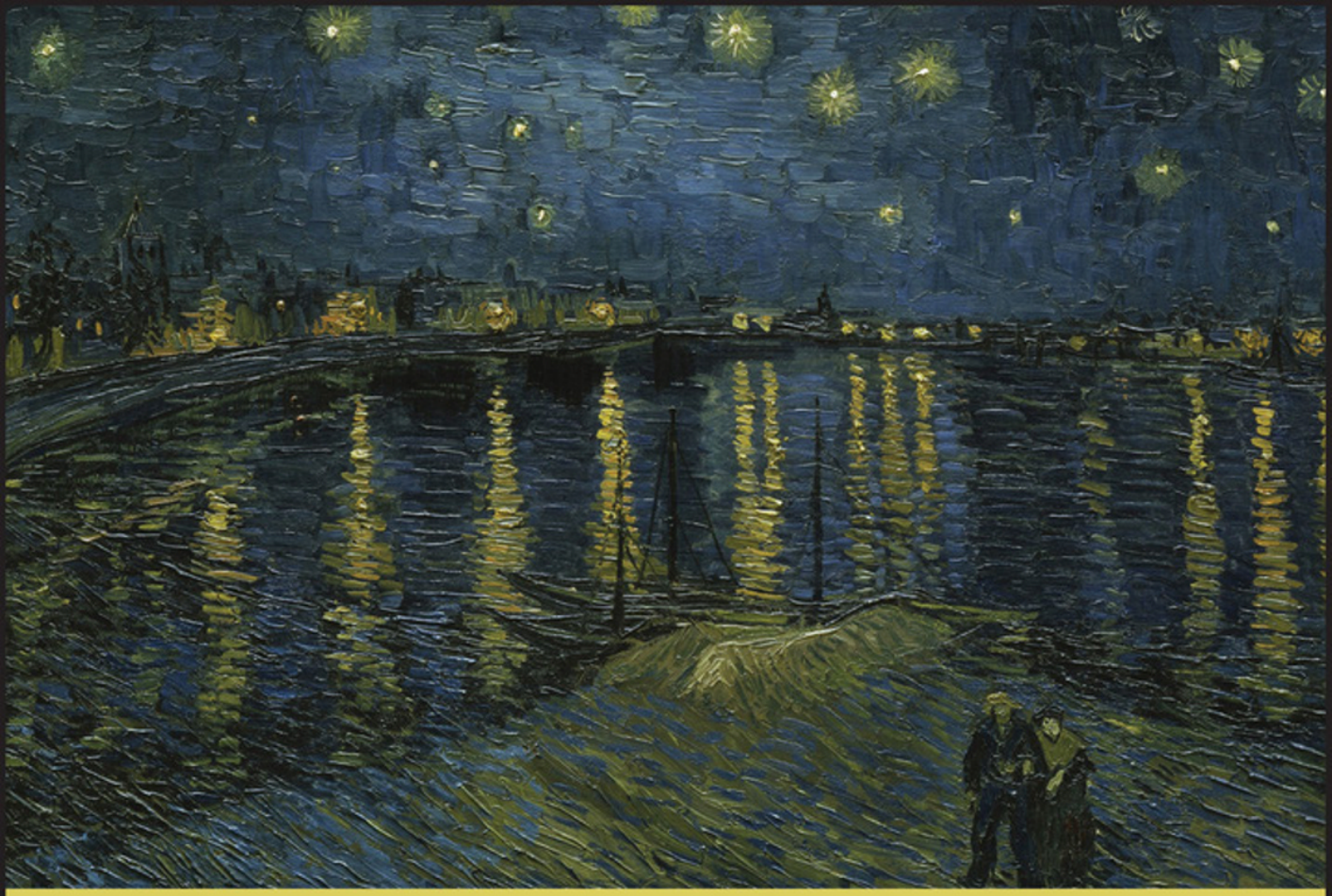


CONTEMPORARY POLITICAL PHILOSOPHY

AN ANTHOLOGY

THIRD EDITION

EDITED BY ROBERT E. GOODIN AND PHILIP PETTIT

WILEY Blackwell

Contemporary Political Philosophy

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Third Edition

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Robert E. Goodin and Philip Pettit

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Preface

The essays contained in this collection represent what seem to us to be canonical texts in contemporary political philosophy. But they only represent the contemporary canon, they do not exhaust it. Although this collection is two or perhaps three times the size of most, we nevertheless found that we had space for only a sample of the very many more texts and topics that we would like to have included.

The collection is deliberately designed as a companion to our earlier *Companion to Contemporary Political Philosophy* (Oxford: Wiley-Blackwell, 1993; 2nd edition, 2012). We attempted to retain something of the same flavor in this collection, much the same scope of substantive concerns and much the same diversity of analytic styles. Inevitably, though, there is so much more surveyed in the *Companion*'s many chapters than can be reprinted here. Interested readers are referred back to the *Companion* not only to situate the texts in the present collection but also for further readings and whole other sets of concerns.

The *Companion* as a whole, and our own introduction to it, serves effectively as a preface to this collection. So we will not expound at length here upon our views as to the nature of the political philosophical enterprise. Let this one comment suffice. We have tried to select and organize the texts included here so as to show political philosophy as it truly is: as a set of ongoing conversations and disputations, arguments, and debates.

Robert E. Goodin
Philip Pettit

PART I

Doing Political Philosophy

1

Realism and Moralism in Political Theory

Bernard Williams

Two Models of Political Theory

I start with two rough models of political theory (or philosophy: the distinction is not important here) with respect to the relation of morality to political practice. One is an *enactment* model. The model is that political theory formulates principles, concepts, ideals, and values; and politics (so far as it does what the theory wants) seeks to express these in political action, through persuasion, the use of power, and so forth. This is not necessarily (although it is usually) a distinction between persons. Moreover, there is an intermediate activity which can be shared by both parties: this shapes particular conceptions of the principles and values in the light of the circumstances, and devises programmes that might express those conceptions.

The paradigm of a theory that implies the enactment model is Utilitarianism. Unless it takes its discredited Invisible Hand form (under which there is nothing for politics to do except to get out of the way and get other people out of the way), this also presents a very clear version of something always implicit in the enactment model, the panoptical view: the theory's perspective on society is that of surveying it to see how it may be made better.

Contrast this with a *structural* model. Here theory lays down moral conditions of co-existence under power, conditions in which power can be justly exercised. The paradigm of such a theory is Rawls's. In *A Theory of Justice* (*TJ*) itself, the theory also implied a certain amount about the ends of political action, because of implications of applying the Difference Principle: though, interestingly, even there it was presented less in terms of a programme, and more in terms of a required structure. In *Political Liberalism* (*PL*) and the writings that led up to it, this aspect is less prominent.[1] This is because Rawls wants to make a bigger gap than *TJ* allowed between two different conceptions: that of a society in which power is rightfully exercised (a well-ordered society), and that of a society that meets liberals' aspirations to social justice. (This distinction may imply various others: human/political/economic rights etc.)

Differences between these two models are of course important. But my concern here is with what they have in common, that they both represent the priority of the moral over the political. Under the enactment model, politics is (very roughly) the instrument of the moral; under the structural model, morality offers constraints (in *TJ*, very severe constraints) on what politics can

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rightfully do. In both cases, political theory is something like applied morality.

This is still true in Rawls's more recent work. He indeed says that "in *TJ* a moral doctrine of justice, general in scope, is not distinguished from a strictly political theory of justice" (*PL*, xv), and he sets out to articulate a political conception. But he also says, revealingly, "such a conception is, of course, a moral conception" (*PL*, 11); it is one that is worked out for a special subject, the basic structure of society. Its further marks are that it is independent of a comprehensive doctrine, and that it marshals ideas implicit in the public culture of a democratic society. The supposedly political conception, then, is still a moral conception, one that is applied to a certain subject matter under certain constraints of content.

Rawls holds that the stability of a democratic pluralistic society is, or should be, sustained by the moral psychology of citizens living within an overlapping consensus (*PL*, 141). There must be a question whether this is an appropriate or plausible answer: it is a matter of history, or political sociology, or some other empirical inquiry. But in any case, Rawls is not merely giving an answer to the question of stability in terms of citizens' morality; he is giving a moral answer. This comes out in his repeated claim (for example, *PL*, 147) that the conditions of pluralism under which liberalism is possible do not represent "a mere *modus vivendi*." Rather, the basis of co-existence, and the qualities elicited by these conditions, include the highest moral powers, above all a sense of fairness. Rawls contrasts "a mere *modus vivendi*" with the principled basis of his own pluralism, and he takes it to cover, not only a Hobbesian standoff of equal fear, but also equilibria based on perceptions of mutual advantage. That these options are grouped together implies a contrast between principle and interest, or morality and prudence, which signifies the continuation of a (Kantian) morality as the framework of the system.[2]

I shall call views that make the moral prior to the political, versions of "political moralism" (PM). PM does not immediately imply much about the style in which political actors should think, but in fact it does tend to have the consequence that they should think, not only in moral terms, but in the moral terms that belong to the political theory itself. It will be familiar how, in various ways, PM can seek to ground liberalism. I shall try to contrast with PM an approach which gives a greater autonomy to distinctively political thought. This can be called, in relation to a certain tradition, "political realism." Associated with this will be a quite different approach to liberalism. (This is related to what the late Judith Shklar called "the liberalism of fear," but I do not develop that aspect of it here.)[3]

The First Political Question

I identify the "first" political question in Hobbesian terms as the securing of order, protection, safety, trust, and the conditions of cooperation. It is "first" because solving it is the condition of solving, indeed posing, any others. It is not (unhappily) first in the sense that once solved, it never has to be solved again. This is particularly important because, a solution to the first question being required *all the time*, it is affected by historical circumstances; it is not a matter of arriving at a solution to the first question at the level of state-of-nature theory and then going on to the rest of the agenda. This is related to what might count as a "foundation" of liberalism.

It is a necessary condition of legitimacy (LEG) that the state solves the first question, but it does not follow that it is a sufficient condition. There are two different sorts of consideration here. Hobbes did, very roughly, think that the conditions for solving the first problem, at least in given historical circumstances, were so demanding that they were sufficient to determine the rest of the political arrangements. In this sense, he did think that the necessary condition of LEG was also the sufficient condition of it; someone who disagrees with this may merely be disagreeing with Hobbes on this point.

If one disagrees with Hobbes, and thinks that more than one set of political arrangements, even in given historical circumstances, may solve the first question, it does not strictly follow that the matter of which arrangements are selected makes a further contribution to the question of LEG, but it is entirely reasonable to think that this can make a contribution, and that some, but only some, of such arrangements are such that the state will be LEG.

Even Hobbes, of course, did not think that a LEG state could be identical with a reign of terror; the whole point was to save people from terror. It was essential to his construction, that is to say, that the state – the solution – should not become part of the problem. (Many, including Locke, have thought that Hobbes's own solution does not pass this test.) This is an important idea: it is part of what is involved in a state's meeting what I shall call the Basic Legitimation Demand (BLD).

The Basic Legitimation Demand

Meeting the BLD is what distinguishes a LEG from an ILLEG state. (I am not concerned with cases in which the society is so disordered that it is not clear whether

there is a state.) Meeting the BLD can be equated with there being an "acceptable" solution to the first political question. I shall say some more about what counts as "acceptable."

It is important, first, to distinguish between the idea of a state's meeting the BLD, and its having further political virtues (e.g., its being a liberal state). I mean that these are two different *ideas*, and in fact I think there manifestly have been, and perhaps are, LEG non-liberal states. However, this does not exclude the possibility that there might be circumstances in which the only way to be LEG involved being liberal. This relates to the question of extra conditions on LEG, and, as I said, I shall come back to this.

I shall claim first that merely the idea of meeting the BLD implies a sense in which the state has to offer a justification of its power *to each subject*.

First, one or two definitions:

(a) For these purposes, the subject of a state is anyone who is in its power, whom by its own lights it can rightfully coerce under its laws and institutions. Of course this is not satisfactory for all purposes, since a state can claim too many people, but I shall not try to pursue this question. I doubt that there is any very general answer of principle to the question of what are the proper boundaries of a state.
(b) "What someone can fear" means what someone would reasonably be afraid of if it were likely to happen to him/her in the basic Hobbesian terms of coercion, pain, torture, humiliation, suffering, death. (The fear need not necessarily be of the operations of the state.)
(c) Call being disadvantaged with regard to what one can fear, being "radically disadvantaged."

Suppose a group of subjects of the state – within its borders, required to obey its officials, and so forth – who are radically disadvantaged relative to others. At the limit, they have virtually no protection at all, from the operations of either officials or other subjects. They are no better off than enemies of the state. There may be something that counts as a local legitimation of this. But is it LEG? Is the BLD satisfied?

Well, there is nothing to be said *to this group* to explain why they shouldn't revolt. We are supposing that they are not seen as a group of alien people captured within the boundaries of the state. (The citizens of ancient Sparta regarded the Helots openly as enemies, and in at least one period, the Spartan officials, on taking office, renewed a declaration of war against them. The frequent Helot "revolts" were thus simply attempts to fight back.) We suppose, contrary to this, that there is an attempt to incorporate the radically disadvantaged group as subjects. I propose that in these circumstances the BLD, to this extent, has not been met.

So we have:

(a) Mere incompetence to protect a radically disadvantaged group is an objection to the state.
(b) The mere circumstance of some subjects' being de facto in the power of others is no legitimation of their being radically disadvantaged. This implies that slavery is imperfectly legitimated relative to a claim of authority over the slaves: it is a form of internalized warfare, as in the case of the Helots.

It may be asked whether the BLD is itself a moral principle. If it is, it does not represent a morality which is prior to politics. It is a claim that is inherent in there being such a thing as politics: in particular, because it is inherent in there being first a political question. The situation of one lot of people terrorizing another lot of people is not per se a political situation: it is, rather, the situation which the existence of the political is in the first place supposed to alleviate (replace). If the power of one lot of people over another is to represent a solution to the first political question, and not itself be part of the problem, *something* has to be said to explain (to the less empowered, to concerned bystanders, to children being educated in this structure, etc.) what the difference is between the solution and the problem, and that cannot simply be an account of successful domination. It has to be something in the mode of justifying explanation or legitimation: hence the BLD.

The answer is all right as far as it goes, but more needs to be said about how a demand for justification arises, and how it may be met. One thing can be taken as an axiom, that might does not imply right, that power itself does not justify. That is to say, the power of coercion offered simply as the power of coercion cannot justify its own use. (Of course, the power to justify may itself be a power, but it is not merely *that* power.)

This principle does not itself determine when there is a need for justification (for instance, it does not imply that a Hobbesian state of nature violates rights). It does do something to determine, when there is a demand for justification, what will count as one. We cannot say that it is either a necessary or a sufficient condition of there

being a (genuine) demand for justification, that someone demands one. It is not sufficient, because anyone who feels he has a grievance can raise a demand, and there is always some place for grievance. It is also not a necessary condition, because people can be drilled by coercive power itself into accepting its exercise. This, in itself, is an obvious truth, and it can be extended to the critique of less blatant cases. What may be called *the critical theory principle*, that the acceptance of a justification does not count if the acceptance itself is produced by the coercive power which is supposedly being justified, is a sound principle: the difficulty with it, of making good on claims of false consciousness and the like, lies in deciding what counts as having been "produced by" coercive power in the relevant sense.

However, one sufficient condition of there being a (genuine) demand for justification is this: A coerces B and claims that B would be wrong to fight back: resents it, forbids it, rallies others to oppose it as wrong, and so on. By doing this, A claims that his actions transcend the conditions of warfare, and this gives rise to a demand for justification of what A does. When A is the state, these claims constitute its claim of authority over B. So we have a sense in which the BLD itself requires a legitimation to be given to every subject.

There can be a pure case of internal warfare, of the kind invoked in the case of the Helots. There is no general answer to what are the boundaries of the state, and I suppose that there can in principle be a spongiform state. While there are no doubt reasons for stopping warfare, these are not the same reasons, or related to politics in the same way, as reasons given by a claim for authority. In terms of rights, the situation is this: first, anyone over whom the state claims authority has a right to treatment justified by the claim of LEG; second, there is no right to be a member of a state, if one is not a member – or, at any rate, no such right that follows from just this account; third, there is no claim of authority over enemies, including those in the situation of the Helots. In virtue of this last point, such people do not have a right of the kind mentioned in the first point. However, crimes against stateless persons are surely crimes, and Helot-like slavery surely violates rights, and this will require a more extended account in terms of the desirable extent of living under law (and hence of the political). However, the significant cases for the present problems are those in which the radically disadvantaged are said to be subjects and the state claims authority over them.

To Liberalism

However, this will not exclude many legitimations which will not be satisfactory from a liberal point of view. How do we get to liberalism?

Liberals will, first, raise the standards of what counts as being disadvantaged. This is because they raise their expectations of what a state can do; moreover they adopt, perhaps because they are in a position to adopt, more demanding standards of what counts as a threat to people's vital interests, a threat in terms of the first problem itself; they take more sophisticated steps to stop the solution becoming part of the problem. They recognize, for instance, rights of free speech; in the first instance, because it is important that citizens and others should know whether the BLD is being met.

Liberals will also add at least the following:

(a) Rationalizations of disadvantage in terms of race and gender are invalid. This is partly a question of how things are now, but it also reflects the fact that only some rationalizations are even intelligible. Those associated with racism, and the like, are all false or by everyone's standards irrelevant. It is also important that acceptance of them by the dominating party is readily explained, while their being accepted by the dominated is an easy case for the critical theory principle.
(b) Hierarchical structures which generate disadvantage are not self-legitimating. Once the question of their legitimacy is raised, it cannot be answered simply by their existence (this is a necessary proposition, a consequence of the axiom about justification: if the supposed legitimation is seen to be baseless, the situation is one of more coercive power). In our world, the question has been raised (this is an historical proposition).

We can say at this point that liberalism imposes more stringent conditions of LEG; that non-liberal states do not now in general meet the BLD. This can be seen in the light of the point just made, that when the "legitimations" of hierarchical states are perceived to be mythical, the situation approximates to one of unmediated coercion.

Summary of Considerations about the BLD

The claim is that we can get from the BLD a constraint of roughly equal acceptability (acceptability to each subject); and that the BLD does not represent morality

prior to politics. But we get beyond this to any distinctively liberal interpretation only given further assumptions about what counts as legitimation. It will be seen that these further conditions contain rejections of some things that certainly have been accepted as legitimations in the past. Moreover, they refer to demands for legitimations where no such demands were made in the past.

So the general position can be summarized:

(a) We reject PM, which claims the priority of the moral over the political. This is to reject the *basic* relation of morality to politics as being that represented either by the enactment model or by the structural model. It does not deny that there can be local applications of moral ideas in politics, and these may take, on a limited scale, an enactment or a structural form.

(b) At the basic level, the answering of the "first" question does involve a principle, the BLD. The approach is distinguished from that of PM by the fact that this principle, which comes from a conception of what could count as answering a demand for justification of coercive power, if such a demand genuinely exists, is implicit in the very idea of a legitimate state, and so is inherent in any politics. The satisfaction of the BLD has not always or even usually, historically, taken a liberal form.

(c) Now and around here the BLD together with the historical conditions permit only a liberal solution: other forms of answer are unacceptable. In part, this is for the Enlightenment reason that other supposed legitimations are now seen to be false and in particular ideological. It is not, though it is often thought to be, because some liberal conception of the person, which delivers the morality of liberalism, is or ought to be seen to be correct.

(d) Inasmuch as liberalism has foundations, it has foundations in its capacity to answer the "first question" in what is now seen, granted these answers to the BLD, as an acceptable way. Insofar as things go well, the conceptions of what is to be feared, of what is an attack on the self, and of what is an unacceptable exercise of power, can themselves be extended. This may indeed be explained in terms of an ethically elaborated account of the person as having more sophisticated interests, which may involve, for instance, a notion of autonomy. This account might be, or approximate to, a liberal conception of the person. But this is not the foundation of the liberal state, because it is a product of those same forces that lead to a situation in which the BLD is satisfied only by a liberal state.

