforce various claims always depend on the foundational theory and do not follow logically from the content of rights. We want to emphasize that the relationships between rights and their specific content on the one hand, and between their content and the institutions designed to protect them on the other, are all fundamentally contingent and normative. They are not logical or otherwise analytically derived.

his entitlement, but others are also free to circumvent negotiations and to impose transfers at their discretion.[18]

In the language of claims, rather than liberties, we distinguish between our understanding of property and liability rules and the alternative view as follows:

In our view:

> (1) If the content of *B*'s entitlement is specified by a *property rule only*, then he has a legitimate claim against *A* that any transfer of his resources from *B* to *A* must proceed according to terms established by *ex ante* agreement. Agreement is necessary and sufficient for legitimate transfer.
>
> (2) If the content of *B*'s entitlement is specified by a *liability rule only*, then *B* has a legitimate claim to compensation against *A* in the event *A* takes what *B* is entitled to. But *A* has a legitimate claim that *B* not prevent him from securing that to which *B* is entitled, provided *A* is prepared to render adequate compensation.[19]
>
> (3) If the content of *B*'s entitlement is given by *both a property and a liability rule*, then *B* has two claims: one is to the liberty to seek a transfer through *ex ante* agreement with *A*; the other is to recompense in the event *A* imposes a transfer upon him.

In the alternative view:

> (1') If the content of *B*'s entitlement is given by a *property rule only*, then *B* has a legitimate claim against *A* that any transfer of *B*'s resources to *A* must proceed according to terms established by *ex ante* agreement. Agreement is necessary and sufficient for legitimate transfer.
>
> (2') If the content of *B*'s entitlement is specified by a *liability rule* only, then *B* has two claims: One is to the liberty to seek a transfer through *ex ante* agreement with *A*; the other is to recom-

18. In our view, then, property and liability rules differ in the liberties they afford *entitled* parties (as well as in other respects). If the content of an entitlement is specified by a liability rule only, then the entitled party is *not* free to seek a voluntary transfer on terms agreeable to him *ex ante*. Only under a property rule would he be. This distinguishes our view from the alternative according to which both property and liability rules afford the entitled party a liberty to secure *ex ante* agreement. In the alternative view, the difference between liability and property rules, therefore, is to be understood entirely in terms of the liberties each affords non-entitled parties. Under property rules the non-entitled party is not at liberty to impose a transfer on terms other than those agreeable to the entitled party, whereas under a liability rule, he is at liberty to impose transfers provided he compensates *ex post*.

19. This last point is important because it demonstrates that legitimate claims (and liberties) may exist even where a party has no prior entitlement. *A* may have no right to pollute, for example, but if *B*'s right that *A* not pollute is given content only by a liability rule, *A* is at liberty to pollute under certain conditions. Because he is at liberty to pollute, he has a claim against *B*, who ironically is the entitled party, that he (*B*) not interfere with his (*A*'s) forcing a transfer (of pollution for dollars) upon him.

pense in the event *A* foregoes negotiations and imposes a transfer upon him.

Both views characterize property rules in the same way: (1) and (1') are identical. What we refer to as a combination of property and liability rules—(3)—is equivalent in the alternative view to liability rules—(2'). The alternative framework provides no place for what *we* think of as liability rules. Is the difference important?

Yes, and there are reasons for preferring our account of liability rules. Any account that distinguishes among property and liability rules and the combination of the two provides more options of giving content to entitlements. This would not be a genuine virtue of our approach if occasions did not arise when we might want to avail ourselves of the additional options. But in fact, such occasions do arise. Suppose *B* has a right against *A*, the exact content of which is given by a liability rule only. This means that *A* can seek to secure what *B* is entitled to provided he pays damages. *A* might want to negotiate around his potential liability to *B*. One reason we might choose to give content to *B*'s entitlement with a liability rule is to rule out the possibility of *A* reducing or eliminating entirely his potential tort liability.[20]

2. *Two Ways of Combining Property and Liability Rules*

We think it important then to give a narrow characterization of the kinds of claims to which liability rules give rise, especially to avoid conflating them in any way with property rules. Part of the reason for doing so has to do with potential combinations of property and liability rules. Let's consider two ways of combining property with liability rules. One way of combining them has been characterized above:

(3) If the content of *B*'s entitlement is given by both a property and a liability rule, then *B* has two claims: One is to the liberty to seek a transfer through *ex ante* agreement with *A*; the other is to compensation in the event negotiations fail, or if *A* foregoes them and imposes a transfer upon him.

In this view, it is sufficient to legitimate a transfer that *A* and *B* settle on the terms *ex ante*. It is *not* necessary, however. *A* may legitimately compel a transfer provided he renders compensation *ex post*. Such action does not constitute a violation of *B*'s right, the content of which is to be

20. We might choose a liability rule rather than a property rule if we thought that *B* was likely significantly to underestimate his damages. This is not intended to suggest that the liability rule is the only alternative. We might choose to set the terms of transfer by an inalienability rule and a liability rule. The inalienability rule forecloses alienation and a liability rule gives rise to claims for damages.

spelled out in terms of two claims: the claim to (i) freedom to negotiate *ex ante*, and (ii) compensation *ex post* should a transfer be forced upon him. In (3), *B* does not have a legitimate claim to *ex ante* negotiation as a *necessary* condition for legitimate transfer.

The point of specifying the content of an entitlement by this sort of arrangement is that in doing so we enable *B* to pursue a jointly favorable voluntary agreement, but we do not limit legitimate transfers to all and only those cases in which he succeeds. Obstacles to successful negotiations which, for example, were not known or did not exist at the onset of negotiations might emerge. And while we might not want to foreclose *B*'s seeking a transfer on terms acceptable to him, we might also not want to preclude transfer in the event satisfying those terms should prove infeasible, or if obstacles to negotiating should make voluntary transfer too costly or impractical. Moreover, compensation may be set too high, so that inefficiently few transactions will take place if voluntary transactions are forbidden. The key feature of this combination of liability with property rules is that once the non-entitled party (in this case *A*) has either negotiated *ex ante* to affect a transfer or forced a transfer and compensated the entitled party (in this case *B*) *ex post*, the entitled party's claims have been exhausted.

Compare this way of combining property and liability rules with the following alternative:

> (3') If the content of *B*'s entitlement is given by a combination of property and liability rules, then *B* has two legitimate claims: One is to *ex ante* agreement as *both necessary and sufficient* for legitimate transfer; the other is to recompense in the event *A* imposes a transfer on him after either negotiations fail or *A* foregoes them.

According to this way of combining property with liability rules, *A* is never at liberty to impose a transfer upon *B*. The only legitimate form of transfer is *ex ante* agreement. Should *A* fail to seek agreement with *B* and take what *B* is entitled to, *B* has a claim to repair against *A*. Even when *A* renders compensation to *B*, the forced transfer remains *illegitimate*, and *B* retains a claim against *A*. *B*'s claim to *ex ante* negotiation as a *necessary* condition for legitimate transfer has been *violated* rather than exhausted. *A*'s rendering compensation does not satisfy *B*'s claim against him. The liability rule aspect of this combination affords the non-entitled party no liberties in setting the terms of legitimate transfer.