This picture will help to explain two things. First, one can invoke a liberal conception of the person in justifying features of the liberal state (they fit together), but one cannot go all the way down and start from the bottom.[4] Second, it sheds some light on the important fact that liberalism has a poor account, or in many cases no account, of the cognitive status of its own history. PM has no answer in its own terms to the question of why what it takes to be the true moral solution to the questions of politics, liberalism, should for the first time (roughly) become evident in European culture from the late seventeenth century onward, and why these truths have been concealed from other people. Moralistic liberalism cannot plausibly explain, adequately to its moral pretensions, why, when, and by whom it has been accepted and rejected. The explanations of the various historical steps that have led to the liberal state do not show very persuasively why or how they involved an increase in moral knowledge; but from here, with our conception of the person, the recognition of liberal rights indeed looks like a recognition.

The Nature and Point of the Concept of LEG

It may help to explain the idea of LEG that I am using if I relate it briefly to some ideas of Habermas, with whom I am partly, but only partly, in agreement. First, there is the basically sociological point, that the legitimations appropriate to a modern state are essentially connected with the nature of modernity as the social thought of the past century, particularly that of Weber, has helped us to understand it. This includes organizational features (pluralism, etc., and bureaucratic forms of control), individualism, and cognitive aspects of authority (*Entzauberung*). I have already referred to the last. To make my view even cruder than it is anyway, it could be expressed in the slogan LEG + Modernity = Liberalism, where the ambiguities of the last term serve to indicate a range of options which make political sense in the modern world: they are all compatible with the *Rechtstaat*, and they vary depending on how much emphasis is put on welfare rights and the like.

Second, my rejection of PM, though not in quite the same terms, is shared with Habermas; I, like him, reject

the derivation of political LEG from the formal properties of the moral law, or from a Kantian account of the moral person (though he makes more of the concept of autonomy than I do, and I shall come to that, on the subject of representation). Equally, though I have not stressed the point here, I reject as he does what he calls an "ethical" derivation, that is to say, a civic republican conception of the polity based on neo-Aristotelian or similar considerations.[5]

Taking these two points together – the facticity of modern societies and the refusal of a mere moral normativity – I can agree with Habermas also in trying to situate these issues "Between facts and norms."[6] Moreover, this is not merely a verbal agreement: the project of taking seriously in political theory an understanding of what modern social formations are is very fundamental. However, we clearly have different ideas of how a space is to be found between facts and norms. Habermas uses discourse theory; in my case what does this work is the all-purpose concept of LEG (together with the associated idea of its specific historical determinations).

However, Habermas's conceptions of legitimacy carry stronger universalistic implications than does the notion of LEG that I am using. So let me say some more about this notion; in particular, to locate it between facts and norms.

If, very roughly speaking indeed, LEG + Modernity = Liberalism, this gives no ground for saying that all non-liberal states in the past were ILLEG, and it would be a silly thing to say. It may be asked, in fact, what the point, or content, is of wondering whether defunct political orders were LEG. Political moralism, particularly in its Kantian forms, has a universalistic tendency which encourages it to inform past societies about their failings. It is not that these judgements are, exactly, meaningless – one can imagine oneself as Kant at the court of King Arthur if one wants to – but they are useless and do not help one to understand anything. The notion of LEG, however, distinguished from the idea of what we would now find acceptable, can serve understanding. It is a human universal that some people coerce or try to coerce others, and nearly a universal that people live under an order in which some of the coercion is intelligible and acceptable, and it can be an illuminating question (one that is certainly evaluative, but not normative) to ask how far, and in what respects, a given society of the past is an example of the human capacity for intelligible order, or of the human tendency to unmediated coercion.

We can accept that the considerations that support LEG are scalar, and the binary cut LEG/ILLEG is artificial and needed only for certain purposes.[7] The idea is that a given historical structure can be (to an appropriate degree) an example of the human capacity to live under an intelligible order of authority. It makes sense (MS) to us *as such a structure*. It is vital that this means more than it MS. Situations of terror and tyranny MS: they are humanly entirely familiar, and what the tyrant is doing MS (or may do so), and what his subjects or victims do MS. The question is whether a structure MS as an example of authoritative order. This requires, on the lines already explained, that there is a legitimation offered which goes beyond the assertion of power; and we can recognize such a thing because in the light of the historical and cultural circumstances, and so forth, it MS to us as a legitimation.

"MS" is a category of historical understanding – which we can call, if we like, a hermeneutical category. There are many difficulties of interpretation associated with it, for example whether there are not some historical constellations of belief which altogether fail to MS. (We are probably wise to resist that conclusion: as R. G. Collingwood says, "we call them the Dark Ages, but all we mean is that we cannot see.") The point is that these are general problems in historical and more broadly social understanding.

One can say, as I have said, that "MS" is itself an evaluative concept; certainly, it is not simply "factual" or "descriptive." This is part of the general theory of interpretation, and I cannot address it here. What it certainly is not, is *normative*: we do not think, typically, that these considerations should guide our behaviour, and there is no point in saying that they ought to have guided the other people's behaviour, except in exceptional cases where there was a clash of legitimations, of which, in the light of the circumstances, one more MS (as it seems to us) than the other.

But when we get to our own case, the notion "MS" does become normative, because what (most) MS to us is a structure of authority which we think we should accept. We do not have to say that these previous societies were wrong about all these things, though we may indeed think, in the light of our *entzaubert* state, that some of what MS to them does not MS to us because we take it to be false, in a sense that represents a cognitive advance – a claim which carries its own responsibilities, in the form of a theory of error, something which PM in its current forms has spectacularly tended to lack.

In any case, there is no problem about the relation between the "external" and non-normative "MS" that

we apply to others, and the "MS" we use about our own practices, which is normative: this is because of the hermeneutical principle, which is roughly that what they do MS if it would MS to us if we were them. In the light of this, it would be actually inconsistent to deny that when we apply "MS" to ourselves, we have a normative notion what MS. The same follows for LEG; what we acknowledge as LEG, here and now, is what, here and now, MS as a legitimation of power as authority; and discussions about whether it does MS will be engaged, first-order discussions using our political, moral, social, interpretive, and other concepts. Much of the time, in ordinary life, we do not discuss whether our concepts MS, though, of particular ones, we may. Mostly, the fact that we use these concepts is what shows us that they MS.

The Concept of the Political

I have not done much to define the concept of the "political" that I have been using. In particular, it may be unclear how it is related to a realist conception of political action. It will probably be clear that my view is in part a reaction to the intense moralism of much American political and indeed legal theory, which is predictably matched by the concentration of American political science on the coordination of private or group interests: a division of labour which is replicated institutionally, between the "politics" of Congress and the principled arguments of the Supreme Court (at least as the activities of the Supreme Court are primarily interpreted at the present time). That view of the practice of politics, and the moralistic view of political theory, are made for each other. They represent a Manichaean dualism of soul and body, high-mindedness and the pork barrel, and the existence of each helps to explain how anyone could have accepted the other.

I want a broader view of the content of politics, not confined to interests, together with a more realistic view of the powers, opportunities, and limitations of political actors, where all the considerations that bear on political action – both ideals and, for example, political survival – can come to one focus of decision (which is not to deny that in a modern state they often do not). The ethic that relates to this is what Weber called *Verantwortungsethik*, the ethic of responsibility.

Rather than trying to give a definition of the political, which would certainly be fruitless, let me end by giving two applications – ways in which thinking "politically" changes the emphasis as contrasted with what I have called PM. One relates to the conduct of political thought, and specifically political theory itself; the other to the way we should think about other societies.

PM naturally construes conflictual political thought in society in terms of rival elaborations of a moral text: this is explicit in the work of Ronald Dworkin. But this is not the nature of opposition between political opponents. Nor can the elaboration of one's own position take this form. (It is helpful to consider the idea of the "ideal" or "model" readers of a political text. PM typically takes them to be utopian magistrates or founding fathers, as Plato and Rousseau did, but this is not the most helpful model now.[8] They are better seen as, say, the audience of a pamphlet.)

We can, after all, reflect on our historical situation. We know that our and others' convictions have to a great degree been the product of previous historical conditions, and of an obscure mixture of beliefs (many incompatible with one another), passions, interests, and so forth. Moreover, the joint outcome of these things has often been that political schemes had perverse results. We can now see to some extent how these convictions came about, and why they worked if they did and didn't work when they didn't; and we would be merely naive if we took our convictions, and those of our opponents, as simply autonomous products of moral reason rather than as another product of historical conditions. Even in the very short term, a minority conception can become mainstream or vice versa, and there can be significant changes in what counts as a conceivable or credible option. This does not mean that we throw our political convictions away: we have no reason to end up with none, or with someone else's. Nor does it mean that we stare at our convictions with ironical amazement, as Rorty suggests. But we do treat them as political convictions which determine political positions, which means, for one thing, that we acknowledge that they have obscure causes and effects.

It also means that we take certain kinds of view of our allies and opponents. Even if we were utopian monarchs, we would have to take into account others' disagreement as a mere fact. As democrats, we have to do more than that. But remembering the points about the historical conditions, we should not think that what we have to do is simply to argue with those who disagree: treating them as *opponents* can, oddly enough, show more respect for them as political actors than treating them simply as arguers – whether as arguers who are simply mistaken, or as fellow seekers after truth. A very important reason for

thinking in terms of the political is that a political decision – the conclusion of a political deliberation which brings all sorts of considerations, considerations of principle along with others, to one focus of decision – is that such a decision does not in itself announce that the other party was morally wrong or, indeed, wrong at all. What it immediately announces is that *they have lost*.

Reflection on history should also affect our view of those who agree with us, or seem to do so, or may come to do so. One important political activity is that of finding proposals and images that can reduce differences (just as, in other political situations, it may be necessary to play them up). What people actually want or value under the name of some given position may be indeterminate and various. It can make a big difference, what images we each have of what we take ourselves all to be pursuing.

All these are platitudes about politics, and that is just the point: liberal political theory should shape its account of itself more realistically to what is platitudinously politics.

The same general point, in a different form, applies to our attitude to certain other societies. To some extent, we may regard some contemporary non-liberal states as LEG. This is different from Rawls's point, that we can recognize as well-ordered some non-liberal (e.g., theocratic) societies with which we have certain kinds of principled differences which are limited in certain particular ways (e.g., that they accept the freedom of religion). The present point concerns what turns on regarding them as LEG or not. The idea of "LEG" is normative for us as applied to our own society; so it is also normative in relation to other societies which coexist with ours and with which we can have or refuse to have various kinds of relations: they cannot be separated from us by the relativism of distance. So there can be practical consequences of applying or withholding "LEG" in the contemporary world. Since these consequences must be responsibly considered, they must be considered politically. An important aspect of thinking about this lies in political realist considerations about the stability of such states. For instance:

(a) With whom does the demand for justification arise? It will be a significant question, who does and who does not accept the current legitimation.
(b) If the current legitimation is fairly stable, the society will not anyway satisfy the other familiar conditions on revolt.
(c) The objections to traditional hierarchical setups are typically based in part on the mythical character of the legitimations. Faced with the criticism of these myths, increasing information from outside, and so on, non-liberal regimes may not be able to sustain themselves without coercion. They will then begin to encounter the basic legitimation problem.
(d) This will also apply to what come to be seen as targets of the *critical theory principle*, accepted social and institutional understandings which increasingly come to appear, now, as more subtle forms of coercion.

It will be seen that the more significant the factors (c) and (d) become, the more coercion may become overt, and the more this happens, the more reason there will be for concern at the level of the BLD. So nothing succeeds like success, with liberal critique as much as anything else. This is one sound application of a general truth (which is important to politics, but not only to politics), the truth discovered by Goethe's Faust: *Im Anfang war die Tat*, in the beginning was the deed.

Modernity and Political Representation

Faust's axiom – perhaps we can indeed call it Goethe's axiom – applies much more widely in these matters. It applies, for instance, to the question of how much, at what level, can be determined by social and political theory with regard to modern states: in particular, how far idealized conceptions of political relations should play a part. I should like to end with a particular application of that question, to the matter of political representation. This also raises, I think, a possible area of disagreement with Habermas.

It goes without saying that Habermas has offered very deeply and broadly elaborated work on the possibilities of the modern state and what might contribute to its legitimation. My few remarks or suggestions in no way seek to address most of the issues he has elaborated, nor am I competent to do so; the role of law, notably, in the understanding of the modern state is a central concern of his on which I have nothing special to offer. Much of this work, it seems to me, fits together with the kind of structure I have suggested. For instance, it seeks to show *in what ways* the conditions of modernity – the facticity of modern societies – demand or impose certain conditions on LEG. It shows how

some kinds of legal order and not others, and some understandings of a legal order, MS to us. It therefore has a practical and progressive possibility. What I have said here does not directly have such consequences, except in the possible improvement of the way in which we, in particular lawyers, think about such questions. This is because mine is a very general sketch at a very high level of generality. But I salute thought that does yield such consequences, and I agree in this respect with a criticism that Habermas has made of Rawls, that Rawls identifies no *project* with regard to the establishment of a constitution – it appears only in the role of the non-violent preservation of basic liberties that are already there.

However, Habermas wants to show something else at the level of the most basic theory: that there is an internal relation between the rule of law, the *Rechtstaat*, and deliberative democracy.

Now certainly I agree – it is a manifest fact – that some kind of democracy, participatory politics at some level, is a feature of LEG for the modern world. One need look no further than the worldwide success of the demand for it. Any theory of modern LEG requires an account of democracy and political participation, and of course such an account may take its place in a programme of improvement. We *may* be able to say: the *point* of democratic political participation in relation to our conception of LEG is such-and-such, and developing our institutions and practices in such-and-such ways is what will further MS in terms of what in this area MS to us.

Now Habermas develops this part of his account at a very deep level, in relation to the discourse theory. It would not be to the present point for me to try to engage with the details of his argument. My question concerns the kind of argument that this yields; specifically, whether it does not situate itself a great deal nearer – too near indeed – to the moral rather than the facts. Habermas writes, "[I]t must be reasonable to expect [participants in the political process] to drop the role of the private subject. … The combination [of facticity and validity] requires a process of law-making in which the participatory citizens are *not* [his emphasis] allowed to take part simply in the role of actors oriented to success." [Editor's note: Williams gave no reference for this quotation, and I have been unable to trace it.] So the concept of modern law harbours the democratic ideal, and we derive, more or less, an ideal associated with Kant and Rousseau, while going beyond the merely moral formalism of Kant and – roughly speaking – the ethical and communitarian over-enthusiasm of Rousseau.

But what is this "are not allowed to"? It cannot be blankly normative. Suppose, one is bound to say, that they do? It may be replied: it will defeat the point. But what if it does? And how can we be sure, in the light of the possibility, what the point really is? It may be said, alternatively: it cannot work – in other words, the system will break down, and the political process will begin to lose significance in relation to other activities and the life world.

I want to say at this point two things: if that is so, then it will show itself, and we shall have a manifest social or political problem for which we shall have to mobilize ideas which already MS to the public and might move towards possible political action. Second, it will be only one of many conflicts about what the processes of political participation can be hoped to yield under conditions of modernity. There are needs that people have which seemingly can be met only by more directly participatory structures; but equally, there are objectives which are notoriously frustrated by these, and other aims which are at least in competition with them, and considerations which raise doubts about the extent to which any procedures can be really participatory anyway.

No transcendental or partly transcendental argument – one might say, more generally, theoretical argument – could serve to resolve these conflicts.

My own view is that the minimum requirements of participatory democracy as an essential part of modern LEG are delivered at a fairly straightforward and virtually instrumental level in terms of the harms and indefensibility of doing without it. What is delivered at that level can only speciously be represented in Kantian and Rousseauian terms as either expressions of autonomy or of *self*-government. To represent it as such may lead to cynicism: while it may be no more than utopian to make larger ambitions which might meet these descriptions – and "self-government" I doubt can be met at all: which is why Rousseau was right to impose impossible conditions on it.

Indeed we should explore what more radical and ambitious forms or participatory or deliberative democracy are possible, which is why I agree that the conditions of LEG in modern states present a progressive project. But how much more is actually possible seems to me a question that belongs to the level of fact, practice, and politics, not one that lies beyond these in the very conditions of legitimacy.

Notes

1 John Rawls, *A Theory of Justice* (Cambridge, MA: Harvard University Press, 1971); *Political Liberalism* (New York: Columbia University Press, 1993).

2 The very phrase "a mere *modus vivendi*" suggests a certain distance from the political; experience (including at the present time) suggests that those who enjoy such a thing are already lucky. There is also an interesting question, which I do not pursue here, about how we are supposed to think about the emergence of the conditions of pluralism. Rawls seems committed to thinking that they constitute not just one historical possibility amongst others (still less, the calamity suggested by communitarian nostalgia), but a providential opportunity for the exercise of the highest moral powers.

3 Judith Shklar, "The Liberalism of Fear," in *Liberalism and the Moral Life*, ed. Nancy Rosenblum (Cambridge, MA: Harvard University Press, 1989), 21–38, and Williams's essay under the same title here.

4 The same difficulty is making itself felt in reverse, when Michael Sandel (*Liberalism and the Limits of Justice* [Cambridge: Cambridge University Press, 1982]) rejects the liberal theory of the state because he rejects the liberal account of the person, but nevertheless finds it very hard to detach himself from many features of the liberal state.

5 One can reject the Rawlsian priority of the right without going all the way to this: compare Dworkin, who tries to rewrite proceduralism in terms of the good life.

6 Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, trans. William Rehg (Cambridge, MA: MIT Press, 1996).

7 In the contemporary case, related to (but not identical with) the question of recognition.

8 Dworkin is addressing a Supreme Court of the United States unencumbered with the historical circumstances that actually affect it.

2

What Do We Want from a Theory of Justice?

Amartya Sen

I begin from the general Rawlsian position that the interpretation of justice is linked with public reasoning. The focus has to be, in John Rawls's words, on "a public framework of thought" that provides "an account of agreement in judgment among reasonable agents."[1] Rawls outlines this demand in terms of avoiding what he calls "a personal slant":

> We do not look at the social order from our situation but take up a point of view that everyone can adopt on an equal footing. In this sense we look at society and our place in it objectively: we share a common standpoint along with others and do not make our judgments from a personal slant.[2]

The bearing of *public reasoning* on the theory of justice leads to two further inquiries: *What is the relevant public*? and *On what questions should the reasoning concentrate*? The former query concerns the range of points of view that should count in public reasoning (for example, whether they must all come from inside a given political state), while the latter relates to the subject matter of public reasoning, in particular what are the questions to be answered for a satisfactory theory of justice? The two issues, I will argue, are linked, and together they lead us to the foundational question: *What do we want from a theory of justice*?

I have begun by drawing on Rawls's lead on the basic connection between objectivity, public reasoning, and the theory of justice. However, I have to argue for a rather different way of pursuing that connection, departing not only from the substantive content of the Rawlsian theory of justice but also from Rawls's diagnosis of the very requirements of a theory of justice, including the subject matter of public reasoning and the reach and coverage of public participation.

The Transcendental versus the Comparative

I begin with the issue of the subject matter of a satisfactory theory of justice. In his analysis of "justice as fairness," Rawls takes the principal question to be: *What is a just society*? Indeed, in most theories of justice in contemporary political philosophy, that question is taken to be central. This leads to what can be called a

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"transcendental" approach to justice, focusing – as it does – on identifying perfectly just societal arrangements. In contrast, what can be called a "comparative" approach would concentrate instead on ranking alternative societal arrangements (whether some arrangement is "less just" or "more just" than another), rather than focusing exclusively – or at all – on the identification of a fully just society. The transcendental and comparative approaches are quite distinct, and as will be presently discussed, neither approach, in general, subsumes or entails the other.[3]

The transcendental approach to justice is not new (it can be traced at least to Thomas Hobbes), but recent contributions have done much to consolidate the reliance on this approach. In his investigation of "justice as fairness," Rawls explores in depth the nature of an entirely just society seen in the perspective of contractarian fairness. Rawls's investigation begins with identifying the demands of fairness through exploring an imagined "original position" in which the members of the society are ignorant of their respective individual characteristics including their own comprehensive preferences. The principles of justice that emerge in the original position are taken to be impartial because they are chosen by the persons involved under a "veil of ignorance," without knowledge of their individual identities in the society with specific vested interests and particular priorities.

Later on in this paper, I shall discuss some limitations of this understanding of the demands of fairness (and ask whether the points of view to be considered must all come from the population of a given state), but the immediate point to note in the context of understanding the transcendental approach is that the fairness exercise is aimed entirely at identifying appropriate principles for a fully just society and at isolating the institutional needs for the basic structure of such a society. The working of these institutions, in turn, leads to further societal decisions at later stages in the Rawlsian system, for example through appropriate legislation (in what Rawls calls "the legislative stage"). The sequence moves forward step by step on firmly specified lines, with elaborately characterized unfolding of completely just societal arrangements.

Despite the standing and widespread use of the transcendental approach, the intellectual interest in, and practical relevance of, comparative questions about justice are hard to deny. Investigation of different ways of advancing justice in a society (or in the world), or of reducing manifest injustices that may exist, demands comparative judgments about justice, for which the identification of fully just social arrangements is neither necessary nor sufficient. To illustrate the contrast involved, it may well turn out that in a comparative perspective, the introduction of social policies that abolish slavery, or eliminate widespread hunger, or remove rampant illiteracy, can be shown to yield an advancement of justice. But the implementation of such policies could still leave the societies involved far away from the transcendental requirements of a fully just society (since transcendence would have other demands regarding equal liberties, distributional equity, and so on).

The grand partition between the "just" and the "nonjust," which is what a theory of transcendental justice yields, would leave the society on the "nonjust" side even after the reform, despite what can be seen, in a comparative perspective, as a justice-enhancing change. Some nontranscendental articulation is clearly needed. To take another type of example, instituting a system of public health insurance in the United States that does not leave tens of millions of Americans without any guarantee of medical attention at all may be judged to be an advancement of justice, but such an institutional change would not turn the United States into a "just society" (since there would remain a hundred other transgressions still to remedy).

A transcendental approach cannot, on its own, address questions about advancing justice and compare alternative proposals for having a more just society, short of proposing a radical jump to a perfectly just world. Indeed, the answers that a transcendental approach to justice gives – or can give – are quite distinct and distant from the type of concerns that engage people in discussions on justice and injustice in the world, for example, iniquities of hunger, illiteracy, torture, arbitrary incarceration, or medical exclusion as particular social features that need remedying. The focus of these engagements tends to be on the ways and means of advancing justice – or reducing injustice – in the world by remedying these inequities, rather than on looking only for the simultaneous fulfilment of the entire cluster of perfectly just societal arrangements demanded by a particular transcendental theory.

Possible Defense of a Transcendental Approach

The argument so far has been, in an important sense, too easy. Surely transcendental answers cannot be all we want from a theory of justice. But there might well be – this is a matter to be investigated – some less obvious connection, some relationship between the

transcendental and the comparative that could make the transcendental approach the right way of proceeding to comparative assessments. The formal remoteness of the transcendental approach from the invoking of the idea of justice in debates and discussions on practical affairs does not in itself indicate that the transcendental approach cannot be the right approach.

Thus, at least two further questions must be addressed, related to the possibility, respectively, of (1) the sufficiency, and (2) the necessity, of the transcendental approach for making comparative judgments about justice. First, can the answers to transcendental queries take us indirectly to comparative assessments of justice as well, in particular through comparisons of "distances" from transcendence at which particular sets of societal arrangements respectively stand? Second, can it be the case that the transcendental question ("What is a just society?") has to be answered first, as an essential requirement, for a cogent and well-founded theory of comparative justice, which would otherwise be foundationally disjunctive and frail? For an adequate critique of the transcendental approach to justice from the comparative perspective, we have to assess these possibilities critically.

Implicit beliefs in the sufficiency or the necessity (or both) of a transcendental approach for comparative assessment clearly have had a powerful role in the widespread belief that the transcendental approach is crucial for the entire theory of justice. Indeed, even in social choice theory, where the analytical framework is firmly relational and altogether grounded on pairwise comparisons, the investigations of justice in particular has been standardly elongated to move relentlessly from the basic comparative rankings to the identification of transcendental justice (often in the Rawlsian mold).[4] In arguing for a more robustly comparative approach to justice, with which this paper is concerned (and for which social choice theory can play, I would suggest, an important role), it would be necessary to examine whether comparative conclusions either *follow from*, or *need*, some transcendental identification.

Does Transcendental Specification Yield Comparative Rankings?

I begin with the issue of *sufficiency*. Does a transcendental approach produce, as a by-product, relational conclusions that are ready to be drawn out, so that transcendence may end up giving us a great deal more than its overt form articulates? In particular, is the specification of an entirely just society sufficient to give us rankings of departures from justness in terms of comparative "distances" from perfection, so that a transcendental identification might immediately entail comparative gradings as well?

The answer here is a firm no. The main difficulty lies in the fact that there are different features involved in identifying distance, related, among other distinctions, to (1) different fields of departure, (2) varying dimensionalities of transgressions within the same general field, and (3) diverse ways of weighing separate infractions. The identification of transcendence does not yield any means of addressing these problems to arrive at a relational ranking of departures from transcendence.

For example, in the context of the Rawlsian analysis of the just society, departures may occur in many different spaces. They can include the breaching of liberty, which, furthermore, can involve diverse violations of distinctive liberties (many of which figure in Rawls's capacious coverage of liberty and its priority). There can also be violations – again in possibly disparate forms – of the demands of equity in the distribution of primary goods (there can be many different departures from the demands of the Difference Principle which forms a part of Rawls's second principle). Similarly, diverse transgressions can occur in other transcendental theories of justice (for example, those that would replace the Rawlsian focus on "primary goods" in the Difference Principle by concentrating respectively on "capabilities" or "resources" or "opportunities," or some other way of formulating the allocational and distributional needs of transcendental justice).

There are also disparate ways of assessing the extent of each such discrepancy and of appraising the comparative remoteness of actual distributions from what the principles of full justice would demand. Further, we have to consider departures in procedural equity (such as infringements of fair equality of public opportunities or facilities), which figure within the domain of Rawlsian demands of justice (in the first part of second principle). To weigh these procedural departures *against* infelicities of emergent patterns of interpersonal distribution (for example, distributions of primary goods), which also figure in the Rawlsian system, would require distinct specification – possibly in axiomatic terms – of relative importance or significance (or "trade-offs" as they are sometimes called in the crude vocabulary of multidimensional assessment). But these extensions, helpful as they would be, lie well beyond the specific exercise of the identification of transcendence, and are indeed the basic ingredients of a "comparative" rather

than a "transcendental" approach to justice. The characterization of spotless justice does not entail any delineation whatever of how diverse departures from spotlessness can be compared and ranked.

The absence of such comparative implications is not, of course, an embarrassment for a transcendental theory of justice, seen as a freestanding achievement. The relational silence is not, in any sense, an internal difficulty of a transcendental theory of justice. Indeed, some pure transcendentalists would be utterly opposed even to flirting with gradings and comparative assessments, and may quite plausibly shun relational conclusions altogether. They may point in particular to their understanding that a "right" social arrangement must not, in any way, be understood as a "best" social arrangement, which could open the door to what is sometimes seen as the intellectually mushy world of graded evaluations in the form of "better" or "worse" (linked with the relationally superlative "best"). The absoluteness of the transcendental "right" – against the relativities of the "better" and the "best" – may well have a powerfully reasoned standing of its own. But it does not help at all in *comparative assessments* of justice.

To be sure, members of any polity can contemplate how a gigantic and totally comprehensive reorganization may be brought about, moving us *at one go* to the ideal of a fully just society. A no-nonsense transcendental theory can serve, in this sense, as something like the "grand revolutionary's complete handbook." But that handbook would not be much invoked in the debates on justice in which we are constantly engaged, which focus on how to reduce the manifold injustices that characterize the world.[5]

Even if we think of transcendence not in the "gradingless" terms of "right" social arrangements, but in the graded terms of the "best" social arrangements, the identification of the best does not, in itself, tell us much about the full grading, such as how to compare two non-best alternatives. The identification of the best does not specify a unique ranking with respect to which the best stands at the pinnacle; indeed the same best may go with a great many different rankings with the same pinnacle. To consider an analogy, the fact that a person regards the *Mona Lisa* as the best picture in the world, does not reveal how she would rank a Gauguin against a Van Gogh. The search for transcendental justice is an engaging exercise in itself, but irrespective of whether we think of transcendence in terms of the gradeless "right" or in the framework of the graded "best," it does not tell us much about the comparative merits of many – indeed typically most – of the different societal arrangements.

Is a Transcendental Theory Necessary for Comparisons of Justice?

I now take up the second question, concerning the hypothesis that the identification of the best is necessary, even if not sufficient, to rank any two alternatives in terms of justice. In the usual sense of necessity, this would be a somewhat odd possibility. In the discipline of comparative judgments in any field, relative assessment of two alternatives tends in general to be a matter between them, without there being the necessity of beseeching the help of a third – "irrelevant" – alternative. Indeed, it is not at all obvious why in making the judgment that some social arrangement x is better than an alternative arrangement y, we have to invoke the identification that some quite different alternative z is the "best" or the "right" social arrangement. In arguing for a Picasso over a Dali we do not need to get steamed up about identifying the perfect picture in the world, which would beat the Picassos and the Dalis and all other paintings in the world.

It might, however, be thought that the analogy with aesthetics is problematic since a person might not even have any idea of a perfect picture, in a way that the idea of a perfectly just society has appeared to be identifiable, in transcendental theories of justice. I will argue later on that the existence of a best, or a transcendent, alternative is actually not guaranteed even in the field of justice, but I am ready to proceed, for the moment, on the presumption that such an identification can somehow be made. However, despite this tentative acceptance, the existence of an identifiably inviolate, or best, alternative does not indicate that it is necessary (or indeed useful) to refer to it in judging the relative merits of two other alternatives. For example, we may indeed be willing to accept, with great certainty, that Everest is the tallest mountain in the world, completely unbeatable in terms of stature by any other peak, but that understanding is neither needed, nor particularly helpful, in comparing the heights of, say, Kanchenjunga and Mont Blanc. There would be something very deeply odd in a general belief that a comparison of any two alternatives cannot be sensibly made without a prior identification of a supreme alternative.

Thus, the hypothesis of necessity in the standard sense would be hard to sustain. There is, however, a weaker form of the hypothesis of necessity, which merely asserts that if comparative assessments can be systematically made, then that discipline must also be able to identify the very best. The claim, in this case, would be not so much that two alternatives cannot be compared in

terms of justice without first knowing what the best or the perfect alternative is, but that the comparative ranking of the different alternatives must *inter alia* also be able to identify the answer to the transcendental question regarding the perfectly just society. Or, to put it in another way, if the transcendental question cannot be answered, then nor can be the comparative. This understanding of necessity would not vindicate the need to go *via* the transcendental approach to comparative assessments, but it would at least give transcendental identification a necessary presence in the theory of justice. We have to examine this considerably weaker claim of "necessity" as well.

Comparatives Without Transcendence

Would a sequence of pairwise comparisons invariably lead us to the very best? That presumption has some appeal, since the superlative might indeed appear to be the natural end point of a robust comparative. But this conclusion would, in general, be a *non sequitur*. In fact, it is only with a "well-ordered" ranking (for example, a complete and transitive ordering over a finite set) that we can be sure that the set of pairwise comparisons must also identify a "best" alternative.

We must, therefore, ask: How complete should the assessment be, for it to be a systematic discipline? In the "totalist" approach that characterizes the standard theories of justice (including Rawls's), incompleteness tends to appear as a failure, or at least as a sign of the unfinished nature of the exercise. Indeed, the survival of incompleteness is sometimes seen as a defect of a theory of justice, which calls into question the positive assertions that such a theory makes. In fact, however, a theory of justice that makes systematic room for incompleteness allows one to arrive at possibly quite strong judgments (for example, about the injustice of continuing famines in a world of prosperity, or of persistently grotesque subjugation of women), without having to find highly differentiated assessment of every political and social arrangement in comparison with every other arrangement (for example, addressing such questions as: Is a top income tax rate of 45 percent more just or less just than a top rate of 46 percent?)

I have discussed elsewhere why a systematic and disciplined theory of normative evaluation, including assessment of social justice, need not take a "totalist" form.[6] Incompleteness may be of the lasting kind for several different reasons, including unbridgeable gaps in information, and judgmental unresolvability involving disparate considerations that cannot be entirely eliminated, even with full information. For example, it may be hard to resolve the overall balance of the comparative claims of equity considerations that lie behind Rawlsian lexicographic maximin, compared with, say, sum-ranking in a gross or equity-adjusted form.[7] And yet, despite such durable incompleteness, we may still be able to agree readily that there is a clear social injustice involved in the persistence of endemic hunger or exclusion from medical access, which calls for a well-specified remedying for the *advancement* of justice (or reduction of injustice), even after taking note of the costs involved. Similarly, we may acknowledge the possibility that liberties of different persons may, to some extent, conflict with each other (so that any fine-tuning of the demands of equal liberty may be hard to work out), and yet strongly agree that torturing accused people would be an unjust violation of liberty and that this injustice calls for an urgent rectification.

There is a further consideration that may work powerfully in the direction of making political room for incompleteness of judgments about social justice, even if it were the case that every person had a complete ordering over the possible social arrangements. Since a theory of justice invokes agreement between different parties (for example, in the "original position" in the Rawlsian framework), incompleteness can also arise from the possibility that different persons may continue to have some differences (consistently with agreeing on a lot of the comparative judgments). Even after vested interests and personal priorities have been somehow "taken out" of consideration through such devices as the "veil of ignorance," there may remain possibly conflicting views on social priorities, for example in weighing the claims of need over entitlement to the fruits of one's labor.

Conflicts of distributive principles that are hard to eradicate can be illustrated with an example, which I have discussed in another context. The example is concerned with the problem of deciding which of three children should get a flute about which they are quarrelling. Child A is the only one of the three who knows how to play the flute (the others do not deny this); child B is the only one without any toys of his own (the other two concede that they are much richer and well supplied with engaging amenities); child C has worked hard to make the flute all on his own (the others confirm this). Theorists of different persuasions – utilitarian or egalitarian or libertarian – may believe that a just resolution can be readily spotted here, though, alas, they would

respectively see totally different resolutions as being exactly right. The main point to note in the present context is that the different resolutions all have serious arguments in support of them, and we may not be able to identify exactly one of the alternative arguments as being the only one (to invoke Thomas Scanlon's criterion) that "could be justified to others on grounds that they, if appropriately motivated, could not reasonably reject."[8]

Even when each of the parties involved has his or her own complete specification of justice, the "intersection" between the rankings – that is the *shared* beliefs of the different parties – can yield a partial ranking, if the judgments are not all congruent.[9] The acceptability of evaluative incompleteness is indeed a central subject in social choice in general, and it is relevant to theories of justice as well, even though Rawlsian and other theories assert (and it *is* an assertion rather than something that is established in any clear way) that a full agreement will definitely emerge in the "original position" and in other such formats.[10]

Indeed, for reasons both of incomplete individual evaluations and of incomplete congruence of individual assessments, incompleteness may be a hardy feature of judgments of social justice. This can be problematic for the identification of a perfectly just society, and make transcendental conclusions difficult to derive.[11] And yet, such incompleteness would not prevent making comparative judgments of justice in a great many cases, where there might be fair agreement on particular pairwise rankings, about how to enhance justice and reduce injustice. A partial ordering can be very useful without being able to lead to any transcendental identification of a fully just society.

The question "What is a just society?" is, therefore, not a good *starting point* for a useful theory of justice. To that has to be added the further conclusion that it may not be a plausible *end point* either. A systematic theory of comparative justice does not need, nor does it necessarily yield, an answer to the question "What is a just society?"

Institutional Barriers and Transcendental Silence

I turn now to a different – though not unrelated – feature of the transcendental approach to justice, in particular the extremely demanding institutional requirements of accomplishing pristine justice. The achievement of a fully just society would require a plethora of institutions, including the unfettered operations of a sovereign state. Some of these institutions are absent or defective in many countries in the world; nor can these countries readily establish them. Even without the possibility of setting up some of these institutions, it is, of course, possible to advance justice – or to reduce injustice – to a considerable extent, but while that is good enough for applying the comparative approach to justice, it does not yield the achievement of transcendental justice. If such spotless justice were the only focus of attention in a theory of justice, then the institutional preconditions would form a kind of "entry barrier," leading to an abstinence from applying justice theory to situations in which those exacting institutional demands are not only not currently met but cannot be met in the foreseeable future.

The institutional preconditions would be particularly hard to meet in dealing with, say, problems of global justice. The claim that we need a sovereign state to apply the principles of justice – a claim that was well articulated by Thomas Hobbes – is substantially connected with the elaborate institutional demands of a transcendental understanding of justice. Thomas Nagel's strongly argued dismissal of the relevance of "the idea of global justice" draws on his understanding that these extensive institutional demands cannot be met at the global level at this time. As he puts it, "It seems to me very difficult to resist Hobbes's claim about the relation between justice and sovereignty," and "if Hobbes is right, the idea of global justice without a world government is a chimera."[12] In the global context, Nagel concentrates, therefore, on clarifying other demands, distinguishable from the demands of justice, such as "minimal humanitarian morality" (which "governs our relations to all other persons"), and also to long-run strategies for radical change in institutional possibilities ("I believe the most likely path toward some version of global justice is through the creation of patently unjust and illegitimate global structures of power that are tolerable to the interests of the most powerful current nation-states").[13]

In the Rawlsian approach too, the application of a theory of justice requires an extensive cluster of institutions that determines the basic structure of a fully just society. Not surprisingly, Rawls actually abandons his own principles of justice when it comes to the assessment of how to go about thinking about global justice. In a later contribution, *The Law of Peoples*, Rawls invokes a "second original position," with a fair negotiation involving representatives of different polities – or different "peoples" as Rawls call them – who serve as parties under this second veil of ignorance.[14] However, Rawls does not try to

derive principles of justice that might emanate from this second original position, and concentrates instead on certain general principles of humanitarian behavior. The Rawlsian vehicle of justice that would take us rapidly forward in pursuit of some justice in a justiceless world remains stalled and stationary in the wintry morning of a world without a global state.

To be sure, Rawls need not agree that the world is really unjust if he remains fully attached to the belief that the concept of justice does not apply at the global level. Nagel, on the other hand, seems definitely convinced that "we do not live in a just world" (the opening sentence of "The Problem of Global Justice" (*op. cit*., p. 113)). While I firmly agree with that conclusion (given what I see as the role of a theory of justice, the subject matter of this paper), it is not entirely clear to me how Nagel can make statements of this kind given his conviction that the idea of global justice is "a chimera."[15]

The challenge of making the world less unjust, thus, remains un-addressed within the transcendental approach. It is not, however, at all clear why we should be reduced to silence, so far as justice is concerned, merely because the reach of institutional possibilities does not prepare us for transcendental justice. The question how global justice can nevertheless be advanced remains pertinent to ask, unless we are forcibly removed from the territory of justice on the ground that transcendental justice is the only satisfactory – or the only understandable – idea of justice. Indeed, that question about advancement of justice (or about reduction of global injustice) can be a fruitful part of the subject matter of the deliberative framework of public reasoning. A "public framework of thought," which Rawls has taught us to value and use, should not become wholly inoperative merely because the institutional demands of a perfectly just society have turned out to be infeasible.

There is, thus, a real tension between making good use of public reasoning (drawing on Rawls's powerful, general arguments in that direction) and remaining silent whenever some exacting institutional conditions needed for transcendental justice cannot be entirely fulfilled (a conclusion that emerges from the special transcendental form that Rawls gives to his theory of justice). There is a serious loss here. Public deliberation can be important and useful both in pursuing institutional reform (even when the totality of the institutional reforms needed for perfection cannot be carried out) and in examining what can be done to reduce injustice – a basic question in die comparative approach to justice – even when not all the right institutions are in place.[16] A non-Rawlsian comparative (rather than transcendental) approach to justice can be a good conceptual base for such – essentially Rawlsian – public reasoning.