We might characterize the difference between (3) and (3') as follows: If the content of an entitlement is specified by the property-liability rule scheme represented by (3), then both voluntary exchange and full compensation after forced transfer are sufficient to legitimate transfer. If,

however, the content of an entitlement is given by a combination of property and liability rules as represented by (3'), only voluntary exchange is a legitimate basis for transfer. Under (3') compensation does not legitimate transfer, but functions instead to secure more firmly the integrity of the property rule as stating both the necessary and sufficient conditions of legitimate transfer.

Integrating the discussion in this and the preceding section provides a fuller characterization of liability rules. If the content of an entitlement is given by a liability rule only, then it cannot be part of the meaning of the entitlement that its holder is free to set the terms of legitimate transfer. A liability rule may, however, be used in conjunction with a property rule. Sometimes when it is so conjoined, the liability rule is intended to enable non-entitled parties to effect legitimate transfers; on other occasions the point of the liability rule is to strengthen the integrity of the property rule as specifying the only terms under which transfer is legitimate.

One way to see how liability rules might strengthen the integrity of the property rule is to imagine that we wanted to establish *ex ante* agreement as both necessary and sufficient for legitimate transfer, and that in order to do so we specified the content of an entitlement by a property rule only. In that case, the non-entitled party would not be at liberty to set the terms of legitimate transfer. Suppose, however, that the non-entitled party acted beyond the range of his liberty and took what he had no right to. If we had not also conferred a liability rule on the entitled party, the "victim" would have no claim to repair against a non-entitled party. In the absence of a liability rule, *A*'s failing to abide by the terms of property-rule governed transfer, *B* would be left without a claim to compensatory relief, where such relief is either necessary or otherwise desirable. But then the presence of a liability rule cannot be understood to signify the legitimacy of forced transfer.

All this suggests that liability rules are employed sometimes to generate a claim to repair in the event the conduct of a non-entitled party is wrongful, that is, in the event it fails to respect the conditions of transfer under a property rule; whereas, on other occasions, liability rules are employed to generate a claim to repair as part of the conditions of legitimate transfer.

It is odd even to think of functions like (3') as combinations of property and liability rules. Combinations of rules are better thought of as specifying jointly or individually sufficient conditions of legitimate transfer, whereas the liability rule in (3') does not specify terms of legitimate transfer. Instead, the liability rule in (3') provides a layer of potential "enforcement" for entitlements whose conditions of transfer are otherwise fully specified by a property rule. It does so by creating a legitimate claim to repair in the event a non-entitled party fails to respect the terms of legiti-

mate transfer set forth under the property rule. Whether liability rules themselves are employed to set out a sufficient condition of legitimate transfer or to create claims to repair in the event the terms set out elsewhere, e.g., by a property rule, are disregarded will depend, in part, on the foundational theory.

II. Implications of the Theory

A. *Appreciating the Importance of the Difference Between (3) and (3')*

The distinction between (3) and (3') has implications for tort theory both with respect to explaining and justifying claims to repair, and to the debate over whether liability rules serve to justify "private takings," or to buttress property rules and thereby discourage and penalize "private takings."

1. *Compensation and Rights*

Following Joel Feinberg[21] and Judith Jarvis Thomson,[22] it has become commonplace in classical rights discourse to distinguish between two ways in which non-entitled parties might invade or act contrary to the rights of others. In one case, *A wrongfully* or unjustifiably invades *B*'s right; in the other, *A permissibly* invades *B*'s right. Consider two cases. In the first, *A* happens upon *B*'s cabin in the mountains and wantonly destroys it. In the second, *A*, caught in a blizzard, takes shelter in *B*'s cabin, burns the furniture to stay warm, and avails himself of whatever food is stored in the cupboards. We can suppose that in neither case does *A* seek to secure *B*'s permission to enter, use, or destroy his property. In the first case, *A*'s conduct is invasive and *impermissible*. In the second case, *A*'s conduct is invasive though *permissible*. Feinberg and Thomson agree that *B* is owed compensation in both cases. The problem is to locate the foundation or source of *B*'s claim to repair.

Suppose we begin by following Feinberg and Thomson in holding that in both cases *B* has a valid claim to repair. One possible explanation of *B*'s claim to repair is that *A*'s conduct in both cases is invasive of or contrary to *B*'s right. This is the Rights or Infringement Thesis, according to which compensation is justified if and only if it is to repair loss resulting from an invasion of a right.

There are at least two arguments to support the contention that the basis of a legitimate claim to repair is conduct infringing upon a right.

21. Feinberg, *Voluntary Euthanasia and the Inalienable Right to Life*, 7 Phil. & Pub. Aff. 93, 102 (1978).
22. Thomson, *Rights and Compensation*, 14 Noûs 3 (1980).

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According to the first, when *A* harms *B*'s right, there are two normative dimensions of the event: *A*'s conduct and *B*'s right. *A*'s conduct, as the above example illustrates, can be either wrongful or not. If *A*'s action is both wrongful and invasive, then we might be inclined to hold that *B*'s right to repair could be supported by either wrongfulness of *A*'s conduct, e.g., his recklessness in harming *B*, or by the fact that in harming *B*, he invaded a right of *B*. No help here in sorting out the source of *B*'s claim. Let's consider, then, the case in which *A* acts justifiably. If wrongfulness is a necessary condition of a legitimate claim to repair, then *B* ought not recover whenever *A* acts reasonably. In this case, we are assuming that *B* ought to recover. If *B* ought to recover, his claim cannot rest on the wrongfulness of *A*'s conduct, because in this case *A* acted reasonably. If *B* has a claim to repair it is because *A* invaded a right of his, even if, under the circumstances, his doing so was reasonable. Then, if compensation is *B*'s due whenever a right of his is invaded, the moral character of *A*'s conduct is not the source of the claim to repair. Instead the right to repair rests on a victim's suffering loss due to a right of his being injured. Therefore, compensation requires rights.

Alternatively, one could argue that the invasion of a right is necessary (and sufficient) for compensation to be warranted by deriving that claim from a particular conception of corrective justice. This argument proceeds by claiming first that the point of institutional or legal rights is to do justice. Because compensation falls within the domain of corrective justice, those legal institutions, like torts, concerned to make available compensatory relief, are best understood as pursuing the ideal of corrective justice. Precisely what does corrective justice require? One conception of corrective justice requires that all and only losses owing to the invasion or infringement of a right deserve to be repaired: that a wrongful or compensable loss is one occasioned by the infringement of a right. The gist of the argument is that only rights can create other rights. How, after all, could someone have a right in justice to recompense for harm done to him, if, in causing him harm, no right of his had been invaded, that is, if he had no right not to be harmed in the first place?

At best, the first argument for the Infringement Thesis establishes only that action contrary to a right is sufficient as the basis of a claim to recompense. To establish the general thesis or claim that rights-invasions are necessary and sufficient for compensation to be justified, one needs to argue that losses occasioned by wrongs that invade no rights ought not be compensated. Or, at least, that justice does not require that they be compensated. The argument from corrective justice we just sketched provides the missing premise. It holds that all and only wrongful losses deserve to be annulled, and that in order to be wrongful a loss must result from the

invasion of a right. Other losses, even those resulting from negligence or recklessness, are simply not compensable as a matter of corrective justice. It makes sense then to treat the two arguments for the Infringement Thesis sketched above as a complementary pair.

If it turned out that corrective justice required that losses other than those occasioned by action contrary to a right be annulled, the Infringement Thesis would fail. As it happens, one of us has argued for precisely such a conception of corrective justice.[23] In that view, a claim to repair exists for losses occasioned by the *wrongful harming of interests*, as well as for losses resulting from the invasion of rights. Not every interest, not even every legitimate interest, is a right. To harm is to invade an interest. So I can harm you without invading a right of yours. And if I harm you *wrongfully*, say through fraud, deceit or simple negligence, then my conduct, though it invades no right of yours (*ex hypothesi*), causes you a wrongful loss. Wrongful losses, so conceived, require rectification as a matter of justice.

One way of trying to save the Infringement Thesis from this objection is by arguing that your right to repair derives from my violating your right that I-not-harm-you-wrongfully. The argument is this: Whenever I harm you through my wrongful behavior, that is, my negligence or recklessness, I violate the general right of yours (and others) not-to-be-harmed-wrongfully. Thus, the right to repair rests on the invasion of another right: the right not to be harmed wrongfully.

But this is not a very persuasive way of reintroducing the concept of a right as essential to the claim to repair. The right grounding your claim to repair would be the right not to be *harmed wrongfully*. This "right" has no content independent of the category of "wrongful harmings." The right here does no work. What does the work is the concept of a wrongful harming. Moreover, the point of the Infringement Thesis is that it distinguishes between justified and unjustified invasions of rights. (Recall the example with which this section began in which the victim's claim to repair is assumed to be justified quite apart from the reasonableness of the injurer's conduct.) But if your right against me *is* the right that I not harm you *wrongfully*, then that is *not* a right that can be invaded justifiably.

The debate at this level is a *normative* one between two conceptions of corrective justice. Although we are confident that the broader conception of corrective justice, in which justified claims to repair do not require the invasion of preexisting entitlements, is the correct one, we may be wrong.

23. Coleman, *Moral Theories of Torts: Their Scope and Limits* (pts. 1 & 2), 1 LAW & PHIL. 371 (1982), 2 LAW & PHIL. 5 (1983).

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It may turn out that every legitimate claim to repair requires reference to a preexisting right. Even then, it would not follow that the legitimacy of the claim to repair depended on a right's having been *invaded*. To see this, simply return to the analysis of liability and property rules introduced above. This analysis, which emphasizes a distinction between two ways in which liability rules generate claims to repair, allows us to explain the legitimacy of someone's claim to repair without necessarily relying on the characterization of others' conduct as invasive of a right.

Assume that *B* is legally entitled to his property. This just means that *B*'s interest in his property is being marked or identified as special. But the precise nature of the claims attending *B*'s entitlement are fully determined only after some rule or combination of rules from the transaction structure have been applied to it. Whether *A*'s harming of *B*'s interest, for example, by taking what *B* has a right to, constitutes an *invasion* of *B*'s right depends on the exact nature of the claims afforded *B* by his entitlement, and that, in turn, depends on the transaction rule applied.

If we imagine that the content of *B*'s right includes the claim to voluntary agreement as a *necessary condition* for the legitimate transfer of his property *in all cases*, then *A*'s conduct, whether or not it is morally permissible, constitutes an invasion of *B*'s right. That is because the content of *B*'s entitlement is given by a combination of property and liability rules like (3') above. Under this combination, agreement *ex ante* is both necessary and sufficient for legitimate transfer; and in taking from *B*, *A* did not secure, indeed he might not even have sought, *B*'s consent. If the content of *B*'s entitlement is given by (3'), then in taking without first securing *B*'s consent, *A* acted without regard to *B*'s legitimate claims against him. He invaded *B*'s right whether or not, on balance, he would be justified in having done so. *B*'s claim to repair is justified because his right so defined was invaded. Moreover, *A*'s rendering compensation to *B* does *not* exhaust *B*'s claims regarding the terms of transfer. *B* maintains his claim against all such imposed transfers. The Infringement Thesis can now be seen to rely upon a particular analysis of what it means to have a right, namely what we have called the classical liberal account.

B's entitlement could, of course, generate quite different claims, such as those set out in (3) above. Under these circumstances, *B* may be free to seek *ex ante* agreement with *A*, and should they reach an accord, the ensuing transfer would be legitimate. Should negotiations fail, or should *A* choose to circumvent them from the outset, he is free to impose a transfer upon *B*. In doing so, *A*'s rendering *B* compensation is a condition of his doing so legitimately. If compensation is full and otherwise adequate, *B*'s claims against *A* are fully exhausted.

In this case, *B*'s claim to repair does not rest on his right having been

invaded. On the contrary, compensation for *A*'s taking is all that *B* is entitled to. A claim to repair that arises from a liability rule as in (3) does not rest on a right having been invaded, but is instead a condition of a right having been fully respected—of its claims having been fully exhausted.

In sum, legitimate claims to repair need not presuppose action contrary to a preexisting right, for two reasons. First, wrongful harming of an interest can give rise to a right to repair for subsequent damages even if the interest does not rise to the level of a right. Second, even in those cases in which compensation presupposes a right, it need not presuppose action *contrary* to the right; in some cases rendering recompense is all that is required to *respect* the right and to exhaust the claims it entails. This is another way of saying that if a person's entitlements in the domain of transfer happen to be specified by a combination of property and liability rules like (3), in which case *ex post* compensation specifies a condition of legitimate transfer, then recompense is what is required to respect a right; it is not someone's due in virtue of his right having been in some sense disrespected.[24]

Let's stay with this distinction between (3) and (3') for a moment. If, by connecting compensation with the invasion of a right, philosophers have taken inadequate notice of transaction rules like (3), rules that treat *ex post* compensation as satisfying the claims entailed by a right, economists have been guilty of precisely the opposite mistake: that is, of failing to appreciate the extent to which compensation *ex post* does not legitimate transfers. Economists, in other words, inadequately appreciate rules like (3'). Let's see where they go wrong.