Transcendental Localism and Global Concerns

The importance of public reasoning for dealing with global problems of justice is a subject of importance on its own. However, it must be acknowledged that even though Rawls was a visionary leader of thought on the importance of public reasoning, he had considerable skepticism about the use of public reasoning at the global level. It is important to separate out two possible grounds for Rawls's reluctance. One issue, which has already been mentioned, is the inapplicability of the exacting framework of transcendental justice at the global level, because of institutional limitations. A second reason for Rawls's reluctance is his insistence on linking public reasoning with the contractarian format of the "original position." This involves a devised deliberative exercise that would appear to be hard to apply beyond the limits of a particular society (or a particular "people," as Rawls defines this collectivity in his later works).[17]

Rawls's statement about the need for a "common standpoint" which was quoted (from *A Theory of Justice*) at the beginning of this paper was immediately followed by the invoking of this particular conceptual device:

> Thus our moral principles and convictions are objective to the extent that they have been arrived at and tested by assuming this general standpoint and by assessing the arguments for them by the restrictions *expressed by the conception of the original position*.[18]

The deliberation thus takes the form of fair negotiation, in which the fairness of the reasoned negotiation is grounded on the demand that the reasoning occurs under a specially conceived veil of ignorance. But the participants in the deliberation are exactly the parties to the social contract for the society in question. A person's voice counts because he or she is directly involved in the social contract, which will "regulate the institutions" of the society of which he is a member.[19]

In contrast with this negotiational justification of the confinement to local points of view, there is a different approach to impartiality which brings in different voices, possibly even from "a distance" (to use Adam Smith's articulate phrase), precisely because these voices

illuminate public decisions and help to make them impartial. In the terminology of conflict resolution, this is more like arbitration, rather than negotiation; the arbitrators need not themselves be parties to the dispute. I have argued elsewhere that the interpretation of fairness and impartiality through an understanding of "fair arbitration" is a serious rival to the route of "fair negotiation," which is the exclusive direction in which the contractarian feature of Rawls's transcendental approach – "justice as fairness" – proceeds.[20]

The approach of fair arbitration is well exemplified by Smith's invoking of the perspectives of "impartial spectators." The impartial spectators are imagined observers who need not be members of the society, and their impartiality does not come, as in the Rawlsian system, exclusively – or even primarily – through the thought experiment of a veil of ignorance about the personal circumstances of individual members of a given society. Rather, the thought experiment by members of society, in the Smithian system of fair arbitration, invokes the judgments of disinterested observers who are not themselves parties to the societal decisions that are to be taken.

In itself this may not seem like a big difference, since both are merely thought experiments that must be undertaken, within the respective formats, by the people in the actual society. Also, there is nothing to prevent the imagined fair arbitrators from undertaking the exercise of placing themselves in the position of the parties involved under a devised veil of ignorance, so that fair arbitration can make good use of the insights that may come from fair negotiation.

However, there are two sources of substantial difference between the Smithian and the Rawlsian procedures. First, the contractarian approach standardly proceeds toward identifying the demands of transcendence (the principal inquiry in the original position is aimed at the demands of a just society), whereas Smith's impartial spectators are typically invoked for contrasting alternatives to throw light on specific issues of advancement or retardation of justice in a comparative approach. A second difference arises from the fact that the impartial observers may be imagined as coming from far as well as near, with questions being asked about how the decisional problem would look to those who may have had different social and institutional experience (a question of some importance, as Smith has argued). While the imagined impartial judges may find it useful to ask *inter alia* what things would look like had they actually been the involved parties (here the exercise would be, in effect, rather similar to the Rawlsian one), they could also be seen as bringing perspectives that are altogether different from the ones generally accepted in the local society and culture.

In the Rawlsian exercise, while there is a procedural requirement of ignorance of personal interests, personal aims, and personal circumstances, nothing is demanded about the knowledge and approbation of shared beliefs – and prejudices – of the society in which these individuals happen to live. In contrast, what the Smithian model of fair arbitration demands is that the people in any society must put in an effort to examine how their own practices and conventions would look to others, including people who are informed about, but not entirely reared in, that society.[21]

Global Perspectives, Local Interests, and Parochialism

The reasons to go beyond the contracting parties in a nation state include at least three distinct concerns: (1) the interests of other people may be affected (for example, by national policies on "global warming," or for that matter what is called the "war against terror"); (2) the local parochialism shared by all (or nearly all) the persons within a given society may call for a distant challenge in the interest of objectivity; and (3) additional knowledge about what is feasible can be acquired from the experiences of other countries.[22]

On the first subject (that is the interests of people beyond borders which may be significantly affected), the arbitration approach allows the possibility of taking note of some of the broader concerns, including distributive ones, about global justice that have led in recent years to attempts to consider a "cosmopolitan" version of the original position, so that the interests of people in other countries, which may be influenced by policies in this country, are not neglected.[23] This is aimed at extending the reach of justice.

It is, however, important to see clearly that the invoking of impartial spectators from elsewhere does not make the Smithian exercise of arbitration by impartial spectators similar to the "cosmopolitan" version of the contractarian approach (which could take the form of including all the people in the world in one gigantic original position, yielding one huge global social contract for an entirely just world). The route of fair arbitration is fundamentally different from that of fair negotiation and of social contract, because of the way impartiality is interpreted.[24] The institutional demands

of the contractarian procedure if aimed at the identification of transcendental justice take us immediately to the need for a sovereign nation, which was the bone of Thomas Nagel's contention. This is a problem that does not arise in a similar way in the case of invoking the device of the impartial spectators to assist in the assessment of justice in a comparative framework.[25]

Nevertheless, there are some similarities between the cosmopolitan version of the social contract and the Smithian invoking of distant observers. The Rawlsian exclusion of foreign nationals from having a voice in the assessment of policies of a country that have influences on the rest of the world is restrained in both the cosmopolitan social contract and in the Smithian exercise of invoking observers from far as well as near.

Second, the approach of the impartial spectator can bring in, *inter alia*, distant perspectives that are detached not only from the particular vested interests of individual citizens, but also from any parochialism of local beliefs that may be generally shared by all members of a given polity or community. One of the possible advantages of the route of fair arbitration is, thus, the greater versatility that the latter has, which can incorporate a systematic procedural challenge to the distortion of parochial convictions.

The avoidance of parochialism was, in fact, one of the principal reasons for Smith's insistence that the impartial spectators must *inter alia* represent perspectives from (as Smith put it) "a certain distance." Smith put the point thus: "we can do this in no other way than by endeavoring to view them with the eyes of other people, or as other people are likely to view them."[26]

In a chapter in *The Theory of Moral Sentiments* entitled "On the Influence of Custom and Fashion upon the Sentiments of Moral Approbation and Disapprobation," Smith argued that "the different situations of different ages and countries are apt…to give different characters to the generality of those who live in them, and their sentiments concerning the particular degree of each quality, that is either blamable or praise-worthy, vary, according to that degree which is usual in their own country, and in their own times."[27] One of Smith's illustrations of such parochial values was the tendency of all political commentators in ancient Greece, including sophisticated Athenians, to regard infanticide as perfectly acceptable social behavior. Even Plato and Aristotle did not depart from expressing approval, Smith noted, of this extraordinary practice which "uninterrupted custom had by this time…thoroughly authorized" in ancient Greece.

The Rawlsian device of losing information about personal identities in a given society, which does much to eliminate the influence of individual vested interests, does not provide any systemic way of avoiding prejudices that are broadly *shared* by everyone within a given society. As it happens, the localism of the contractarian approach is, in fact, reinforced by Rawls's insistence that the transcendental exercise in the original position should concentrate on "the basic structure" of "a closed society: that is, we are to regard it as self-contained and as having no relations with other societies."[28] Smith's argument that we must *inter alia* view our sentiments from "a certain distance from us" is motivated by the need to ask the question whether some appearance of justice is socially biased through the impact of entrenched tradition and local custom. Smith's actual example of infanticide remains distressingly relevant in some societies even today (though no longer in Greece), but there are also many other practices for which justice being seen to be done may usefully invoke, as Smith put it, "the eyes of the rest of mankind."[29]

While an American audience may find it easy to believe that distant perspectives may be usefully brought in, in the case of "backward" societies such as Sudan or Afghanistan, in which, for example, honor killings occur and adulterous women might be stoned to death, there may be no corresponding recognition of the need to do this for more advanced countries like the United States. However, well-established practices that receive widespread support within the borders might be seen as unacceptable to people in many other countries, spread across the world, from Europe to Japan. For example, plentiful use of capital punishments, with or without being accompanied by public jubilation, may need to be addressed not only by asking whether they appear "cruel and unusual" *within* the local US culture, but also in "the eyes of the rest of mankind," which, Smith thought, must be invoked to understand whether "a punishment appears equitable" (*ibid*., p. 104).

The relevance of distant perspectives has a clear bearing on some current debates in the United States, for example, that in the Supreme Court not long ago, on the appropriateness of using capital punishment for crimes committed in juvenile years. The demands of justice being seen to be done even in a country like the United States cannot entirely neglect the understanding that may be generated by how the problem is assessed in other countries in the world. The majority judgment of the Court did not simply "defer to like-minded foreigners" (as Justice Scalia suggested), but accepted that in

the deliberations to arrive at grounded but nonparochial American judgments, it may be useful to take into account the enlightenment that nonlocal perspectives provide, after subjecting them to critical scrutiny in a better informed local framework.

Indeed, the apparent cogency of parochial values often turns on the lack of knowledge of what has proved feasible in the experiences of other people. The inertial defense of infanticide in ancient Greece could be influenced not only by the knowledge of societies in which infanticide is taken to be entirely unacceptable, but also from the fact that these societies are not crumbling into chaos and crisis as a result of not permitting such killing. Despite the undoubted importance of local knowledge, global knowledge has some value too, and can contribute to the debates on parochial values and practices.

Divergence and the Feasibility of the Comparative Approach

In a model of arbitration there is likely to be some divergence of voices on a number of issues, especially when the perspectives sought come from far and wide. Even though there may be considerable convergence of values through global public reasoning, there might well be lasting differences between how the outcomes of such deliberations may emerge in different social and cultural settings. For a transcendental approach to justice dependent on the emergence of a complete agreement on the nature and demands of "global justice," this would of course be an overpowering problem. It is not, however, similarly problematic for the use of the comparative approach to justice. The focus here will be on whether there are significant issues on which agreements or consensus may emerge, especially after public interaction, with exchange of knowledge and understanding. The demands of global justice may not go beyond the agreed ways of enhancing justice in the world in the comparative route to judgments of justice.

Furthermore, the extent of agreement on global rankings may itself go on expanding as the process of interaction continues. The comparative approach does not require an "all or nothing" extremism, and it allows the world to come to grips with intense issues of global injustice (such as famines, widespread hunger, rampant illiteracy, or needless deaths from preventable or manageable diseases), on which consensus may be easier to obtain, without waiting for a full agreement on more contentious evaluations.

A similar thing can be said about taking note of global perspectives in making local decisions that are not primarily matters of global justice: for example, in assessing a national framework of punitive legislation, taking into account whether "a punishment appears equitable," to use Smith's phrase, without neglecting how it appears to people reared in a different background and with different informational understanding. The demands of objectivity not only require avoiding a "personal slant" (as Rawls noted), but also national parochialism (as Smith emphasized). This does not, however, yield any obligation to accept the views of others elsewhere, only that they be taken into account in an overall scrutiny (leading to modification of local priorities in some cases and no revision in others).

Indeed, distant voices too are subject to the discipline of critical scrutiny, including the invoking of impartial spectators from far as well as near. The discipline of fair arbitration in the context of global justice can be seen to be globally interactive. General *acceptability*, which must be distinguished from pre-existing ubiquitous acceptance, is an important issue in any social evaluation, and I have tried to discuss elsewhere why open and interactive public reasoning is centrally important for understanding the claims that human rights make, despite differences in manifest practices *between* countries, and also of course *within* each country.[30]

The common standpoint that may be seen to emerge on the basis of such associative scrutiny may be far from total, and the form of the concordance need not, in many cases, go beyond noting that some social arrangements are seriously unjust in a way that can be remedied, even though other comparisons may be hard to make without substantial ambiguity. A theory of justice need not turn up its nose against the vast reach and relevance of acceptable conclusions on human rights, or social justice, arrived at on the basis of public reasoning, even when they do not amount to a complete resolution of all the existing decisional issues about societal organization.[31]

What Difference Does It Make?

I shall not try to summarize the paper but will briefly note some of the issues discussed here. First, I have argued for rejecting the tradition of focusing on the classic – and much invoked – question "What is a just society?" and in favor of concentrating instead on comparative questions of justice (linked to inquiries about

advancing justice, or reducing injustice). I have presented some reasons for doubting that the transcendental question can typically be answered, but even if it could be, and a transcendental theory of justice were entirely successful in answering that classic question, it would not yield – directly or even indirectly – a comparative framework, which is needed for the actual assessment of justice. On the other side, a comparative theory of justice may be entirely viable and thoroughly usable without containing – or entailing – any answer to the grand question "What is a just society?"

Second, the specification of the demands of full justice, and of the elaborate institutional paraphernalia which have to be marshaled for the pursuit of Rawlsian modeling of justice, leaves open the question how we should assess whether some social change would advance the cause of justice or hinder it – questions that we constantly face in the world, within each country and in the field of global arrangements. For example, having decent patent laws about the production and distribution of pharmaceutical products may do a lot for the miserable and needlessly doomed AIDS patients in the world today, and arguments can be presented to suggest that this would reduce a manifest injustice in the global society. But it will not, on its own, take us anywhere near the demands of Rawlsian transcendental justice.

Third, an implicit belief, which seems fairly common in a substantial part of political philosophy, that the identification of a fully just society is not only crucial for the comprehension of the nature of justice, but also essential for a well-founded relational understanding of justice, has had the effect of giving a fairly ubiquitous role to transcendental analysis of justice in contemporary philosophy. I have argued that this underlying belief may be entirely mistaken. A transcendental approach is neither necessary nor sufficient for answering questions on the advancement of justice that urgently demand our attention, which call for a robustly comparative approach. That approach is sharply different from the exploration of transcendence.

Fourth, there is a need to allow – and sometimes even to assert – incompleteness of relational comparisons of justice. Incompleteness can arise from unbridgeable gaps in information, but also from decisional unresolvability involving disparate considerations that may resist gradation, even with full information. However, possible incompleteness of judgments emerging from the relational route is not an embarrassment for practical reason. Indeed, far from it.[32] The challenge of assessing *advancement*, or identifying *regression*, will very often be not compromised at all by the presence of substantial incompleteness in the rankings of justice.

Fifth, aside from the general importance of incorporating possible incompleteness of evaluations, the admissibility of incompleteness also makes it easier to bring in distant voices in the assessment of justice, which can be critically important for the reach and strength of public reasoning. A procedural requirement to consider nonlocal perspectives can help to avoid undue dominance of local interest as well as possible parochialism of local reasoning shaped by the influence of established conventions and limited informational frameworks (without these being intellectually challenged). We have to go firmly beyond relying on the territorially moored perspectives of "free and equal citizens who are born into that society in which they lead their lives" (to use Rawls's phrase).[33]

The world in which we live is not only unjust, it is, arguably, extraordinarily unjust. It is not frivolous to seek a framework for a theory of justice that concentrates on advancement, not transcendence, and also allows being globally interactive, rather than being intellectually sequestered. We have good reason to abstain from concentrating so fully on the program of identifying the totalist – and possibly parochial – demands of transcendental, contractarian justice. We have to move the theory of justice out of that little corner.

Notes

1 See Rawls, *Political Liberalism* (New York: Columbia University Press, 1993), pp. 110–13.

2 Rawls, *A Theory of Justice* (Cambridge, MA: Harvard University Press, 1971), pp. 516–17. This corresponds to page 453 of the revised edition of the book (Cambridge, MA: Harvard University Press, 1999). On the relation between political objectivity and public reasoning, see also Bruce A. Ackerman, *Social Justice in the Liberal State* (New Haven, CT: Yale University Press, 1980); Joshua Cohen, "An Epistemic Conception of Democracy," *Ethics*, XCVII (1986–7): 26–38; Seyla Benhabib, ed., *Democracy and Difference: Contesting the Boundaries of the Political* (Princeton, NJ: Princeton University Press, 1996); Amy Gutmann and Dennis Thompson, *Democracy and Disagreement* (Cambridge, MA: Harvard University Press, 1996); Thomas Scanlon, *What We Owe to Each Other* (Cambridge, MA: Harvard University Press, 1998).

3 Social choice theory, pioneered in the modern form by Kenneth Arrow (*Social Choice and Individual Values* (New York:

Wiley, 1951)), is based on a fundamentally comparative approach. The analytical priority of the comparative can also be seen in the early formulations of social choice in the eighteenth century, particularly in Marquis de Condorcet, *Essai sur l'Application de l'Analyse à la Probabilité des Decisions rendues à la Pluralité des Voix* (Paris: L'Imprimerie Royale, 1785).

4 The comparative conclusions have typically been pieced together to arrive at some ultimately transcendental claims (a translation that is possible with rather restrictive and limiting assumptions, as will be discussed presently). See, for example, Sen, *Collective Choice and Social Welfare* (San Francisco: Holden-Day, 1970); Kotaro Suzumura, *Rational Choice, Collective Decisions, and Social Welfare* (New York: Cambridge University Press, 1983); Peter J. Hammond, "Equity, Arrow's Conditions and Rawls' Difference Principle," *Econometrica*, XLIV (1976): 793–804; Claude d'Aspremont and Louis Gevers, "Equity and the Informational Basis of Collective Choice," *Review of Economic Studies*, XLVI (1977): 199–209; Arrow, "Extended Sympathy and the Possibility of Social Choice," *American Economic Review*, LXVII (1977): 219–25. The influence of the Rawlsian perspective on justice has been very strong on the application of social choice theory, despite the basic distance between the respective comparative and transcendental approaches.

5 It is worth noting here that the diagnosis of injustice does not demand a unique identification of the "just society," since many different identifications of perfectly just social arrangements may all agree on the diagnosis of a remediable deficiency of a particular social arrangement (say, with manifest hunger or illiteracy or medical neglect).

6 Sen, "Consequential Evaluation and Practical Reason," *Journal of Philosophy*, XCVII, 9 (September 2000): 477–502. See also Sen, *Collective Choice and Social Welfare*; "Maximization and the Act of Choice," *Econometrica*, LXV (1997): 745–79; and "The Possibility of Social Choice," *American Economic Review*, LXXXIX (1999): 349–78; and also "Incompleteness and Reasoned Choice," *Synthese*, CXI (2004): 43–59. See also Isaac Levi's response to the last, in "Amartya Sen," in the same number of *Synthese*, pp. 61–7.

7 The vast literature on this include, among other contributions, S.-Ch. Kolm, "The Optimum Production of Social Justice," in J. Margolis and H. Guitton, eds., *Public Economics* (London: Macmillan, 1969), pp. 145–200; A.B. Atkinson, "On the Measurement of Inequality," *Journal of Economic Theory*, II (1970): 244–63; James Mirrlees, "An Exploration of the Theory of Optimal Income Taxation," *Review of Economic Studies*, XXXVIII (1971): 175–208; Sen, *On Economic Inequality* (New York: Oxford University Press, 1973; enlarged edition with a new addendum jointly written with James Foster, 1997); Claude d'Aspremont and Louis Gevers, "Equity and the Informational Basis of Collective Choice," Eric Maskin, "Decision-making under Ignorance with Implications for Social Choice," *Theory and Decision*, XI (1979): 319–37; Kevin W.S. Roberts, "Interpersonal Comparability and Social Choice Theory," *Review of Economic Studies*, XLVII (1980): 421–39; Charles Blackorby, David Donaldson, and John Weymark, "Social Choice with Interpersonal Utility Comparisons: A Diagrammatic Introduction," *International Economic Review*, XXV (1984): 327–56; d'Aspremont, "Axioms for Social Welfare Ordering," in Leonid Hurwicz, David Schmeidler, and Hugo Sonnenschein, eds., *Social Goals and Social Organization: Essays in Memory of Elisha Pazner* (New York: Cambridge University Press, 1985), pp. 19–76; and d'Aspremont and Gevers, "Social Welfare Functionals and Interpersonal Comparability," Blackorby, Walter Bossert, and Donaldson, "Utilitarianism and the Theory of Justice," and Bhaskar Dutta, "Inequality, Poverty and Welfare," the last three in Arrow, Sen, and Suzumura, eds., *Handbook of Social Choice and Welfare*, Volume 1 (Amsterdam: North-Holland, 2002), chapters 10–12.

8 Scanlon, *What We Owe to Each Other*, p. 5; see also his "Contractualism and Utilitarianism," in Sen and Bernard Williams, eds., *Utilitarianism and Beyond* (New York: Cambridge University Press, 1982), pp. 103–28.