B. *Compensation, Rights and Utility*

At one end of the tort-theoretic spectrum, recompense is conceived of as a device for respecting prior entitlements and for reinforcing the claims to which those rights give rise. This is the view of torts that certainly emerges within the libertarian and perhaps within other rights-based traditions. It is a view of torts suggested by the Infringement Thesis and exemplified by the role liability rules play in (3').

At the other end of the spectrum are theorists who view compensation

24. The debate does not end here (even if we wished it would). All that we can claim to have shown is that we can specify the content of a right in such a way that compensation exhausts the relevant claims. This means that one cannot defend the Infringement Thesis by appealing to the essential nature of rights and by arguing that the meaning of a right is such that it entails compensation for its *violation*. But this may just shift debate back to the foundational level. For the claim may then be that no rights should ever be for compensation only. If the point of having institutions is to do justice, then that cannot be done by giving content to rights in terms of claims to *ex post* relief and to no more.

rendered *ex post* as a kind of licensing fee one has to pay in order to take things to which others in fact are entitled. In this view, tortious actions are conceived of as *private* takings in which the role compensation plays between private parties is analogous to the role it plays under the takings clause of the Fifth Amendment to the U.S. Constitution. In that context, compensation is understood as legitimating transfers of private resources to public uses. Making one's victims whole is viewed as the price one pays to make justifiable or legitimate use of another's resources for one's private purposes.

While the rectificatory conception of liability rules emerges from the "justice" or "rights" traditions, the "takings" view of them falls out of the larger economic framework. To see this, suppose that the norms governing legitimate transfer were derived from the principle of efficiency. What turns out to be efficient depends of course on contingent features of the world. If the parties are rational and transaction costs are low, governing their relationships by property rules is jointly wealth maximizing. When transactions are costly, however, wealth maximization requires foregoing property for liability rules. Liability rules, then, define a realm of takings which may be rendered legitimate (because efficient) by *ex post* compensation. In a well-formulated, efficient tort law, injurers do not have a duty to refrain from harming others, but to compensate for the harm they cause. Compensation, in this view, is not redress for wrong done; indeed, it cannot be; liability rules exist to specify the terms of legitimate transfer when the costs of setting those terms in a market are too great. Instead, it is instrumental in ensuring the movement of resources to more highly valued uses, an end, given the overall goal of efficiency, that renders the "forced exchange" legitimate.

In contrast, if liability rules in torts function as they do in (3'), compensation serves not to legitimate forced transfer, but to redress wrongs done. Compensation for loss owing to a wrong is not equivalent to righting the wrong. It does not serve as a way of righting what would, in its absence, constitute a wrong. The difference between (3) and (3') is just the difference between the claim that conduct is conditionally wrong depending upon the payment of compensation, and the claim that some conduct is wrong, whether or not compensation is paid. Compensation is due in the latter case to *redress* losses resulting from failure to comply with the conditions of legitimate transfer, not to legitimate it. Compensation can legitimate transfer, as it does in (3), only if both the liability and the property rule specify *sufficient* conditions of legitimate transfer. Once the distinction between (3) and (3') is clarified, it is obvious that the key, but inadequately examined, issue in tort theory is whether liability rules ought to be thought of as they are in (3), as justifying forced transfer, or in (3'), as

denying the legitimacy of forced transfer. The difference between the takings or conditional liability view of torts and the rights view of torts is *just* the difference between the interpretation liability rules are given in (3) and (3') respectively—and that is all the difference in the world.

This discussion suggests two questions: one normative, the other positive. In an ideal world, what sort of tort system ought we have: one in which compensation legitimates forced transfers only (as in (3)) or one in which compensation is paid because all forced transfers are wrongful (as in (3')), or some combination of the two? The answer to this question ultimately depends on one's foundational view. The second question is positive. It asks whether the best explanation of current tort law is an economic or a justice one: one that emphasizes the legitimating (3), or the rectificatory (3') dimensions of tort liability. Both accounts of current tort law have been enthusiastically endorsed. Neither strikes us as completely compelling.[25]

When Lake Erie Corporation is required to pay the damages caused by its ship ramming into Vincent's dock, its liability payment can be interpreted plausibly as a condition of legitimating its use or taking of the dock.[26] Similarly, when the Perini Corporation is required to make good garage owner Spano's losses resulting from Perini's non-negligent blasting, it is plausible to interpret Perini's liability as constituting a condition of its legitimately blasting.[27] Non-negligent blasting is permissible provided compensation is paid, otherwise not. On the other hand, when drunken Jones recklessly rams his car into someone, it is not plausible to interpret his liability as necessary to legitimate the activity in which he is engaged (drunk driving), or as sufficient to justify or warrant the transfer of resources from that person to him. In such cases, it is simply ludicrous to interpret the liability rule as specifying terms of legitimate transfer. This becomes even more obvious once we note both that certain intentional torts warrant punitive damages or even criminal sanctions, which can only make sense if we deny that rendering compensation is always sufficient to legitimate transfer.[28]

The claim that liability rules invariably constitute forms of legitimate transfer is ludicrous, but that has not prevented intelligent people from

25. On the economic side of the debate, see Posner, *A Theory of Negligence*, 1 J. LEGAL STUD. 29 (1972); S. Shavell, An Analysis of Accident Law (unpublished manuscript) (on file with author). On the corrective justice side, see Epstein, *A Theory of Strict Liability*, 2 J. LEGAL STUD. 151 (1973), Fletcher, *Fairness and Utility in Tort Theory*, 85 HARV. L. REV. 537 (1972). Some of the most interesting work on corrective justice currently being done is by Weinrib, *Toward a Moral Theory of Negligence Law*, 2 LAW & PHIL. 37 (1983).

26. Vincent v. Lake Erie Trans. Co., 109 Minn. 456, 124 N.W. 221 (1910).

27. Spano v. Perini Corp., 25 N.Y.2d 11, 250 N.E.2d 31, 302 N.Y.S.2d 527 (1969).

28. For a contrasting view, see Coleman, *supra* note 2.

embracing it explicitly or being otherwise committed to it. Of all economic analysts of torts, Richard Posner seems to be most obviously committed to precisely this position. (He is committed to this claim, we will show, by the internal logic of his argument, not by any explicit assertion.) In arguing in another context for the claim that adopting Pareto improving policies is *morally* justified, Posner claims that because a Pareto improvement makes at least one person better off and no one worse off, it secures the *consent* of each affected party. Thus, Pareto improvements are justified on *consensual* grounds, that is, they are justified because all the affected parties consent to them. It is this line of argument that creates the problem for Posner's tort theory. Let's see why.

If we suppose that Pareto improvements are consented to, then it must also follow that an individual gives his consent by accepting compensation *ex post*. That is because some Pareto improvements are made by imposing losses and then rendering compensation. And if all Pareto improvements are consented to by the relevant parties, the initially injured party must be presumed to give his consent by accepting compensation *ex post*. Under a liability rule, therefore, *full* compensation turns an illegitimate act, that is, a forced transfer, into a legitimate one, that is, an "*ex post* consensual exchange." In this view, the legitimating force of liability rules comes from the fact that in accepting full compensation injured parties give their consent. When conjoined with the presumption that injurers act voluntarily (consensually), the net result is a *consensualist* defense of liability rules. Liability rules set up "forced but consented to exchanges." Because the exchanges are consented to, they are legitimate. Liability rules, therefore, always specify terms of legitimate transfer.[29]

An argument like Posner's treats liability rules as *normatively* equivalent to property rules. In both cases consent turns out to be the necessary and sufficient condition of legitimate transfer. Under property rules consent is given *ex ante*; under liability rules it is given *ex post*—through the acceptance of compensation. The difference between them is temporal, i.e., when consent is given. And that is a function of relevant facts or conditions of the world, for example, the presence or absence of significant transaction costs. In the standard economic account, liability rules substitute for property rules when transaction costs are significant.

If Posner is right, one kind of economic response to our puzzle about *Spur*, namely how liability rules can protect rights if they turn control or autonomy over to others, is that on a deeper level, liability rules *return* autonomy or control to entitled parties by requiring their consent to

29. *See* R. Posner, The Economics of Justice 231–407 (3d ed. 1983).

"forced transfers": that consent being given by their acceptance of compensation *ex post*. Because Pareto improvements through liability rules are consented to (by definition), there is no real incompatibility between the economic and classical liberal conceptions of rights. A Posnerian account of liability rules simply eliminates the tension between liability rules and the classical liberal conception of rights, a tension that motivates our analysis in the first place. Posner pulls the rug from under us by arguing, in effect, that efficiency is just another way of talking about autonomy.

Fortunately for us, the Posnerian reduction of efficiency to autonomy rests on the deeply confused claim that accepting compensation entails giving one's consent.[30] If Posner were right, the only way in which a victim of another's wrongdoing could refuse to give his consent to being wronged would be to refuse compensation. If however he demands and receives compensation as his due because he has been wronged, then he consents to his being wronged. Surely this is a perverse enough consequence of the compensation-as-consent claim to dismiss it as implausible, if not incoherent.

Nonconsensual economists—those who argue for liability rules on straightforward efficiency grounds—do not face this objection. Of course, they face the problem of defending efficiency on normative grounds other than consent. Interestingly, like Posner, these economists treat liability and property rules on a normative par. Both are defensible because, used properly, both can be efficient. Liability rules can be efficient, but an efficient transfer can nevertheless be an illegitimate transfer, if, for example, it violates someone's rights. The problem is how can a transfer imposed under a liability rule be legitimate if it involves taking that to which another is entitled. The problem, once again, is to square the efficiency of liability rules with the concept of right. Liability rules can be efficient, but are they compatible with rights? Can they protect or secure rights?

One approach the economist could take would be to assert that efficiency, not compatibility with or respect for rights, is the criterion of legitimacy. Alternatively, he could stipulate a definition of efficiency such that action in violation of a right is necessarily inefficient. A more intriguing solution to what we take to be a genuine, serious problem would try to render efficiency and rights compatible by providing an efficiency theory or analysis of rights. The trick is to analyze a right to something as giving someone a guarantee of a stream of welfare or utility, and no more. Facts of the world will then dictate how this stream of welfare or utility is to be

30. *See* Coleman, *The Normative Basis of Economic Analysis: A Critical Review of Richard Posner's* The Economics of Justice (Book Review), 34 STAN. L. REV. 1105, 1117-31 (1982) (reviewing R. POSNER, *supra* note 29).

realized. When transaction costs are low, the stream of utility is secured by exchange; when exchange is sufficiently costly, it may be secured by liability rules. In neither case does having a right entail any control or liberty, but in every case having a right guarantees a stream of utility.

Here, as in the compensation-as-consent view, property and liability rules are treated as normative equivalents: not because liability rules are really property rules with a temporally delayed consent element, but because both liability and property rules are ways, in differing circumstances, of giving right holders what they are entitled to, namely, a particular level of welfare or utility.

The Posnerian account of the relationship between liability, property rules, and rights analyzes rights in terms of a realm of autonomy or control and then argues that, contrary to what we might otherwise have thought, liability rules, in virtue of their compensatory element, specify a realm of autonomy. The traditional economic approach analyzes rights entirely in terms of individual utilities,[31] in which case property and liability rules are simply instruments; and the choice between them is entirely a function of pertinent facts of the world, such as transaction costs. In both accounts, liability rules legitimate forced transfers in spite of the fact that the transfer is a taking of what another is entitled to. Both accounts achieve this result by offering distinct conceptions of what it means to have a right. The Posnerian opts for the classical or autonomy theory of rights, and argues that by accepting compensation an individual fully exercises his autonomy over his holdings. In contrast, the traditional economist opts for a welfare or utility conception of rights, and argues that, provided the compensation is adequate, paying compensation fully exhausts one's claims within the scope of one's rights.

Both theories, in addition to justifying liability rules as legitimating transfers (rather than as compensating for wrongs), solve as well the conflict between liability rules and the classical liberal conception of rights. The Posnerian manages this feat by accepting the classical theory and reconstructing liability rules as instruments of autonomy. The traditional economist solves the riddle the easy way; he dumps the classical liberal theory of rights in favor of a more convenient, economic one.

The argument to this point is a bit misleading. We have argued at length that liability rules do not always serve a legitimating function. Yet we have just taken pains to show how on two different economic theories

31. It is important to distinguish between two claims: that rights are just guarantees of utility, and that the rights we have, whatever rights are, can be justified on utilitarian grounds. The first claim is an analytic one about the meaning of rights. The second is a normative one about their foundations. Someone can hold both, of course. But someone who asserts the normative claim need not be committed to the analytic one. We are here discussing the economic *analysis* of rights, not their economic foundation.

of them, liability rules seem invariably to legitimate. This last discussion, in particular, would appear to suggest that economic analysis is unable to contemplate liability rules other than as setting conditions of legitimate transfer. But economic analysis can in fact comprehend alternative uses of liability rules, though only at the expense of abandoning the economic analysis of rights. Because we have argued for a theory of rights in which rights are neither necessarily utilities nor liberties, this is a price well worth paying. The first task is to show that it is a price that must be paid.

We have taken some care in distinguishing between two forms of economic analysis comprehending two different economic theories of rights. In the traditional theory, acts, rules or institutions are justified if and only if they are efficient; while in consensualist theory they are justified if and only if they are (or would have been) consented to. In Posner's view, for example, the consent or autonomy theory is the deeper one, because only it provides an independent, non-question-begging reason for pursuing efficiency. Moreover, only it renders efficiency and the classical theory of rights compatible. Happily, the two forms of argument, efficiency and autonomy, converge on outcomes, or so he believes. Now let's see how these two conceptions of rights fit with the role of liability in torts.