9 The formal characteristics of "intersection partial orderings" are discussed in Sen, *On Economic Inequality*, and "Maximization and the Act of Choice."

10 For an early expression of skepticism about the plausibility of unanimous judgments in the "original position," see my joint essay with W.G. Runciman, "Games, Justice and the General Will," *Mind*, LXXIV (September 1965): 554–62.

11 On a mathematical point, it must be acknowledged that a transitive but incomplete ordering over a finite set will invariably yield one or more "maximal" elements, in the sense of there being no element that is better than a maximal element. Maximality does not, however, guarantee the existence of a best element. The foundational nature of the mathematical distinction involved and its significant implications are investigated in N. Bourbaki, *General Topology*, Parts I and II, English translation (Reading, MA: Addison-Wesley, 1966), and *Theory of Sets* (Reading, MA: Addison-Wesley, 1968). The presence of maximal elements is sufficient for reasoned choice of an alternative that is no worse than any other. It will not, however, in general allow the unfolding of a perfectly just social arrangement, not to mention a unique arrangement of perfect justice (as in the Rawlsian and other transcendental systems). On the far-reaching relevance of the distinction between maximality and optimality (and transcendence), see Sen, "Internal Consistency of Choice," *Econometrica*, LXI (1993): 495–521, and "Maximization and the Act of Choice," *Econometrica*, LXV (1997): 745–79.

12 Nagel, "The Problem of Global Justice," *Philosophy and Public Affairs*, XXXIII (2005): 113–47, here p. 115.

13 Nagel, "The Problem of Global Justice," pp. 130–3, 146–7. An important critique of what Joshua Cohen and Charles Sabel describe as Nagel's "statism" can be found in their

"Extra Rempublicam Nulla Justitia?," *Philosophy and Public Affairs*, XXXIV (Spring 2006): 147–75, in which see also A.L. Julius, "Nagel's Atlas," pp. 176–92.

14 Rawls, *The Law of Peoples* (Cambridge, MA: Harvard University Press, 1999).

15 If Nagel is relying on a possible formal interpretation (by stretching a point) that in the absence of an applicable theory of justice it can indeed be said that "we do not live in a just world," then he could have, with equal ease, also said, "we do not live in an unjust world." That may not, however, have served quite so well as the opening sentence of Nagel's finely argued and sensitive essay, and there is, I would argue, reason to ask ourselves how this asymmetry arises if the idea of global justice is really such a chimera.

16 On this see my "Elements of a Theory of Human Rights," *Philosophy and Public Affairs*, XXXIV (Fall 2004): 315–56.

17 It is, however, important to note that in the version of "contractualism" that Scanlon has developed and explored, which requires judgment about what it "would be reasonable for those affected by a principle to reject," citizenal confinement is neither necessary nor indeed sensible, since the policies and institutions of a nation, or state, or "people," as Rawls calls this collectivity, can significantly affect other people elsewhere. See Scanlon's *What We Owe to Each Other*, and also his earlier contribution, "Contractualism and Utilitarianism."

18 Rawls, *A Theory of Justice* (1971), pp. 517, and (1999), p. 453; italics added.

19 Rawls, *A Theory of Justice* (1971), p. 23.

20 Sen, "Open and Closed Impartiality," *Journal of Philosophy*, XCIX, 9 (September 2002): 445–69.

21 The Rawlsian formulation of the "original position" suffers also from a further problem in specifying the allegedly fixed set of negotiators when the results of the negotiation can change the size and composition of the population involved. This problem of "inclusionary incoherence" (as I called it), which the Smithian approach does not have, was discussed, among other issues, in an earlier essay in the *Journal of Philosophy*, "Open and Closed Impartiality." I shall not, however, further pursue here this rather different type of difficulty.

22 On the last issue, it is worth mentioning that the understanding in different countries of social feasibilities (relevant, for example, for gender justice) and economic feasibilities (relevant, for example, for policies against poverty) is significantly influenced in the contemporary world by learning from the experiences – successes and failures – of other countries; on this see my *Development as Freedom* (New York: Knopf, 1999).

23 See, for example, Thomas Pogge, ed., *Global Justice* (Malden, MA: Blackwell, 2001). See also Deen Chatterjee, *The Ethics of Assistance: Morality and the Distant Needy* (New York: Cambridge University Press, 2004).

24 For example, it can be shown that the cosmopolitan version of the Rawlsian original position is also vulnerable to "inclusionary incoherence" in a way that the Smithian approach is not, as is discussed in my "Open and Closed Impartiality."

25 Here again it must be noted that in the version of "contractualism" presented by Scanlon (*What We Owe to Each Other*), which has many affinities with the Smithian exercise of impartiality, the focus need not be on transcendence only.

26 Smith, *The Theory of Moral Sentiments*, III, 1, 2, p. 110.

27 Smith, *The Theory of Moral Sentiments*, Volume 2.7, p. 204.

28 Rawls, *Political Liberalism*, p. 12.

29 Smith, *Lectures on Jurisprudence*, R.L. Meek, D.D. Raphael, and P.G. Stein, eds. (New York: Oxford, 1978), p. 104.

30 See my "Elements of a Theory of Human Rights," *Philosophy and Public Affairs*, XXXII (Fall 2004): 315–56. See also Joshua Cohen, "Procedure and Substance in Deliberative Democracy," in Seyla Benhabib, ed., *Democracy and Difference: Contesting the Boundaries of the Political* (Princeton: University Press, 1996), pp. 95–119; and Charles Beitz, "Human Rights as a Common Concern," *American Political Science Review*, XCV (June 2001): 229–82.

31 I take up these issues more fully in a forthcoming book to be published by Harvard University Press, called *Freedom and the Theory of Justice*.

32 I have discussed this subject in "Consequential Evaluation and Practical Reason," and some of the underlying analytical concerns in "Maximization and the Act of Choice."

33 Rawls, *Political Liberalism*, p. 23.

3

Utopophobia

David Estlund

It being my intention to write a thing which shall be useful to him who apprehends it, it appears to me more appropriate to follow up the real truth of a matter than the imagination of it; for many have pictured republics and principalities which in fact have never been known or seen, because how one lives is so far distant from how one ought to live, that he who neglects what is done for what ought to be done, sooner effects his ruin than his preservation.

Machiavelli, ***The Prince***, Chapter XV

I Introduction

We are told, by Machiavelli and others, that political philosophy must not be utopian.[1] I am sure there is wisdom in this, but there is also the danger of a chilling effect. Unless we get very clear about what kind of theorizing is appropriately proscribed, there is the risk that a broader set of possible projects will go unpursued, for no good reason. I take up just one part of this question. My thesis is that moral theories of social justice, political authority, political legitimacy, and many other moral-political concepts are not shown to have any defect in virtue of the fact, if it is one, that the alleged requirements or preconditions of these things are not likely ever to be met. If a theory of social justice is offered, and it is objected, "But you and I both know people will never do that," I believe the right response is (as a starter), "I never said they would."

I focus narrowly on the question of likelihood. This is not because there is a set of authors who explicitly impose a likelihood constraint on theorizing about justice. Rather, there is a heterogeneous antipathy in much traditional and contemporary political philosophy for accounts (of which there are also many) of justice according to which it is nothing we have ever seen or ever expect to see.[2] Recently, this point of view plays a role in the burgeoning literature about the idea of political feasibility,[3] and in the so-called ideal/nonideal theory debate about social justice.[4] I conjecture that a tempting idea underlying some of this antipathy is, roughly, that a sound standard of social justice must be something it would be appropriate to set as a practical social goal. Since the likelihood of success is (as I grant) a criterion of appropriate practical goals, likelihood of achieving justice would emerge, on this view, as a constraint on a sound conception of the content of justice. But then, put the other way around, if I am right that likelihood is no such constraint, then it is a mistake to suppose that a sound standard of justice must be an appropriate practical goal.

Machiavelli, in my epigraph, says that theories of politics that describe things that "have never been known

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or seen" could not be "the real truth of the matter." He admits in the next breath, however, that "how one lives is so far distant from how one ought to live." It is, he implicitly admits, one thing to ask what sort of thing we might write that "shall be useful to him who apprehends it," and quite another question what the truth is about how we ought to live. The two questions do not, even in Machiavelli, collapse into the useful. Toward the end, I will briefly consider the question of value and importance of modes of theorizing, but my main concern here – arguing that the truth about justice is not constrained by considerations of the likelihood of success in realizing it – is separate from whether it would be valuable or important to understand the truth about justice.

II Being Realistic, and the Alternatives

The most realistic normative theory of all, of course, would recommend or require people and institutions to be exactly as they actually are already (or exactly as, it so happens, they will come to be). As Rousseau said in the Preface to *Emile*, "'Propose what can be done,' they never stop repeating to me. It is as if I were told, 'Propose doing what is done.'"[5] Few writers believe that things are already, or are bound to be, precisely as they ought to be, and so almost all normative political theory departs from realism in this strict sense. Any theory that implies criticism of actual institutions or behavior is not as realistic as it could be. For example, a normative framework that criticizes existing legal regulations on political advertising for being either too strict or too lax is not entirely, maximally realistic. A theory that criticizes actual voters for being too selfish or too uninformed departs from strict realism in exactly the same way. Since no one will insist on this extreme kind of realism in normative theory, we can safely give it a derogatory label: *complacent realism*.

On the other hand, there are surely ways in which normative political theory can be morally too idealized. It was Rousseau, again, who pledged to proceed, in *The Social Contract*, "taking men as they are, and laws as they might be."[6] "Utopian" is an epithet (its etymology suggests "no place at all") used to ridicule theories that are thought to violate that stricture – to be too unrealistic. Rawls attempts to reclaim the term, speaking of his own "realistic utopianism."[7] I prefer to speak, less eloquently, of the noncomplacent nonutopian range of normative political theories, the range in which most theorists would agree normative political theory should toil. I call this "aspirational theory." "Utopian" remains an epithet in this article, even as I argue that certain modes of normative political theory that are highly unrealistic do not, on that account, have any defect. They therefore do not deserve this epithet that is rightly applied to some other approaches. Utopophobia is the unreasonable fear of utopianism, and it can lead to the marginalization of inquiries and insights that do not suffer the defects of utopianism properly conceived.

A theory can be too unrealistic in various ways. One form of utopian defect might be involved when a conception of society posits moral standards for people or institutions that it is beyond their abilities ever to live up to. The defect, I take it, would be that it *falsely* imposes those standards, since people are not morally failing when they fall short of impossible standards. I accept, for the sake of argument, that "ought" entails "can" – that if something is not within someone's abilities, then it is not required. I do not accept the very different and perverse principle that if it is unlikely (even extremely so), however possible or easy, then it is not required. It is not the case that ought implies reasonably likely.

Even though I will grant it for the sake of argument, it is far from obvious that standards of social justice entail ability. For example, familiar egalitarian accounts of distributive justice will often posit standards such as that people's relative fortunes (or wealth, or resources, and so on) are exactly equal, or proportionate to their relative goodness of will, or equal except when difference are due (in certain ways) to their voluntary choices. It is probably beyond the power of human action, even if it were superbly motivated and deftly organized, ever to bring any of this about (and nonegalitarian views, such as sufficiency and priority views and others, could easily be added to the list). And yet, that may be an inadequate way of dispensing with the claim that these standards are correct about the content of justice. G. A. Cohen plausibly argues that even some things that are beyond an agent's abilities might be "normatively fundamental," in that they ought to be done if they can. Cohen writes, "If justice is, as Justinian said, each person getting her due, then justice is her due irrespective of the constraints that might make it impossible to give it to her."[8] Indeed, judgments of that kind often precede, I think, our more intensive inquiries into what we might be able to do. Justice might be like this: not an ought, but normatively fundamental, and an "ought if we can." So maybe the standard of social justice, whatever it is, is not bound to be within our abilities. For my purposes, this need not be decided, since I want to grant solely for the sake of

argument that standards or requirements of justice, or some associated requirements, do entail ability – that inability refutes them. This is because I will emphasize that in any case an action's being unlikely, even extremely unlikely, does not entail that it is beyond the agent's ability. So even if moral standards of justice entail ability, they would not thereby be shown to be refuted by very low probability.

Consider, then, a theory that holds individuals and institutions to standards that it is within their ability to meet, but that there is good reason to believe they will never meet. So far, I contend, the theory has no defect. It might be a false theory if it claimed that the standards would someday be met, but it does not say that. And we can suppose that it would be false if the standards were impossible to meet, but, again by assumption, they are not. Many things that are within people's abilities will never be done, of course. The imagined theory simply constructs a vision of how a society should and could arrange itself (maybe even without difficulty, an issue I will come back to below), even while acknowledging that this will not happen.

So, for example, suppose this theory posits a conception of democracy in which citizens are publicly and privately highly virtuous (but not more than people are capable of), and institutions are designed accordingly, so that in the imagined world laws are just, rights are protected, the vulnerable are cared for, minorities are embraced and respected, and so on. In an obvious sense, realizing this is not realistic. But by saying that, we do not mean only that it is more than people actually do, that complacent realism is a worthless constraint. Nor do we mean that the standard of virtue used by the theory is impossible for people to live up to. People could behave this well; they just do not and will not. Their failures are avoidable and wrong, but they are also entirely to be expected as a matter of fact, in the scenario I have sketched. So far, as I have said, there is no discernible defect in the theory. For all we have said, the standards to which it holds people and institutions might be sound and true. The fact that people will not live up to them even though they could is, evidently, a defect of people, not of the theory. For lack of a better term, let us call this kind of theory a version of *hopeless aspirational theory*. The name "hopeless" might suggest that I aim to criticize this kind of theory, but in fact I want to defend it. I keep the sad name in order to avoid any suggestion that my point is that maybe the standards will, after all, be met. The possibilities for unanticipated moral achievement in the future are suggested by history to be vast, and highly idealistic political thought might find some justification there. But I am insisting on a different but compatible point. I want to defend political theory that defends standards even though they will *not* be met, and even if we knew this for sure.

III The Ability/Probability Distinction

It is easy to confuse standards that are impossible to meet with standards that will certainly not be met. It is worth dwelling on the distinction in a general way for a moment. If something simply will not happen – if there is no chance of it happening – we are tempted to describe it as impossible. It is sometimes said that "impossible" just means "zero probability," but that view is subject to several serious difficulties, at least where our interest is in what it is possible or impossible to do.

Consider this case: what is the chance that I will dance like a chicken while giving a lecture? It is very, very close to zero, trust me. So should we accept that this is nearly impossible to do? To say that an action is "nearly impossible to do" suggests that it is extremely difficult, but that would be a non sequitur. It does not get more difficult as it gets less likely. This shows, I think, that it would be misleading to call action with zero probability impossible, unless it were added that, in the intended sense of "impossible," this does not mean that it is at all difficult.[9]

To say that a certain action (by a certain agent) is impossible might mean either of two quite different things: First, it sometimes means that the agent cannot do it – that she is unable to do it. We could mark this use of "impossible" by saying that it is impossible *for her to do*. Second, it sometimes means that there is no chance that she will do it, that the (objective) probability of her doing it is zero. This might be marked by saying that it is impossible *that she will do it*. In short, calling an action impossible is sometimes a claim about ability, but sometimes a claim about probability. Missing probability does not entail missing ability. Of course, sometimes the explanation for low probability of an action will be inability, but that is an empirical question in each case.

What I have said suggests that even zero probability that an action will be performed does not entail inability. The reason is that, recall, zero probability does not entail difficulty. Add to this the unexceptional premise that, if some action is easy for an agent, then it is within the agent's ability. It follows that an action's having even zero probability does not entail that it is beyond the agent's ability (or even that it is difficult). This argument

does not depend on denying that there might be some other useful sense of "impossible" that is entailed by zero probability, as I suggest above that we mark with "impossible that she will do it." That kind of impossibility, which is about probability rather than ability, would not engage with the assumption that "ought implies can" – that unless something is within an agent's ability it is not morally required of her. In any case, nothing in my argument depends on a view about the zero probability case, since that is not the form in which idealistic political theories are criticized for being too unlikely. And it is clear that some cases of very low likelihood simply reflect agents' ordinary motives and choices, not obstacles of any kind.

The ability/probability distinction matters a lot for political philosophy. We might not believe in moral standards or requirements that are beyond agents' abilities. But this is not yet any reason for rejecting standards that will (almost) certainly not be met. It is an important question, and one that has not often been directly confronted, what reason there might be to want normative political theory to limit itself to setting standards – standards for judgment – that are not only possible, not only not too difficult, but also not too unlikely to be met in practice. I will be arguing that there is no reason for such a limitation at all.[10]

IV Hopeless Aspirational Theory (Defended)

A hopeless theory can be dangerous, of course. The soundness of the standards might lead some to take actions in their pursuit, and this might be bad. Actions in pursuit of what will never be achieved can be wasteful or even disastrous. A theory that counsels action in pursuit of high standards that are not sufficiently likely to be achieved, where the costs of failing are very high, often deserves to be chastised as utopian. On the other hand, some people might be led by unrealistically high standards to improve themselves or their institutions, even though not all the way (full achievement is hopeless after all, by hypothesis). This might be fine, and even a good thing. But some things that would be good in a context of other good things can be very bad on their own. An important category of example involves institutions that should be a certain way, conjoined with people living up to their duties, but where those institutions would only make things worse, or at least bad, if people do not live up to them. So, for example, suppose that people should be much more (even if not fully) impartial in their choices than they are. Institutions in which victims of injustice can claim compensation might have an unfortunate tendency to encourage partial and selfish thinking, a tendency to think like a victim in order to get the benefits to which a victim would be entitled. The best institutions for the best possible people might avoid mechanisms of victim compensation of certain kinds. But when people are very far from the impartial ideal, it might be a disaster not to have these compensatory institutions. The world is not brought closer to the ideal by having the institutions called for in the ideal even while citizens are far from living up. Rather, those institutions only make things worse. Ideals of society often have this sort of holistic character, and so hopeless realistic normative theories pose the danger of piecemeal "improvements" that are likely only to do more damage.[11] Granting these dangers, they nevertheless reveal no defect in the hopeless theory, which might be perfectly correct, even for all the danger. What to do in such a case is an important question, but it is important to see how separate that is from the question of what the truth (or the best theory) is about justice, authority, legitimacy, and so on.

It might seem that a theory is not moral or normative unless it counsels action of some kind. A hopeless theory, in the present sense, might seem not to counsel any action, and so not to be normative. First, however, a theory can be normative in one sense by being evaluative, whether or not evaluation itself counsels action. "Society would be better like this" might be true whether or not there is anything it makes sense to do in light of this fact. And if the kind of value in question is not aesthetic, or epistemic, or instrumental, it might best be thought of as moral. Still, this would not yet make it practical in any way, and that is a separate complaint: hopeless aspirational theory might be merely evaluative, without any practical import. But, second, the sort of hopeless realistic theory in question does prescribe action in a certain way after all. It counsels society to behave differently, and in ways that it could. It is not rendered practically idle just because the requirement will not be met. Bad behavior does not strip the practicality from requirements to behave better.

This brings us naturally to the idea of a hopeful (by which I mean simply nonhopeless) realistic normative political theory. This is one that applies appropriate standards that are not only possible for people and institutions to meet (that is, within their abilities), but that it is also reasonable to believe they might meet. It is hard to resist the sense that a hopeful theory is a better kind of

theory. Still, I think this is an important mistake. There is no defect in a hopeless aspirational normative theory, and so none that hopeful theories avoid to their advantage. Things are better in one way, of course, if the best theory turns out to be hopeful rather than hopeless: it is unfortunate if people will not live up to sound moral requirements, and fortunate if they will. But this consideration is patently not any evidence or support for a less hopeless theory. That would be simply to believe in different, more easily satisfied moral standards for the reason that they are more likely to be satisfied. This is not moral reasoning at all. The likelihood that a person will not behave in a certain (entirely possible) way simply does not bear on whether they morally should. It is not a fact that has that kind of moral significance.

A supposed moral standard's difficulty, the strain or sacrifice that would be necessary for a person to meet the standard, is sometimes said to bear on whether it is a genuine moral standard at all, or on whether it provides reasons or duties. So one way in which a normative political theory might expect too much is by demanding something that is possible but yet more than can reasonably be demanded. Utilitarianism is often accused of requiring that we sacrifice our own pursuits and wealth almost endlessly, making the promotion of the total amount of well-being our dominant project. Some say this places demands that agents often have no reason to heed.[12] Many people believe that this would be a defect in the theory even if the demands were entirely possible to meet. To have a handy name for them, let us call theories that purport to require more strain or sacrifice than is genuinely required *harsh*. By definition, then, harsh theories (if there are any) are false. They state standards that are not genuine standards because they demand too much of agents. For the sake of argument, then, I will grant that at some level of required hardship, the theory purporting to require it has the fatal defect of harshness. On the other hand, I have so far not said anything about where the line between harsh and nonharsh theories might lie. I introduce the idea here to point out that a theory might be hopeless without being harsh. As we have said, a hopeless normative standard is one that there is reason to think will never be met, but the explanation might be only that people are unlikely to do what they should do. A standard might be improbable without even being harsh, much less impossible.[13]

There is a place for nonhopeless theory, but it is not somehow privileged. Nonhopeless theory is what we want when we want to know what we should do, in practice, *given* what people and institutions are actually likely to do and taking those facts as fixed. This is obviously an important inquiry. We do, after all, have to act one way or another. Acting as if people or institutions will behave in some better way might sometimes be a way of improving them. But even in that case, action is to be guided by what we think the probabilities are. In other words, an action plan that has false premises about how people or institutions are likely to act is unsound and sometimes dangerous. We need to concede these facts in practice, even if not in all of our moral conclusions. In addition to aspirational theory, then, we also need what I will call *concessive* normative theory. This is different from what I previously called "complacent realism," which eschews all aspirational theory. Concessive theory aims to supplement aspirational theory and is not inimical to it in any way. The view I am arguing against holds that hopeless aspirational theory is misguided, and based on a mistake about moral thinking. The stance I defend here is inclusive: aspirational and concessive theorizing are both perfectly legitimate – there are moral truths and insights of both kinds, and neither enterprise is based on some kind of mistake.

V Aspiration and Concession in Ethics

There is less temptation, for some reason, in moral philosophy than there is in political philosophy to withdraw a principle on the ground that it is too unlikely to be satisfied. Consider the principle "You should not lie except in exceptional circumstances *E*." Fill in the exceptions as you like. Still, on any plausible way of specifying the exceptions, this requirement is not realistic. There is probably no agent who will live up to it. But this does not tempt us to withdraw the requirement. "Ought" might entail "can," but it does not entail "reasonably likely," as we noticed above. It is puzzling why someone would think moral principles about politics should be withdrawn on grounds of improbability when there is no similar constraint in nonpolitical moral contexts. As we have seen, this does not mean that there is no place for a concessive layer of normative political theory. Given that certain sound moral principles of politics are not likely to be met, we can go on to ask what should be done then. If voters will be lazy and selfish, then what should we do politically in light of that fact? This is still a moral question. (And, importantly, I see no general reason to believe that the standard we arrive at on this concessive question will have any greater likelihood of being met than the aspirational standard.)

Is there any analogue to concessive theory in moral philosophy? I believe there is, and the analogy helps to fortify my claim that the nonconcessive layer of normative political theory is above reproach. Frank Jackson and Robert Pargetter describe Professor Procrastinate,[14] who declines a request to referee a manuscript that he is duty bound to referee. He does so because he knows himself well enough to know that if he accepted the assignment, he would procrastinate and only complete the assignment very late, if at all. Is he morally wrong to decline the assignment? In one way he is: he was duty bound to referee the manuscript, but he did not do so. In another way, however, he was morally correct to turn down the assignment since he knew full well that, given that he would not complete it, accepting would impermissibly inconvenience others. Moral questions remain, then, once it is conceded that he is not likely to do everything he should do. This marks out a concessive layer to moral theory that is parallel to the layer of normative political theory that asks what should be done given that certain requirements will not be met. In both cases, the political and the nonpolitical, concessive theory exists alongside nonconcessive theory, the part of theory that states requirements unconstrained by questions about how likely it is that they will be met. He ought to accept and perform the assignment, and this is the nonconcessive layer. It does not disappear or lapse in any way in light of his procrastination.

Shall we say that Professor Procrastinate ought not to accept? This might seem to contradict our having said that he ought to accept the task and perform it. However, that does not commit us to saying that he ought to accept the task. It is a familiar moral fact that some requirements are essentially packaged in this way. Should the doctor make the incision? Well, he ought to make it if he is going to sew it up. Moreover, he ought to do both. But whether he ought to make the incision depends on whether he would sew it up. Suppose he will not sew it up. Then he ought not to make the incision. Still, he ought to make it and sew it up – the patient's life may depend on it. "S ought to do x and y" does not entail "S ought to do x and S ought to do y." This point is closely related to the familiar "problem of second best" discussed above. When there are several desiderata that are desirable as a package, if one of them is not satisfied, the value of the rest of them is thrown back into question.

The analogy, of course, is that it might be that a society ought to build and comply with certain institutions. This is a moral, practical prescription. But if they will not comply, it might well be that they morally ought not to build those institutions. The important point here is that this would not in any way cancel or invalidate the prescription to build and comply.[15]

VI Oughts, Cans, and Groups

When a theory requires a highly unlikely or hopeless degree of widespread political participation, it is natural to think that something here is impossible, or at least too difficult. As I argued above, this might just be a confusion between missing probability and missing ability. However, a separate source for the slide from very low probability to impossibility or difficulty is the quite valid thought that it might well be impossible or very difficult to *get* people to participate to the specified degree. Even if they could all do it, and do it without undue difficulty, it does not follow that anyone could get them to do it. I could easily dance like a chicken while giving a lecture, but you could never get me to (at a price you can afford). My dancing is easy – your getting me to dance is impossible.

Return to a theory requiring widespread political participation. It might not require anyone to get people to do anything. Instead, it is directly requiring the people to participate. There are no requirements here that are impossible or too difficult to fulfill. The point about "getting" can be made first without the extra complexity of a collective. The school requires your adolescent child to be present by starting time every day. When you hear this as a parent, your reaction might be that this is impossible. You know from experience that your son will preen endlessly in front of the mirror in the morning, which will often make him late, and he will do this *no matter what you do*. You simply cannot get him to be at school on time every day. However, the school is not actually requiring anything that is beyond anyone's abilities, because it is not requiring anything of you at all. It is requiring your son to be at school on time, which he could certainly do, even if it is clear that he will not.

The same structure is present in many cases of actions that are required on a mass scale. Assume that it is not impossible or unreasonably difficult to refrain from nepotism in hiring choices. Consider a theory that requires everyone to refrain from nepotism in government hiring. It is impossible, or at least supremely difficult, to get everyone to comply with this rule. If something is impossible, then it is not required. But that only shows that it is not required for anyone to *get* all people to refrain from nepotism. That is no challenge to the theory because it

does not require anyone to get everyone to refrain from nepotism. What it requires, rather, is everyone together to refrain from nepotism. There is no action required by the theory that is difficult, much less impossible.

A final point about oughts and groups concerns two different issues about whether oughts applied to a group also apply to the individuals. One case is where the action is, as I will call it, essentially collective. An example would be a group singing a G chord. This is not the kind of thing an individual can do since the chord is made up of three distinct tones.[16] For that stark reason, we cannot infer from a group's obligation to sing the chord (suppose they have contracted to do so) that any of the individuals ought to sing the chord. Oughts on a group (to do Φ) do not directly distribute over oughts on members (to do Φ) when the group action in question is essentially collective. But, of course, often a member could nevertheless do her part, which would be something other than Φ, and so there is a question whether the obligation on the group entails obligations on members to do their parts. First, this is still not always a possible action if others are not doing their parts, as in the case of "Add the clapboard to the house's frame." But there remain many cases without that holistic aspect, such as refraining from nepotism, voting, keeping agreements, and obeying many laws. These ways of doing one's part will not always be obligatory in the case where others are not playing their part, but the present point is only that these acts would not be impossible and so there is not that basis for denying the obligation.

VII Ideal Theory

I have been arguing that there is no successful argument against political theorizing in which important normative achievements such as justice, authority, and legitimacy are held to depend on conditions that are probably or even certainly never going to happen. Some might call this a defense of "ideal theory," but that term often means other things. Here are two things that are often at issue when the concept of ideal theory is in play: full compliance, and complete and universal moral virtue. Neither is a realistic assumption, and so it is a kind of idealization. It operates under assumptions that are known to be factually false, and does so for certain specified reasons. Full compliance theory, familiar from Rawls,[17] is theory that chooses between principles of (in his case) justice on the assumption that those principles would be fully complied with by the people in the society. The second kind of ideal theory takes people not as they are but as they ought, morally, to be. That is, it operates on the assumption that they are morally good. This is not the same thing as assuming full compliance, since morality might not require compliance with the norms of social justice. In fact it might even prohibit it in some cases, as when obligations to a loved one outweigh the requirements to comply with a certain rule or norm. In both cases, the normative theory takes its conclusions to be conditional on factual assumptions that it grants to be false. This might sound immediately damning, but I doubt that it is (some conditionals are worth knowing in their own right), and in any case I am not arguing for that view here. My concern is simply to distinguish what I call aspirational theory from ideal theory of that kind.

Several authors understand the category of ideal theory as making intentionally false assumptions about the facts.[18] The conclusions, then, are conditional on those counterfactual assumptions. (Of course, if we step back, there is a conditional claim that is offered as unconditionally true.) As O'Neill points out, such "idealizations" are not always meant to be positing ideals. That would be a further thing. It would be an idealization in the general sense to assume that people are rational maximizers of their own utility. It would be an idealization of the more robust and controversial kind to add that this would be a good trait for people to have. In both cases, the assumptions are granted to be false to how people actually are. There might be various reasons for operating on false assumptions. They might be simpler than the truth while yet approximating it in some way. Or, it may be that the question the author is after is one that is essentially about something more ideal than the real world, such as "What should society be like if people were good?"

Consider, though, a theory of social justice that frankly admits that justice will probably never be achieved even though it is still morally required. The theory is not assuming that people will comply, or that they have certain simplified motives, or that they are morally good. It simply says that society is morally required to be a certain way, a way that perhaps it never will be owing to facts about people and the like. It refuses to let certain facts change the content of the theory's conclusions. But that is not the same as assuming anything false about the facts. It is not conditional on any such assumption. It does not say: if people were better, this is what would be required. It says that this is what is required, and the requirement includes within its scope people being better than they will be. It does not (qua

aspirational theory) condition its moral conclusions on any factual assumptions about the extent of compliance or virtue. As a result, it does not pull its punches when those conditions are not met: it judges society to be unjust partly owing to those underlying deficiencies. The difference is between saying that we should have certain institutions *if* people are good (the requirement being conditional on their being good) and saying it is required that people be good *and* have certain institutions (the requirement not being conditional on their being good).

There is a sense in which what I call aspirational theory ignores certain facts. Perhaps we know that people will not inform themselves about politics as well as they ought to. Aspirational theory makes normative assertions whose truth is not conditional on an assumption either way about how well people will inform themselves. It might say, for example, that justice requires various things including self-informing citizens. It "ignores" what we know about poor citizen behavior in the sense that it declines to adjust its normative conclusions to those facts. The important point, though, is that it does not assume that the facts are different. If it did that, then its conclusions would be conditional on those fictional assumptions, and so false. Again, there might be good reasons to theorize in that way among other ways, but that is not what aspirational theory does. It is pointedly *not* conditional on fictional assumptions. Like concessive theory, it applies normative conclusions (such as, for example, "this society is unjust") to society as it actually is. For example, while concessive theory might ask what we should do given that people will not be well informed, aspirational theory might say that a society is not just unless people are well informed. There is no respect in which this assumes or hypothesizes that they are.

VIII Cohen's View Distinguished

There is some affinity between my argument here and the widely discussed arguments of G. A. Cohen,[19] but let me begin by noting a fundamental difference. Cohen asks whether the content of principles of justice is borne upon by facts about how it would work out in practice if those principles were adopted as social rules of regulation. He argues that in adopting rules of regulation, justice is only one of the values that ought to be weighed, alongside nonjustice considerations such as stability and efficiency. Therefore, principles of justice and appropriate rules of regulation answer different questions.

I am taking no stand on this thesis of Cohen's here. My question about principles of justice is not about whether they must be well suited to serve as principles of social regulation. Whether they must or not, there remains the question of whether their ever being satisfied must be reasonably likely, or not too unlikely. The two questions are quite independent: no answer to one supports any answer to the other.

There is the following affinity between my position and Cohen's, however. I agree with Cohen that it is a philosophical mistake to evaluate the truth of a theory of justice according to whether its principles could be put to certain practical uses. Some ask whether they would serve well as rules of regulation. Cohen, as I have said, argues that their suitability for that use is a different question from what justice requires. Similarly, many (I think) think that principles of justice must identify conditions that it is appropriate to set as practical goals. On that view, the likelihood of success in satisfying the principles would be an unavoidable desideratum for a theory of justice, since it is an obvious criterion of appropriate practical goals. In this article, I argue that likelihood of satisfying the principles is not a desideratum of a theory of justice – that it is no defect in a theory of justice if its principles are highly unlikely ever to be met. If this is correct, then it follows that it is a mistake to think that principles of justice must identify conditions that it is appropriate to set as practical goals.

IX Would Perfect People Need Politics?

Here is another obvious issue about which facts to concede and which not to concede. If a normative theory refuses to concede any facts that represent moral failings (along with the other facts it might ignore), then it will be assuming away a lot of crime. Not all crime, since not everything that is illegal is immoral. Still, if we assume complete and universal moral virtue, then what would become of law?[20] The objection is that whereas we might have thought we were investigating a position in political philosophy, politics itself is being assumed away from the beginning. We can make a few points briefly. Would theorizing for the case of moral flawlessness lead, absurdly, to a political philosophy with no place (or an implausibly small place) for laws, police, judges, and juries? Would it be assuming away politics itself? If so, that sounds like a fatal defect in a political philosophy.

Or does it? A lot of work is being done in this objection by a definition. A theory's subject matter is asserted

to lie outside of politics unless it grants a substantial role to laws, police, criminal courts, and so on. Consider a theory that gave compelling arguments for the conclusion that a society could not be characterized by political justice, or authority, or legitimacy in conditions where there was a substantial role for laws, police, and courts. On the definition of politics in question, this would not be a political philosophy. But that is only because politics has been defined out from under it. Fine, let it not count as a political philosophy. This would leave entirely intact its claim to have the correct theory of justice, authority, and legitimacy. If the charge of utopianism is to be a criticism, then it must mean more than this.

I have not seriously considered whether morally flawless people would need laws, courts, police, or other hallmarks of normal political conditions. I have mainly questioned why that question is supposed to matter. The point is not that political theory positively ought to assume moral perfection. It will pay at this point to remind ourselves of the polemical situation. A political theory gives an account of justice, authority, legitimacy, or some other central normative political value, and is confronted by an objection on grounds of realism: we all know, it is said, people will never act in the ways this theory says that justice, or authority, or legitimacy is said to depend upon their behaving. I have argued that it is an adequate reply to point out that the theory never said they would. It only said that there would not be justice or authority or legitimacy (either fully or to some stated degree) unless they did. So far we have not even specified whether the behavior in question would be morally good, much less morally perfect. So there is no pressure implied here for the theory to rest things on moral perfection.

X Does "Ideal Theory" Have Concessive Components?

Some institutions might have no point except in a concessive theory, one that asks what we should do in light of the fact that we will not be doing all we can and should do. Suppose (what is not actually obvious, I think) that if we did all we should do there would be no point in having institutions of punishment. But, since we will not do all we should do, we need institutions of punishment. Now we must ask what they ought to be like. At this point, we face the aspirational/concessive distinction again. One question would be what institutions of punishment we should have if, except for the exceptions we already conceded, we do everything (else) we should do. That is, beginning from a concession, we proceed aspirationally under that constraint. For example, prison staff should presumably abide by certain fair and decent standards, and the prisoners ought to behave as directed. In fact, suppose the guards will not live up to those standards. Now we need a second level of concessive theory, and this highlights the fact that we would thereby be departing from a second level of aspirational (and maybe hopelessly so) theory about what is required of prison guards, an aspirational level of theory that is taking place under a previous level that is concessive. A piece of normative political theory might concede nothing, and that would be purely aspirational. It might, however, concede some things and not others, a mixed case of concessive and aspirational. Or it might concede everything – or almost everything.

There is a limit. It is not clear that it makes any sense for a theory to concede all the facts about what we will do, since that would leave nothing open to be normative about, so to speak. This brings us back to the absurdity of what I called complacent realism. Even if we knew all the facts, including what everyone will do, unless every alternative is beyond people's abilities, all normative theory must be partly aspirational, purporting to recommend or require some things even if they will not be done. That there are important theoretical truths of a hopeless aspirational kind, then, should be beyond dispute. Once that structural point is clear, there is, I think, no good objection – or at least none of the kind we have canvassed here – to hopeless aspirational theory of all degrees, including the limiting case of normative political theory that requires much and concedes nothing.

XI What Good Is It?

If people are not going to comply adequately with the institutions that a just society would require, then, as we have seen, it would probably be wrong to build those institutions. For this sort of reason, the true or best theory of justice, even though it is "action guiding" in the way that moral requirements must be, might have no practical value at all once we ask what to do given that we will not build and comply as required. I have mainly been defending the possibility that even if it is unrealistic in this way the theory might be true (or theoretically sound, if "truth" strikes you as inapt in this context). Even if this is granted, though, it might be asked what good such a theory is.

As I said above, I do not want to diminish the value that ostensibly unrealistic theory can have by virtue of our own limited knowledge of the limits of human possibility. The great achievements in the development of human social life have typically been preceded by incredulity about their very possibility, much less their likelihood. If theoretical inquiry had limited itself to what was plausibly thought to be achievable, the achievements might never have happened. For at least this reason, we ought not to lower our gaze in a practical and realistic spirit.[21]

Recall that the *value* of unrealistic theory is not my point in this article. The point is that a hopeless normative theory might be the true theory. Admittedly, not all truths are of great value. The telephone book contains many relatively unimportant truths.[22] We are talking about the truth about justice, however, and I am inclined to think that there is more importance here, but perhaps this is only because we would have thought that it would be of practical value. If it is not, then what good is it?[23] If that question evinces skepticism about the general possibility of nonpractical value of intellectual work, the case of pure mathematics is difficult for that skeptical view to handle. While their own view of the matter does not settle it, many mathematicians themselves are quite explicit that what motivates their research is not any dimly or clearly suspected practical value, but curiosity itself. In an important lecture a century ago, the great mathematician David Hilbert argued that, even while the origins of mathematical thinking "spring from experience and are suggested by the world of external phenomena" (which does not yet grant a *practical* motive), nevertheless, "in the further development of a branch of mathematics, the human mind, encouraged by the success of its solutions, becomes conscious of its independence. It evolves from itself alone, often without appreciable influence from without, … and appears then itself as the real questioner."[24] The example of "pure mathematics" is meant only to suggest that the general view that only practically applicable intellectual work has value is difficult to maintain without implausibly implying that even what are widely regarded (not just by mathematicians) as the greatest mathematical achievements have, it turns out, no great value of any kind. If higher math is important, then aspirational theory is not shown to be unimportant simply for being (like much higher math) of no practical value.[25] Still, that does not tell us what *is* important about either one. Not all truths are equally important. The truths in the phone book are, except in special situations, not very important. But, I say, truths about justice are. How can this be substantiated? It is not obvious once we allow that truths about, say, justice might be as practically idle as higher math.

Even if (as I doubt) understanding justice would have no practical value, and even if (as I doubt) it is, for that reason, not the kind of thing a person should spent a lot of time on, and even if (as I doubt) such understanding has little or no value of any kind, none of this would show that the truth about justice *is* bound to have practical value. Whether there is any value in knowing about it or not, I have argued that a standard of justice is not automatically shaped so as to guarantee that we ought, given what we know about how we and others will behave in the future, to set out toward achieving it. Looked at the other way around, just because it is not something we ought to set out for does not mean it is not the genuine standard of social justice.