Consider the case of the reckless driver, whose unjustifiably risky conduct injures a pedestrian. Under the classical liberal view, the victim's right not to be injured or harmed entails that others are not free to "injure" or "take" without securing his consent. In this analysis his right not to be harmed is intended to secure a realm of autonomous control over what happens to him. Under the compensation-as-consent thesis, if the reckless motorist fully compensates his victim, he secures the injured party's consent, and thereby rights what otherwise might have been a wrong. Compensation under a liability rule gives consent and thereby satisfies the autonomy condition imposed by rights ownership. The reckless driver did no wrong, and in the end, violated no one's rights, or, alternatively, the victim consented to the wrong.

This is the merger of classical liberalism and economic efficiency achieved by the compensation-as-consent trick. The merger, if it worked, would have one desirable property, but one fatal flaw as well. It's the same property in both cases. The problem is that the same argument that legitimates forced but efficient transfers legitimates forced but *inefficient* transfers as well. The elements of consent are present whenever the victim accepts compensation and the injurer acts voluntarily (which is distinguishable from whether he acted *rationally* or *efficiently*). Neither actor need to have acted efficiently. The consensual form of economic analysis is compatible with the liberal conception of rights as secured liberties, but it is overbroad; if the compensation-as-consent account justifies anything, it

justifies too much, at least from an efficiency point of view. Presumably, the economist wants to justify liability rules only if they are efficient; but they can be consented to (in the Posnerian sense) even when they are inefficient!

The traditional form of economic analysis can avoid the problem of having to hold that the "forced exchange" between the reckless driver and the pedestrian is legitimate, but not without cost. The traditional efficiency economist almost certainly will begin by noting that reckless conduct is, by definition, inefficient. Negligence is, following the Hand formula, inefficient: the costs of accident avoidance are less than the expected value of the harm. Recklessness is just gross negligence. Therefore, the reckless motorist who makes repair under the liability rules does not legitimate "his taking." So the economist wants to deny—with good reason—that such a transfer is legitimate, even if consented to. But can he? There's a problem in his doing so, and here it is.

In the standard form of economic analysis rights are defined in terms of guaranteed streams of utility or welfare. This is the move that makes it possible for liability rules to legitimate transfers in the first place. By compensating someone an amount equal to the level of utility secured by his right, a "taker" insures that his "victim's" right is fully respected; its claims against the taker fully exhausted. But look what happens when this analysis of rights is transposed to the reckless motorist context. If the "forced transfer" is not legitimate, it cannot be because in taking without the pedestrian's permission, the injurer violated the pedestrian's right. By rendering full compensation under the liability rule, he gave the pedestrian all that his right entitled him to—given the economic account of rights. If the transfer is illegitimate, it cannot be because it violates the pedestrian's right. So considerations of efficiency lead the economist to deny the legitimacy of the transfer, but his analysis of rights prevents him from doing so.

The culprit is the economic conception of rights and the corollary conception of liability rules either as legitimating transfer or as exhausting the claims of rights. One way of avoiding the conclusion that by compensating the pedestrian, the reckless motorist violates no right of his, is to deny that a pedestrian's right is to a level of welfare or utility only. The pedestrian's right against the motorist is not a right to compensation only. It is not a right in other words whose content can be given by a liability rule as in (3). Instead, the pedestrian's right must be specified by a liability rule such as in (3'). As between (3) and (3'), only in (3') does the payment of compensation fail to legitimate. The failure is because, according to (3'), only voluntary agreement legitimates transfer. So if the economist wants to deny that the reckless motorist's conduct is legiti-

mate—which he rightly wants to do—then he has to claim that by paying compensation, the motorist does not give the pedestrian what he is entitled to, does not respect his rights. What we need is a transaction rule like (3') in which compensation fails to legitimate, or alternatively and more naturally in this context, an inalienability-liability rule combination. This discussion leads to two important conclusions. First, the economist has to give up what we called the economic conception of rights in which rights are merely secured levels of welfare. For the reckless motorist example shows that the only way to deny the legitimacy of inefficient forced but fully compensated transfers is to claim that some rights are more than guarantees of utility alone. Secondly, and perhaps more importantly, sometimes the foundational goal of efficiency is best secured by having rights secure liberties rather than interests. Sometimes, autonomy preserving rules like (3') can be utility maximizing. A domain of rights as secured liberties may be required on utilitarian or efficiency grounds. So even if the goal of the law is to promote overall welfare or utility, it does not follow that the legal rights created for that end are themselves conceptionally no more than guarantees of welfare or utility. As a matter of logic or necessity, legal rights are neither protected domains of autonomy or levels of protected welfare. Their content is a contingent matter depending on the foundational theory. Moreover, as this discussion shows, even a broad utilitarian foundational theory will not, indeed cannot, always specify the content of rights in terms of utilities or interests only.

Standard economic analysis emphasizes the role of liability rules in legitimating transfer under conditions of high transaction costs. This emphasis leads the economist to think of legal rights in largely utilitarian terms, as protected levels of welfare, and to ignore at the same time the role of liability rules in redressing for wrong done. Focusing on illegitimate forced transfers, however, enables us to broaden the economist's understanding of legal rights, while allowing us to demonstrate once again our central claim, namely that it is a mistake to analyze rights as necessarily specifying either a realm of autonomy or a level of welfare. Rights are just conceptual markers. The extent to which rights turn out to secure a realm of control or to guarantee a level of welfare will depend on the foundational theory and the structure of human interaction. It will rest on normative argument, in the light of pertinent facts of the world, not on conceptual analysis.

More importantly, whether liability rules in particular contexts turn out to specify terms of legitimate transfer will depend on whether particular rights secure a realm of control or a level of utility. Consequently, it is a mistake to treat liability rules as if they always specified terms of legitimate transfer: no greater a mistake, however, than to treat them as if they

never did. The simple truth is that liability rules in torts play both roles. Distinguishing between them in a principled manner is *the* task of tort theory.[32]

III. The Transaction Structure and the Criminal Law

One purported advantage of the property-liability-inalienability rule framework is that it suggests a plausible explanation of the existence of the criminal law. In the Calabresi-Melamed view, the criminal law exists to discourage individuals from turning property rules into liability rules. Richard Posner advances roughly the same position. The criminal law exists to encourage market forms of transfer (property rules) when individuals might otherwise prefer to impose nonconsensual transfers.[33] In both the Calabresi-Melamed and Posner views, the basic idea is simple. Circumstances are likely to arise in which the costs to non-entitled parties of respecting property rules exceed the costs of imposed transfer. Absent adequate incentives, non-entitled parties will naturally opt for the less costly (to them) means of transfer. The criminal law provides the incentive necessary to induce respect for property rules. In this sense, it prevents non-entitled parties from converting property rules into liability rules.

In a recent, excellent article, Alvin Klevorick expands upon the Calabresi-Melamed-Posner explanation.[34] Klevorick argues that in addition to discouraging individuals from turning property into liability rules, the criminal law discourages individuals from turning both inalienability and liability rules into property rules. In short, Klevorick's view is that the criminal law attempts to induce compliance with the entirety of the transaction structure.

In our view, the transaction framework partially specifies the content of rights by setting forth conditions of legitimate transfer. The property-liability rule framework does not in general protect rights. One question we might ask then is whether the economic argument for a criminal category is affected by our understanding of the role of transaction rules in the analysis of entitlements. This is the question we want to raise and answer in this Part; but before we reach it, we want to consider whether the familiar economic explanation outlined above is persuasive.

32. The conclusion of the argument in this Part is analogous to that in the previous one. We cannot claim to have demonstrated the inadequacy of economic analysis by showing that in our legal system liability rules do not always serve a legitimating function. What we have demonstrated, quite convincingly we hope, is that it is not analytically necessary that liability rules play a legitimating role and that to the extent to which they do not play such a role in our legal system, economic analysis cannot explain current tort law.

33. *See* R. Posner, *supra* note 2, at 201–22.

34. *See* Klevorick, *supra* note 14, at 289.

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Before we evaluate the economic argument, a bit of clarification is in order. Despite having a system of injunctions and tort-like remedies to enforce certain claims, an enjoined party might refuse to comply with an injunction, or a party liable in torts might refuse to pay damages. A criminal law might then be necessary to enforce compliance. In this sense the criminal law is always in the background of the transaction structure, supporting it as a whole. The criminal law, or some institutional arrangement very much like it, is therefore necessary to enforce the primary means of institutional relief. Notice that this is by no means a purely economic argument for the criminal law. Nor is it a very robust one, for the essential crimes are easily enumerated: (1) failure to abide by an injunction; (2) failure to pay tort damages; (3) failure to pay damages awarded for breach of contract, etc. All "crimes" would be contingent upon other forms of remedial relief. And the criminal law would itself enforce no standards of behavior other than those imposing the duty to comply with injunctions, damage awards and the like.

Those who have attempted to explain the existence of a criminal category by reference to the transaction framework have invariably had something else in mind. In their view, the criminal law is necessary not just because a person who is enjoined may seek to ignore the injunction, but because individuals may seek to convert transaction rules of one sort into rules of another sort. The claim is that for every transaction they face, individuals will decide whether to seek *ex ante* agreement or to pay compensation *ex post* entirely on utility maximizing grounds. The transaction structure is intended to make this decision non-optional, but in the absence of a criminal law, rational individuals will consider themselves free to conduct transactions on terms dictated by expediency rather than on terms specified by the transaction structure. But this analysis of the necessity of the criminal law is inconsistent with the standard economic interpretation of the transaction structure.

In the Calabresi-Melamed view, property rules provide for injunctive relief. The post-Calabresi-Melamed literature also treats the availability of injunctive relief as *entailed* by property rules. That is why the prevailing wisdom is that a rational person would prefer to have his entitlements "protected" by property rules rather than by liability rules. At best, liability rules guarantee compensation set by a third party. A rational person should expect to do at least as well negotiating on his own behalf—especially if the property rights are well defined and if his entitlement is secured by injunction.

But, if injunctions are part of the meaning of property rules—as standard economic analysis assumes—then the criminal law cannot be necessary to induce compliance with property rules. A person who is enjoined

from taking is prevented from taking. Because he is prevented from taking, he is not in a position to treat the property rule as if it were a liability rule. If injunctions can be sufficient to prevent individuals from converting property rules to liability rules, the criminal law cannot be necessary.[35]

A better argument for the criminal category, consistent with the argument advanced by Calabresi-Melamed, Posner and Klevorick, relies on a distinction between known and unknown injurers. Not everyone who might invade *B*'s rights will be known to him. Against those individuals, an injunction affords *B* no relief. The reason is obvious; *B* doesn't know whose conduct to enjoin. In these cases, injunctive relief is not available. A taking contrary to the property rule will call for compensation only, and strangers who cannot be enjoined will thus be free to treat property rules as if they were liability rules. Here is a place for the criminal law, not as an enforcer of injunctions, but as a "kicker" which, when conjoined with potential damage awards, may suffice to induce compliance with property rules among *strangers*. The combined costs to a stranger of liability (discounted by the probability of its being imposed) and the criminal sanction (similarly discounted) can be designed to exceed whatever gain he anticipates by foregoing voluntary agreement in favor of forced exchange. Properly set, the combined costs may be sufficient to induce compliance with property rules. This is the right sort of economic argument for the criminal category because it explains the role that criminal law plays in inducing compliance with property rules when, in the absence of a criminal law, individuals (in this case, strangers) would, in fact, have reason to ignore them in favor of liability rules.

Unfortunately, this argument for the criminal law explains a good deal less than the traditional economic argument purports to. It applies only to strangers, because only against strangers are injunctions infeasible. The standard argument is more robust, but unsound.

We now want to consider whether the economic argument for the criminal law is more robust if, instead of treating property and liability rules as ways of protecting rights, we treat them, as we suggest they ought to be treated, as normative rules specifying the content of rights within the transactional domain. It is not.

35. It is no response to this objection, moreover, to argue that the criminal law is necessary to enforce injunctions. It may well be. Indeed, we have conceded as much. Still, it is one thing to allege that a criminal law is necessary to enforce the institutions that enforce property and liability rules, i.e., injunctions and compensatory awards; it is quite another to say that the criminal law is necessary to prevent someone from converting property to liability rules. Injunctions may suffice to enforce the property-liability rule distinction. At best, the criminal law may be necessary to render injunctions and compensatory awards adequately effective. But here the criminal law plays no role peculiar to an economic analysis; rather it plays an enforcement role countenanced by every theory of law.

Transaction rules themselves *entail* no institutions of enforcement. They merely specify terms or conditions of transfer. Consequently, in the absence of enforcement mechanisms of any sort, non-entitled parties may be encouraged to disregard entirely the legitimacy of the claims of entitled parties, whether to *ex ante* agreement or to *ex post* compensation. Suppose *B* is entitled to be free of *A*'s pollution, and that we specify in part the content of that right by a property rule. *A* cannot pollute *B* other than on terms agreeable to *B*. If no enforcement mechanism of any sort is available to vindicate *B*'s claim, *A* may be encouraged simply to bypass it. It's not as if he will treat *B*'s claim differently, as a claim to repair under a liability rule, as if he had any intention of paying damages. Absent means of enforcement, non-entitled parties do not "turn" or convert one sort of rule into another, so much as they may be disposed to ignore the lot of them.

A criminal law which penalizes individuals for failing to respect property, liability and inalienability rules may be adequate to induce compliance with the conditions set forth in each, provided that both the absolute level of the penalty and the probability of its being administered quickly are sufficiently high. But this argument for a criminal law is *not* that in its absence non-entitled parties will substitute one sort of transaction rule for another. Instead, this argument for the criminal law is that in its absence non-entitled parties may be inclined to treat the entitlements of others as if they imposed no constraints on them at all.