Notes

1 In this article, I develop and expand on ideas first put forward in a few pages (pp. 263–68) of my book *Democratic Authority: A Philosophical Framework* (Princeton, NJ: Princeton University Press, 2008). In particular, Sections II and IV borrow extensively from the language in the book. I am grateful to the press for permission to use that material here.

2 William Galston criticizes normative political theory that sets moral standards unlikely ever to be achieved. Galston, "Realism in Political Theory," *European Journal of Political Theory* 9 (2010): 385. He writes, "Realists reject this account of political theory on the grounds that it is utopian in the wrong way – that it does not represent an ideal of political life achievable under even the most favorable circumstances. Tranquility is fleeting at best; conflict and instability are perennial possibilities. The yearning for a world beyond politics is at best diversionary, at worst destructive" (p. 387). Theorists who Galston takes to accept this general stance include Bernard Williams, Stuart Hampshire, John Dunn, Glen Newey, Richard Bellamy, Geoffrey Hawthorne, Raymond Geuss, John Gray, William Connolly, Bonnie Honig, Chantal Mouffe, Mark Philp, Judith Shklar "and her many admirers who endorse her anti-utopian skepticism," and others.

3 Two articles that also provide references to many other recent treatments of feasibility are Juha Räikkä, "The Feasibility Condition in Political Theory," *Journal of Political Philosophy* 6 (1998): 27–40; and Pablo Gilabert and Holly

Lawford-Smith, "Political Feasibility: A Conceptual Exploration," *Political Studies* 60 (2012): 809–25.

4 For an excellent overview of this literature, see Zofia Stemplowska and Adam Swift, "Ideal and Nonideal Theory," in *The Oxford Handbook of Political Philosophy*, ed. David Estlund (Oxford: Oxford University Press, 2012).

5 Jean Jacques Rousseau, *Emile: or On Education*, trans. Allan Bloom (New York: Basic Books, 1979), p. 34. The original was published in 1762.

6 Jean Jacques Rousseau, *On the Social Contract*, bk. I, para. 1.

7 John Rawls, *The Law of Peoples* (Cambridge, MA: Harvard University Press, 1999), p. 4.

8 G. A. Cohen, *Rescuing Justice and Equality* (Cambridge, MA: Harvard University Press, 2008), pp. 252–53. See the surrounding text for Cohen's argument.

9 Such a notion of impossibility is not conceptually incoherent, since even if being nearer to zero probability does not entail being more nearly impossible, being *at* zero probability could yet entail impossibility. To see how two variables could be related in that way, observe that if circle A and circle B have the same diameter and center point, then they are identical: one and the same circle. And yet, the center points of the two circles can get nearer each other without the circles getting (whatever this would mean) more nearly identical. I thank Josh Schechter for this example.

10 I benefited from comments on an earlier version of this section from Jerry Cohen and Nina Emery.

11 This point is commonly known as the problem of second best. The classic statement is R. G. Lipsey and K. J. Lancaster, "The General Theory of Second Best," *Review of Economic Studies* 24 (1956): 11–33.

12 See discussions in Peter Singer, "Famine, Affluence, and Morality," *Philosophy & Public Affairs* 1 (1972): 229–43; Bernard Williams, *Ethics and the Limits of Philosophy* (London: Taylor & Francis, 2011); Shelly Kagan, "Does Consequentialism Demand Too Much? Recent Work on the Limits of Obligation," *Philosophy & Public Affairs* 13 (1984): 239–54; Samuel Scheffler, "Prerogatives without Restrictions," *Philosophical Perspectives* 6 (1992): 377–97.

13 There might be some things that people cannot bring themselves to do, even though there is no obstacle other than their motivations. This raises different questions from the case where they simply will not do it. Still, I believe there is no good reason to think such motivational incapacities, even any that might be part of human nature, are generally, and as such, constraints on what justice might require. I argue for this in Estlund, "Human Nature and the Limits (If Any) of Political Philosophy," *Philosophy & Public Affairs* 39 (2011).

14 Frank Jackson and Robert Pargetter, "Oughts, Options, and Actualism," *Philosophical Review* 95 (1986): 233–55.

15 I expand on this analogy in Estlund, "Human Nature and the Limits."

16 It is possible to sing two notes at once, as in "overtone singing." Obviously the example can be adjusted, if it turns out some individuals can make three notes, into a G7 chord (4 notes) or a G7b9 chord (5 notes), and so on.

17 John Rawls, *A Theory of Justice* (Cambridge, MA: Belknap Press of Harvard University Press, 1971). The revised second edition was published in 1999. See, for example, pp. 7–8, 215–16, 308–9 (pagination from second edition). See also A. John Simmons, "Ideal and Nonideal Theory," *Philosophy & Public Affairs* 38 (2010): 5–36.

18 O. O'Neill, "Abstraction, Idealization and Ideology in Ethics," in *Moral Philosophy and Contemporary Problems*, ed. J.D.G. Evans (Cambridge: Cambridge University Press, 1988), pp. 55–69. See Alan Hamlin and Zofia Stemplowska, "Theory, Ideal Theory, and Theory of Ideals," *Political Studies Review* 10 (2012): 48–62, for more discussion of this point.

19 G. A. Cohen, *Rescuing Justice and Equality*.

20 See Gregory S. Kavka, "Would Perfect People Need Government?" *Social Philosophy and Policy* 12 (1995): 1–18. Kavka argues that they would.

21 Immanuel Kant writes, "What the highest degree may be at which mankind may have to come to a stand, and how great a gulf may still have to be left between the idea and its realization, are questions which no one can, or ought to, answer. For the issue depends on freedom; and it is in the power of freedom to pass beyond any and every specified limit." Kant, *Critique of Pure Reason*, trans. Norman Kemp Smith (New York: Macmillan, 1929), A317.

22 Ernest Sosa, "For the Love of Truth," in *Virtue Epistemology: Essays on Epistemic Virtue and Responsibility*, ed. Linda Zagzebski (Oxford: Oxford University Press, 2000).

23 I pursue this kind of question at greater length in Estlund, "What Good Is It? Unrealistic Political Theory and the Value of Intellectual Work," *Analyze und Kritik* 33 (2011).

24 David Hilbert, "Mathematical Problems," lecture, 1900.

25 For an extended reflection on the value, but uselessness, of mathematics, see G. H. Hardy, "A Mathematician's Apology" (1940). The text is in the public domain and available online.

4

Political Political Theory: An Inaugural Lecture

Jeremy Waldron

I Hume on Persons versus Institutions

It is a question, said David Hume, "whether there be any essential difference between one form of government and another and, whether every form … may not become good or bad, according as it is well or ill administered,"[1] administered well by men of virtue – that is, people of good character, wisdom, and high principle – or administered badly by fools and knaves who know or care nothing for justice and the common good. "Were it once admitted," Hume continued, "that all governments are alike, and that the only difference consists in the character and conduct of the governors, most political disputes would be at an end, and all zeal for one constitution above another, must be esteemed mere bigotry and folly."[2] Hume imagines people who take that view adopting the maxim of Alexander Pope in the *Essay on Man*: "For forms of government let fools contest / Whate'er is best administer'd is best."[3]

Institutions or the character of those who inhabit them? Should students of politics make a study of the one or the other? Both, surely, would be the obvious answer. They should understand something of political virtue and the demands that the requirements of good government make on the character of those who take on responsibility for public affairs, even if it is no more than the ethic of responsibility that Max Weber recommended.[4] But maybe there is a special reason for studying institutions: to understand the ways in which institutional forms can be designed so as to outwit and outflank what Hume called "the casual humours and characters of particular men."[5]

> Political writers have established it as a maxim, that, in contriving any system of government, and fixing the several checks and controuls of the constitution, every man ought to be supposed a knave, and to have no other end, in all his actions, than private interest. By this interest we must govern him, and, by means of it, make him, notwithstanding his insatiable avarice and ambition, co-operate to public good. Without this … we shall in vain boast of the advantages of any constitution, and shall find, in the end, that we have no security for our liberties or possessions, except the good-will of our rulers; that is, we shall have no security at all.[6]

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The idea that we can devise structures and processes to balance the self-interest of men against one another to promote the common good, even when that is not the prime aim of the individuals whose political habitat we are designing, is familiar to Americans from James Madison's discourse about the separation of powers in *The Federalist Papers*:

> Ambition must be made to counteract ambition. … It may be a reflection on human nature, that such devices should be necessary to control the abuses of government. But what is government itself, but the greatest of all reflections on human nature? If men were angels, no government would be necessary.[7]

It is anticipated precisely in the Humean essays I have been quoting from, written a generation earlier than Madison.

II Choices for Political Theory

One of the places in which Hume pursued the considerations I have mentioned is in an essay devoted to the question of whether politics may be reduced to a science. Hume seems to have believed that political science would be impossible if everything depended on individual character. No political science, just bedside biographies. However, fortunately for the scientist, "the force of laws, and of particular forms of government," is so great and has "so little dependence … on the humours and tempers of men, that consequences almost as general and certain may sometimes be deduced from them" as those we can deduce in the natural and mathematical sciences.[8]

Now, the chair whose sixth occupancy was inaugurated in this lecture is not devoted to political science; it is devoted to social and political theory. But with regard to the political theory, there are similar choices to be made. Where should we direct our philosophical energies? Should we focus on institutions? Or should we focus on the virtues – looking, for example, to test Machiavelli's claim that politics demands a set of virtues quite different from those extolled in the Christian tradition,[9] or the claim of some political theorists that republican and democratic forms of government cannot survive without the prevalence of certain virtues of self-restraint among the politically active section of the population?[10] Is that correct? Or is there a version of the Hume/Madison thesis for subjects as well as their rulers? Can we so design our institutions in a modern democracy that a democratic constitution can survive the corruption of the people, their obsession with material wealth, and their revealed unwillingness to sacrifice anything for their country? What matters – structures or character, institutions or virtue?

III G. A. Cohen

My predecessor in the Chichele Chair of Social and Political Theory was G. A. Cohen. One of the most striking arguments pursued by Cohen in his recent work involved a version of our Humean question. Cohen asked: when we are considering what is necessary for a just society, should we consider only the possibility of changes to the society's institutional structure or must we consider also the possibility of changes at the level of the virtues possessed by the members of the society that we want to make more equal?[11] It is not exactly an either/or question, since institutions do not change by magic. We cannot imagine the changes that would be necessary to make the basic structure of our society more equal without changes of heart on the part of those who have control of the institutions and on the part of those who pressure them and vote for them or against them. Still Cohen pressed a version of Hume's question. Apart from whatever changes of heart are necessary to generate institutional change, can a society really be just if we imagine only its structures being changed, not the character of the citizens – in Rousseau's formulation, taking men as they are and laws as they might be?[12]

Cohen focused this question on a particular suggestion by John Rawls, to the effect that one of his principles of social justice, calling for the amelioration of the position of the worst-off group in society, might require inequality. The talented might require incentives to exercise their talents – a doctor, for example, might need to be paid many times more than a poor worker in order to persuade him to offer his medical services to the poor. Any attempt to lower doctors' salaries in the interests of equality would make the poor people they serve even worse off, because that low salary would deprive doctors of the incentive they presently have to exercise their skills in poor areas of the country. That was Rawls's position.[13]

Cohen's response was that this assumes the doctor's approach to the matter is wholly self-interested, and that

he (the doctor) is not imbued, in his daily life, with the spirit of equality or concern for the worst-off group which is supposedly motivating the Rawlsian enterprise. Rawls was happy to proceed on that basis. But Cohen believed that we should rethink this assumption and consider the pursuit of justice in a society where there is not this gap between social and individual ends.[14] So I guess Cohen is addressing a version of Hume's question: his answer was that we have to look at individual virtue and not just the basic structure.

Except that it is not quite the Humean question. For Cohen was not contrasting an interest in virtue with an interest in forms of government. When he talked of institutions, he meant the institutions of political economy: the market, the system of property, the structure of corporations, the welfare state, and things like the health system and the education system that determine people's chances in life. It was Rawls's view that we could confine our attention to these; Cohen said we also had to look at the character and motivation of those who live and work within them. Not only that, but everything Cohen said about the claims of virtue and about the claims of institutions was said in the shadow of his theorizing about justice. It was ultimately justice (or equality) that mattered for Cohen, not democracy or legislatures or the legal system or the separation of powers. In a paper entitled "How to do Political Philosophy,"[15] Cohen identified three questions that he thought were crucial: (i) What is justice? (ii) What should the state do? (iii) Which social states of affairs ought to be brought about? Those were all questions of aims and ideals. He was much less interested, theoretically, in the political institutions and processes that would be required for the pursuit of these ends.[16]

IV The Dominance of Justice

This is not untypical of modern political theory. I think it indicates that we have to expand Hume's two-fold choice between an emphasis on virtue and an emphasis on institutions. There is also a third option, perhaps the most important one. Maybe our main focus ought to be not on virtue, not on institutions, but on the aims and ideals that direct our politics. I mean ideals like justice, equality, human rights, toleration, liberty, community, prosperity, wealth-maximization, and the common good. We need to replace Hume's dichotomy with a *tri*-chotomy. The question now is whether we should direct our theoretical energy to questions about (1) the individual virtues that good governance requires, or (2) the political institutions that are needed in a good society formed of humans rather than angels, or (3) the ends and ideals that a good society should be seeking to promote.[17] I think it is fair to say that, for some time now, the focus in political theory – both in our teaching and in our writing, particularly in the UK – has been on (3), the ends and ideals that a good society should seek to promote.

Indeed, an enormous amount of energy has been devoted and is being devoted to normative argument and conceptual analysis about the ends of political action – beginning most prominently with Rawls's detailed and articulate theory of justice, published in 1971. Rawls's work has inspired a whole industry comprising thinkers as diverse as Robert Nozick, Ronald Dworkin, Amartya Sen, Michael Walzer, and of course G. A. Cohen too.[18] These theorists examine not only justice but the idea of equality in relation to justice; they ask about the currency of equality (what sort of equality we should be aiming for); they ask about whether equality should be our aim or, instead, a priority of concern for the needs of those who are worst off; and they respond to critics of equality, by examining the importance of individual choices in determining unequal outcomes; and the moral significance of brute bad luck in relation to equality and justice. All of this is focused on topic (3), the aims and policies of a good society and the basic structure of its political economy. Some of this theorizing about our ideals is also projected out into the world – in the study of global justice, for example, and the conditions for being able to say that gross disparities in life chances between people in different parts of the world add up to something like injustice.

In itself this is all fine and valuable work. I want nothing I say here to be read as denigrating the study of justice and equality by my colleagues. I too have contributed to the project, including an article exploring and defending the idea of the primacy of justice among the values and ideals that may be explored in political philosophy.[19] But I worry nevertheless that it is a little one-sided. For precious little attention is paid in the justice-industry or the equality-industry to questions about political process, political institutions, and political structures, including the structures, institutions, and processes that might be implicated in the pursuit of justice or equality at a national or global level.

V Isaiah Berlin

Sometimes I worry that political theory is understood as just applied moral philosophy. Apart from his work in the history of ideas, this seems to have been the view of another of my Chichele predecessors: Isaiah Berlin, who held the chair from 1957 until 1967. Asked in a 1997 interview a few months before his death, "What do you think are the tasks of political philosophy?" Berlin replied: "To examine the ends of life,"[20] and he added that "[p]olitical philosophy is in essence moral philosophy applied to social situations."[21] Admittedly, Berlin went on to say that the social situations to which moral philosophy is applied "of course include political organization, the relations of the individual to the community, the state, and the relations of communities and states to each other." But he gave no indication that these were worth study in their own right.[22]

> The business of political philosophy is to examine the validity of various claims made for various social goals, and the justification of the methods of specifying and attaining these. … It sets itself to evaluate the arguments for and against various ends pursued by human beings. … This is the business of political philosophy and has always been such. No true political philosopher has omitted to do this.[23]

In fact Berlin himself undertook a rather larger agenda than this, looking not just at the ends of life but at broad *zeitgeist* issues such as the clash between romantic nationalism and human individualism,[24] and big-picture diagnosis of the pathologies of certain general currents of thought about man in society. Once again, I don't want to convey the impression that any of this is unimportant. But I do think there are problems with this as a specification of an agenda for political theory.[25]

To read almost any of Berlin's work is to read essays that are resolutely uninterested in the detailed character of political structure. Beyond airy talk of freedom and openness, Berlin was unconcerned with the ways in which liberal or democratic political institutions might accommodate the liberty and diversity he thought so important in human life.[26] Invited by his interviewer to consider "[w]hat possible support can your theory of pluralism give to the problem of democracy?," Berlin simply repeated the commonplace that "[d]emocracy need not be pluralistic,"[27] indicating, by an immediate focus on the prospect of the tyranny of the majority, how his understanding of political theory had inherited philosophy's ancient grudge against democracy nurtured since the trial and execution of Socrates.

VI Realism versus Moralism

So is that it? Is political philosophy just a study of the ends of life? Very recently, we have begun to get glimpses of a different view, for example in some of the essays that Bernard Williams wrote towards the end of *his* life. I have in mind Williams's critique of what he called "political moralism," of the alleged "priority of the moral over the political," the application of what is essentially moral philosophy to the resolution of social issues.[28]

But Williams's alternative was to turn away from moral ideals and to look for distinctively political ideals, like *security*. He was interested in the relation between legitimacy and what he called "the 'first' political question – Thomas Hobbes's question about 'the securing of order, protection, safety, trust, and the conditions of cooperation.'"[29] Williams was helping us cultivate or recall a sense of different and distinctive ends for politics – different from justice, for example.[30] His was not an attempt to locate the distinctive subject-matter of political theory in the realm of political institutions.

VII Topics and Principles

It is time to lay my own cards on the table. I think political institutions are massively important. Exactly because we disagree in our ideals and policy aims, we need to inquire into the structures that are to house and refine our disputes and the processes that are to regulate the way we resolve them, how we (in our millions) resolve disagreements over disparate aims that we severally regard as fundamentally important – without degenerating into fighting driven either by self-interest or worse still by the militias of self-righteousness.[31]

First and foremost we need to understand the foundations of democracy, but not just democracy in a crude undifferentiated sense: we need to understand democratic representation, electoral competition, and democratic political parties.[32] We need to understand the different ways in which the institutions of a modern political system are democratic and to theorize the difference between a representative legislature, an administration headed by a directly or indirectly elected government, and courts in a democracy. We need to

appreciate the difference between different sorts of democratically elected officials: an elected president, elected law-makers, and even, in some American states, an elected judiciary.

But it is not only democracy. It is our responsibility as theorists of politics to reflect on a broader array of issues about constitutional structure. I mean traditional, even fuddy-duddy topics that I worry that we are in danger of losing sight of in British political theory[33] – topics like federalism and devolution; the choice between a unicameral and a bicameral parliament; sovereignty; the separation of powers; checks and balances; the independence of the judiciary; judicial review; the principle of loyal opposition; and the rule of law. Those are the big ones and there are a bunch of lesser principles too, such as civilian control of military (think of S. E. Finer's great book, *The Man on Horseback*),[34] the separation of church and state, and the neutrality of the civil service.

All of this, I believe, is important for us as political theorists to study and write about. Even if our main preoccupation remains with justice, liberty, and equality, we still need to complement and inform that work with an understanding of the mechanisms through which these ideals – these ends of life – will be pursued. This is what I mean by *political* political theory – theory addressing itself to politics and to the way our political institutions house and frame our disagreements about social ideals and orchestrate what is done about whatever aims we can settle on.

I do not argue this on the sort of grounds on which Hume argued for the primacy of institutions over virtue; the Hume/Madison argument that we can set up institutional structures to produce good results whatever the state of individual virtue in the polity.[35] I have no version of that for the choice between a theoretical emphasis on institutions and a theoretical emphasis on justice. In jurisprudence, Lon Fuller toyed with something analogous on the rule of law: he thought that if you do things the right way – follow the right formal, procedural, and institutional pathways (that he called law's inner morality) – you are more likely to end up doing the right thing. If you do things explicitly, consistently, transparently, and with due process, you are less likely to find yourself administering injustice; bad things happen mainly in the dark, on this account, and unjust aims do not have the same coherence as good ones.[36] It is an intriguing hypothesis, but the consensus in legal philosophy has been that it cannot be pushed very far.[37]

Nor is my emphasis on institutions as opposed to ultimate aims based on any doubts concerning the ends of political life or any skepticism about justice and right answers. The fact is that whether these values are objective or not, we have disagreements about them; people who are thoroughly committed to their objectivity disagree about them. That means our philosophy departments have to accommodate disagreement – Rawls and Nozick working away in the same corridor in Emerson Hall at Harvard University – and philosophers have to also frame their disagreements in the way they organize conference panels and published symposia.[38] And if this is true of our professional life in the academy, how much more urgent is it in politics to structure an institutional environment to house and accommodate the rival views, all of whom are convinced that they are right – some of them wrongly, no doubt, but which ones (for the purpose of this structuring)?