However sound, this reinterpretation of the economic argument for the criminal law establishes only that the criminal law may be *sufficient* to induce compliance with the transaction structure, not that it is *necessary*. Nor does this argument suggest that the point of the criminal category is to prevent individuals from substituting transaction rules for one another.[36]

36. Economic analyses do not speak with one mind when it comes to the criminal law. There are at least two ways of thinking about the criminal law that are, broadly speaking, economic. In the line of argument we have been discussing in this Part, the criminal law is represented as either parasitic upon other enforcement institutions or in the "background," "supporting the transaction structure as a whole." At the very least, the criminal law is of a different order of enforcement than is, say, torts. Whenever economists discuss the criminal law outside of the context of giving an economic explanation of the need for it, however, they treat the criminal law as if it were on a par with torts. In those contexts, the question often is whether to enforce public norms publicly (via the criminal law) or privately (through torts). The question is never whether a criminal statute is established in order to prevent conversion of a property rule to a liability rule. Instead, it is invariably of the following sort: given an enforcement budget, how much ought to be allocated to public enforcement, and how much to private? Putting the matter this way reveals a very different conception of the relationship between criminal and other branches of the law than that which emerges within the economic explanation of the criminal category.

We should note as well that both forms of economic analysis of the criminal law attend inadequately to the fact that the conditions which must be satisfied before the criminal sanction can legitimately be imposed are more demanding than those necessary for civil liability. The scope of potential excusing conditions and severe restrictions on the scope of strict liability in the criminal law—at least compared to the expansive scope of strict liability in torts—suggests a difference in the normative

IV. Interests, Liberties and Transaction Structure

Calabresi-Melamed do not address the question of whether the transaction structure is compatible with all possible analyses of rights. In contrast, our account of the property-liability rule distinction is motivated in part by a desire to respond to the tension between liability rules and the classical liberal conception of rights. The tension is expressed in the questions raised in the *Spur* case: how can liability rules protect entitlements if a liability rule provides non-entitled parties a liberty to impose transfers on terms set by third parties? How can forced transfer be made compatible with the liberal conception of rights?

We said earlier that a correct analysis of rights would require giving up both the classical liberal conception of rights as well as the economic conception of the proper role of property and liability rules. The time has come to see if we have made good on our promise. In the economic conception of them, property and liability rules protect rights. We have argued that they do not, that instead they specify the content of rights over the transactional domain. The classical liberal conception holds that rights necessarily specify a domain of autonomy or control. We have shown that the claims to which rights give rise depend on the transaction rules applied to them, and that the choice of transaction rule depends on the foundational theory. Sometimes one's rights require others to seek agreement as a condition of transfer; other times not. This is one consequence of the distinction, much emphasized here, between (3) and (3'). In either case, moreover, the choice between (3) and (3') depends on the purposes for which institutions are designed; and so whether rights provide autonomy or are designed purely to guarantee a level of welfare is a contingent feature of them, resolved not by appeal to *meanings* but by appeal to *justifications*. To the extent the classical liberal conception of rights is taken as providing an account of the meaning of the concept, it too fails.

Having made good on our basic claim, we want to close by exploring briefly some other connections between rights and liability rules. The alleged incompatibility of the economic framework and the liberal conception of rights presupposes not just that rights secure a domain of autonomy but that liability rules necessarily place non-entitled parties *at liberty*. In fact, there are at least two kinds of cases in which liability rules fail to confer a liberty to compel transfer. The first is by now very familiar. If the content of an entitlement is given by a combination of property and liability rules—in which case *ex ante* agreement is both *necessary* and *sufficient* for legitimate transfer, and a taking creates a claim to recom-

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dimensions of criminal and civil law inadequately comprehended by either of the ways in which economic analysis thinks about the relationship between criminal and civil law.

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pense but does not legitimate (as in (3'))—the liability rule does not warrant forced transfer.

Secondly, suppose I have a right against you that you not do *X*, and that the content of my right over the domain of transfer is given by a liability rule only. If you do *X*, I have a claim against you to repair, no more. It does not follow that you are *at liberty* to do *X*, even if you compensate me—even if my claim against you has been exhausted—because doing *X* may be wrong on other grounds. And if it is wrong to do *X* (e.g., torture me), then you are not at liberty to do *X* even if I am no longer entitled or empowered to prevent you. It is not, therefore, part of the meaning of liability rules that they place non-entitled parties at liberty to compel transfer. Another way, therefore, in which the tension between liability rules and classical liberalism can be eased is simply to emphasize that liability rules do not always function as economic analysis suggests they do: as setting terms of forced transfer.

We have argued against both the economic conception of liability rules and the classical liberal theory of rights. Given our analysis of liability rules, it is possible, even within classical liberal theory, to convey a sense in which liability rules protect rights. That is, even if rights necessarily secure a domain of autonomy or control, liability rules could sometimes be construed as protecting them. Here's how. Once again, the key is (3'). Under (3'), property rules specify fully the conditions of legitimate transfer, so that the liability rule component plays no role in legitimating transfers imposed against a right holder's will. The liability rule simply provides the right holder with a claim to relief grounded on the injurer's conduct *violating* the conditions of transfer set out by the property rule: i.e., its invasion of the relevant right. The right to relief is grounded not just in the harming of an interest, but in the transfer occurring without the right holder's *ex ante* consent. Where property rules specify fully the content of a right over the transactional domain, as they must if rights mark liberties, and as they can even if rights mark interests, then a liability rule can serve to protect the relevant liberty or interest, not by specifying an alternative mode of *legitimate* transfer, but by increasing the costs to injurers of their invasive conduct. This is not to say that liability rules are sufficient to secure liberty of control and transfer, only that there is a limited sense even within the liberal-libertarian conception of entitlements in which liability rules protect rights.

Ultimately what sets apart the classical liberal and economic conceptions of rights and liability rules is the case in which liability rules are thought sufficient to justify a transfer, not the case in which liability is imposed because the injurer failed to respect a victim's rights. For it can never be any part of the classical liberal account that by compensating

someone for taking what is his without his consent, an injurer respects the victim's rights; whereas the core of economic analysis is the possibility that by compensating a victim, an injurer (at least sometimes) gives his victim all that he is entitled to, thereby legitimating the taking. And it is precisely this sort of role for liability rules that emerges within the economic account in which liability rules are introduced because transaction costs preclude voluntary movement of resources to higher-valued uses.

It is not surprising, then, that while we have shown that the transaction structure is not restricted to economic analysis, it was first developed and, to this point, fully appreciated only within the overall economic framework. Our hope is that by more accurately and fully analyzing the transaction structure especially its role within an overall theory of institutional entitlements, we have helped to widen its applications, while locating and strengthening its foundations.

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