Institutions matter, and in a moment I am going to talk about the variety of ways in which they matter. In legal systems and in nation-building (whether we are overhauling our own constitution or trying to establish a new one in Iraq or Afghanistan), it matters what processes we set up. Institutions make a difference, not just to the political game but, through the inclusiveness of the order they establish, to the security, prosperity and openness of the societies in which they are established. A recent book by Daron Acemoglu and James Robinson, *Why Nations Fail: The Origins of Power, Prosperity, and Poverty* is just the latest in a long line of persuasive arguments to this effect.[39]

VIII The Value of Institutions

Very well, you may say, but isn't the study of institutions and political processes a matter for empirical political science? Well, yes and no. Certainly it is a task for empirical political science. The study of how politics actually work within the institutions and procedures we have established: that is the immense and challenging agenda of political science, one that I greatly respect and that political theorists should take much more notice of and dovetail their work with much more than they do.

But this does not preclude the reflective interest of political theory. Institutions are theoretical matters too. And not just for what is sometimes called "*positive*" political theory.[40] The study that I am envisaging is emphatically normative. For we have *choices* to make about our institutions and processes. (Look at the agenda for political and constitutional reform in the UK right now: the referendum about independence for Scotland;

the reform of the House of Lords; and Britain's relation to the European Union and also to the European Court of Human Rights.) We bring to those choices reasons of various kinds and the reasons in turn implicate values and principles that are also the basis for our assessment of existing institutions – parliament, the monarchy, the courts, the administration, the political parties, the country's division into nations with devolved legislatures, our international laws and institutions.

Moreover – and this is very important – not all of the values that are at stake in our understanding of institutions and institutional choices are the straightforward pragmatic or consequentialist values that our realist colleagues in positive political theory or empirical political science are most comfortable talking about. There are many layers of additional value to be considered. Certainly consequential assessment of institutions is important. And it is complicated. On the one hand, there is our assessment of the output of a given institution (compared to the different output that a different institution or a different system of institutions might have yielded). Assessing this means mapping values like justice, equality, liberty, utility, and aggregate prosperity onto the social results of implementing our policies. As Rawls put it in *A Theory of Justice*, "[t]he fundamental criterion for judging any procedure is the justice of its likely results."[41] On the other hand, there are the side-effects of the operation of our institutions on people – often good side-effects, like the educational impact that John Stuart Mill or, in twentieth century political theory, Carole Pateman expected from participatory democracy.[42]

Third, and still in the realm of consequences, there is the analysis of the cost of operating a given institution – salaries, buildings, and so on. Recently there has been discussion in Britain of how much more an elected House of Lords would cost the taxpayer than the present unelected version.[43] Why? Well there are different ways of understanding this. Sometimes it is just a matter of efficiency: are the costs of a second chamber worth the value that it adds to our political process? But democratic theorists may have a different perspective on legislative costs. Whichever house of the legislature you are talking about, people may want to elect individuals who have to give up their jobs to become representatives and who cannot just make do on a daily "allowance." This has always been a problem with candidates for office who are not independently wealthy. So theoretical scrutiny of even this matter of institutional efficiency adds a dimension we might otherwise miss. In general, we have to be very careful with the sort of cold-eyed budgetary approach that applies a ruthless value-added test for each step or phase in our institutional politics. In my home country, New Zealand, it was budgetary considerations that explained the abolition of the upper house, the Legislative Council, in 1950,[44] and in recent years a similarly ruthless efficiency-based approach has led to the elimination of a Parliamentary quorum in the House of Representatives, not to mention the elimination of any requirement that members have to be personally present in the chamber in order to vote (what a waste of their time, it is said, when it could be spent more efficiently somewhere else); the Whips just call out their nominal party strength whenever there is a division. In general, in New Zealand, the efficiency approach to political institutions has engendered the growth of a bullying mentality that insists that, since the government is almost always bound to get its way in the House of Representatives, there can be no real objection to the truncation of formal parliamentary debate by repeated use of urgency and closure motions. It is a sorry spectacle.[45]

So those are some layers of consequentialist analysis, which we as theorists should participate in. But then we have to reflect as well – and this is subtler and more difficult – on certain elements of *non*-consequential assessment. Here I have in mind the deeper layers of dignitarian value, for example, that explain why certain processes like democratic decision-making and the rule of law are important quite apart from their outputs and quite apart from their efficiency. We have to consider ways in which various institutional alternatives embody various kinds of respect for the persons upon whom and in whose name our laws and policies are administered – respect for them as persons, as agents, as centers of intelligence, and respect for their dignity as individuals.

In a courtroom, to take one illustration, we justify the rigid procedural safeguards that are imposed, not just because (consequentially) they make accurate verdicts more likely, but also because of the tribute they pay to the dignity of the person on trial. Deciding what to do about a suspected offender is not like deciding what to do about a rabid dog or a dilapidated house. This is a *person* who is on trial. He will have a case of his own to make, his own version of the facts or his own legal argument to present, and room has to be made for respecting all that whether we think it promotes truth-finding or not.[46]

The same is true in our elective institutions. In his great book, *Considerations on Representative Government*,

Mill pondered the arguments about outcomes but he also insisted that,

> [i]ndependently of … these considerations, it is a personal injustice to withhold from any one … the ordinary privilege of having his voice reckoned in the disposal of affairs in which he has the same interest as other people. If he is compelled to pay, if he may be compelled to fight, if he is required implicitly to obey, he should be legally entitled to be told what for; to have his consent asked, and his opinion counted at its worth. … Every one is degraded … when other people … take upon themselves unlimited power to regulate his destiny. … Every one has a right to feel insulted by being made a nobody, and stamped as of no account.[47]

Dignity, respect; these are not just philosophical theses about Kantian values.[48] They are institutional concerns. The respect and dignity that are embodied in some political systems and the indignity, humiliation, and dismissiveness embodied in others are among the most important values that there are – not least because they entangle themselves with and intensify what people fear or hope for, so far as their political institutions are concerned.

May I use a literary example? Elizabeth Gaskell in her 1848 novel *Mary Barton* tells of the time when desperate and impoverished mill-workers all over England resolved to take their case to Parliament.

> [T]he starving multitudes had heard that the very existence of their distress had been denied in Parliament; and though they felt this strange and inexplicable, yet the idea that their misery had still to be revealed in all its depths, and that then some remedy would be found, soothed their aching hearts, and kept down their rising fury. So a petition was framed, and signed by thousands in the bright spring days of 1839, imploring Parliament to hear witnesses who could testify to the unparalleled destitution of the manufacturing districts. Nottingham, Sheffield, Glasgow, Manchester, and many other towns, were busy appointing delegates to convey this petition, who might speak, not merely of what they had seen, and had heard, but from what they had borne and suffered. Life-worn, gaunt, anxious, hunger-stamped men, were those delegates.[49]

And she writes of the initial pride of Mary Barton's father, John, at being selected as one of those delegates – "the … gladness of heart arising from the idea that he was one of those chosen to be instruments in making known the distresses of the people."[50] But, then, as Mrs. Gaskell says, though the delegation went down to London, "Parliament … refused to listen to the workingmen, when they petitioned, with all the force of their rough, untutored words, to be heard concerning the distress which was riding, like the Conqueror on his Pale Horse, among the people."[51] And John Barton returned to Manchester crushed and in silent despair: "Tell us what happened when you got to th' Parliament House," said a friend of the family. After a little pause, John answered,

> "If you please, neighbour, I'd rather say nought about that. It's not to be forgotten, or forgiven either … As long as I live, our rejection that day will bide in my heart; and as long as I live I shall curse them as so cruelly refused to hear us; but I'll not speak of it no more"[52]

– except to say to his daughter when they were alone: "Mary, we mun speak to our God to hear us, for man will not hearken; no, not now, when we weep tears o' blood."[53] An institution is not just a sociological construct; it is a human entity that confronts human pleas, human claims, human proposals, and human petitions. And in that confrontation there is room for respect and dignity and for degradation and insult; and neither of these may be ignored in our theoretical assessment of the institutions we have.

There is room for indignity, too, in the relation between institutions. In a remarkable book called *Law and the Shaping of the American Labor Movement*, William Forbath, who teaches legal history in Texas, has gathered some observations voiced by labor organizers and labor legislators in America in the 1890s and the early years of the twentieth century, when statute after statute, regulating working hours and working conditions, was falling victim to judicial review.[54] "It has been preached to the men that legislation was the only proper means to secure relief. They were led to believe they could win at the ballot box, and they believe they did win," but the Courts struck their enacted laws down as unconstitutional. "[W]e have tried different laws," said another labor organizer, "and we have tried framing the laws in different ways … and it appears we have always been defeated by the Courts."[55] "I would kill them all and see if that would be considered unconstitutional," said one despairing Colorado mine-worker (according to a company spy).[56] These are *insiders* in a legislative institution confronting a dismissive and high-handed rebuff by another institution. And again, we need to reflect on

all this not just in terms of the value or the justice of the laws that were struck down, but also the bitter indignity of the treatment meted out to these working men and labor politicians in the political life of the communities to which they belonged.

Somebody in our discipline has to have the job of reflecting in these terms on our institutions and our choices among institutional alternatives. The public lawyers do some of it; and if I had my way there would be a much closer connection between political theory and law (even if that were at the expense of the connection between political theory and philosophy). But really, we need both. We certainly do need a sophisticated philosophical understanding of the layers of value that are implicated in the assessment of political institutions. Somebody has to make sure that we do not lose sight of the dignitarian and ontological elements. Someone has to consider how these questions of honor and dignity, political justice and respect, stand alongside the criteria we use (like Rawlsian justice) for evaluating the output of our politics. They don't fit easily together – that much, we can accept from the value-pluralism of Berlin. But they are not to be neglected.

IX Even Beyond Value: Presence

There are other layers too in the evaluation of political institutions. I mean the importance of history, of political aesthetics and the symbolic, ceremonial, maybe even the sacramental, aspects of the processes we use for assembling and deliberating about the common good.[57] There are questions of stability and longevity,[58] about the importance of constitutional reformers being able to look on their work, as Hannah Arendt put it, with the eyes of generations to come.[59]

And if we want to go even deeper, there are layers of reflection about the ontology of political institutions – the ordering presence that they have among us in what might otherwise be a crushing scramble for individual advantage, the roar of millions of blind mouths, shouting slogans and threats at one another, bellowing to get out of each other's way – each convinced that we can forget about processes, that it is only the interest or the justice of the outcome that matters.

Here I draw very heavily on the work of Arendt. (I know Berlin never had any time for the person he called "the egregious Hannah Arendt": "I do not greatly respect the lady's ideas," he said and, though himself neither the most rigorous nor consecutive thinker, his verdict was that "[s]he produces no arguments, no evidence of serious philosophical … thought. It is all a stream of metaphysical free association."[60] This is one of many disagreements I have with Berlin. I have been entranced by Arendt's work since the days of the great *Hannah Arendt Reading Group* in Edinburgh in the 1980s.) That politics needs housing and that building such accommodation can be equated with the framing of a constitution – this is an image that recurs throughout Arendt's writings. Sometimes it is less a metaphor of bricks and mortar than of the furniture that enables us to sit facing one another in politics, separated but brought into relation with one another in just the right way. "The public realm [that] … gathers us together and yet prevents our falling over each other, so to speak."[61] Sometimes this is quite literal: whether in the design of legislative chambers or the shape of the table at the Paris peace talks during the Vietnam War.[62]

Let us go back to what we want from our political institutions. We want there to be (in Mill's words)

> [a] place where every interest and shade of opinion in the country can have its cause even passionately pleaded, in the face of the government and of all other interests and opinions, can compel them to listen, and either comply, or state clearly why they do not.[63]

We want there to be a place for talk as well as decision, particularly when, as Mill puts it, "the subject of talk is the great public interests of the country, and every sentence of it represents the opinion either of some important body of persons in the nation, or of an individual in whom some such body have reposed their confidence."[64] But we cannot have this without procedural rules and processes that enable deliberation among people who have been assembled precisely on account of their diversity and disagreement. Rules of order that are needed precisely because we are not transparent to one another and we disagree radically with one another, yet nevertheless we want to be able to listen and respond to each representative's disagreement with what various others have to say.[65]

Those who know the HBO TV series *The Wire* may remember the episode at the beginning of the third series, where the drug lord Stringer Bell introduces parliamentary procedure, *Robert's Rules of Order*, to try to make meetings of his lieutenants and his drug dealers more orderly and more productive – yielding a wonderful array of quotes like "Motherfucka's got the floor" and "Chair ain't recognize yo' ass."[66] It's not exactly John Stuart Mill; it is exactly what I'm talking about.

Max Weber spoke of an ethic of responsibility in politics.[67] Part of that is the duty of respect for the structures and procedures that frame the political enterprise and that make deliberation and action with others possible. Since the invention of politics, some politicians have thrived on institutional irresponsibility. In a remarkable biography published originally in 1982, the German historian Christian Meier wrote this about Julius Caesar:

> Caesar was insensitive to political institutions and the complex ways in which they operate. … Since his year as consul, if not before, Caesar had been unable to see Rome's institutions as autonomous entities. … He could see them only as instruments in the interplay of forces. His cold gaze passed through everything that Roman society still believed in, lived by, valued and defended. He had no feeling for the power of institutions …, but only for what he found useful or troublesome about them. … In Caesar's eyes no one existed but himself and his opponents. It was all an interpersonal game. … The scene was cleared of any suprapersonal elements. Or if any were left, they were merely props behind which one could take cover or with which one could fight.[68]

Meier's judgment of Caesar is complicated by his understanding that other participants in Roman politics had the opposite vice. They failed to grasp that the decrepit institutions of the Republic did need to be seen and maybe even "seen through" in a way that would permit the question of their restructuring to be raised.[69]

But the point I want to make is that there is something reckless, even pathological, about a mode of political action in which the walls and structures intended to house actions of that kind become suddenly invisible, transparent, even contemptible to a given statesman. Such drastically unmediated proximity – "Now there is just you, and me, and the issue of my greatness" or "Now there is just you and me and our interest in justice" – is alarmingly like the press of millions of bodies against each other that Arendt associates with the destruction of thought and deliberation in mass society.[70]

X Political Theory Teaching

This article began life as an Inaugural Lecture in Oxford and readers may be interested in what my analysis entails for the way we teach the theory of politics in Oxford, one of two compulsory politics papers in *Philosophy, Politics, and Economics* (PPE)?

It is partly a matter of orientation. I am conscious that for most of this article I have run the terms "political theory" and "political philosophy" together. My suggestion has been that even if there is a difference between them, both need to be more political – in the sense of focusing on issues of institutions as well as the ends, aims, and ideals of politics, like justice. But what I am suggesting may involve a slight redirection of interdisciplinary energy. Political philosophy is surely a branch of philosophy; and, inasmuch as our teaching in the theoretical side of PPE presents itself as political philosophy, we naturally orient ourselves towards the Philosophy Department. My predecessor Cohen was comfortable, I think, with that orientation. Me, I am happier with an orientation towards law, and also (as I said) with an approach that looks for political theory to dovetail its concerns with those of empirical political science.

At present, when we give undergraduate lectures and tutorials in this subject, we are careful to ensure that our students understand contemporary arguments about equality, about rights, about liberty, and about justice (including recent arguments about global justice – the expansion of justice from the domestic to the international realm). We would normally expect six out of eight tutorials to be devoted to these topics, with the remaining two devoted to questions that are slightly more political and institutional in character, but only *slightly*. Our students study the obligation to obey the law, and the philosophical foundations of democracy. As things stand, we have not devoted any substantial time in this curriculum to institutional principles such as constitutionalism, the separation of powers, the nature of sovereignty, international law, the rule of law, the legal process, the role of the courts in modern governance, and the case for or against bicameralism. We are lucky if there is time for anything on representation.

Of course the first set of issues is important. Our students do need to be fluent in arguments about justice, liberty, and equality, particularly if that can be brought to bear on the work they are doing on political economy. This is especially so for those who are looking to go on to graduate work and perhaps enter the academic profession. At the same time, one wonders whether the vast majority of our PPE students, who will not become lecturers but who will take up positions in business and industry, in journalism or think-tanks, in the arts or in government, are being given the preparation that they need in the theory of politics.

I mentioned earlier that the UK faces unprecedented issues of constitutional reform and institutional design. There is the possible secession of Scotland: what are the theoretical dimensions of the debate about the scope and timing of a referendum? There is the establishment of a UK Supreme Court and the perceived increase in judicial activism associated with it, under the auspices of the Human Rights Act, or the great debate about the influence of the European Court of Human Rights in Britain's political decision-making. Political theory students in the US are prepared as a matter of course for a debate about judicial review and the challenge to democracy that it gives rise to. But are *our* students in Oxford prepared to debate the British equivalent of these issues, on questions like prisoner voting, for example?[71]

Over the past year or so, there has been great discussion about further reform of the House of Lords: the expulsion of most of the hereditary peers; the precipitation out of the judges; the retention of the bishops; and a debate about whether we want a mostly elected upper house or an appointed one or some combination of the two. My impression is that students of the theory of politics emerge from their tutorials and lectures untouched by and unfamiliar with any of the detailed theoretical arguments that are relevant to Lords reform – arguments by Mill and Bentham on the topic of bicameralism, for example.[72] They will know the crude terms in which these issues are debated in the newspapers, but they will have nothing distinctive from their training in the theory of politics to contribute to the debate.

For example: why exactly was it important to move the judges out of the House of Lords? Separation of powers, you will say. Alright, then: are there any other issues of the separation of powers that are relevant to Lords reform? For example, do we want to reproduce in a second chamber the same executive dominance that we see in the lower house? In Britain, the Cabinet dominates the House of Commons, more or less by constitutional definition. Is that why certain people want to maintain the ascendancy of Commons, because it is the one chamber that the executive can continue to dominate? Is it possible that our upper house could be a genuinely independent legislative assembly, like the US Senate, for example? Or are we wary of setting up such an entity in the midst of our Westminster system?

What would it be like to have the genuinely independent legislature that is promised by the ideal of the separation of powers? That is, an institutional setting where assembled representatives of the people could consider and debate, in a resolutely general way, carefully and through formalized deliberation, the laws that we want to be governed by, without worrying all the time about their prospects for Cabinet office? It is hard, under the best of circumstances, to maintain the focus at this general level. But that is what legislatures are for, at least in our *theory* of governance, and the separation of powers is supposed to facilitate that by making it harder for those whose focus is more on the day-to-day issues of administration to insinuate their executive and political agenda.[73] Should any of this be relevant to House of Lords reform? Or have we given up on the separation of powers, preferring a more compressed, undifferentiated, unarticulated exercise of political power and political accountability?[74] On the other hand, if we *do* want to pay some tribute to the separation of powers, can we really look forward to an *independent* second chamber in our Parliament if its members are not elected but appointed as a result of cronyism, rewards for favors, and government patronage?

For now, these are questions not answers. But I believe the citizens of the UK ought to be thinking along these lines – as should our theorists and our students. We need to deepen everyone's sense of what is at stake here: and we cannot do that without examining all the layers of value that, as I said a few minutes ago, are relevant to institutional assessment.

XI Beyond Oxford

My concerns in this article, however parochial they were in their inception, actually take us far beyond Oxford: they have to do with the orientation of political theory generally. I have a foothold in the academic world of the United States as well as the United Kingdom, and I must say that there is greater receptivity in the US to institutional political theory – what I am calling *political* political theory – than there is in Britain.

Partly it is because the distinction between political theory and political philosophy is more pronounced, though some of the best work on democratic structures in recent years has emerged from US philosophy departments: I have in mind David Estlund's work on the epistemic dimension of our attachment to democracy and Tom Christiano's writing on the relation between democracy and political equality.[75] Detailed work on the justification and the normative dimensions of

democratic institutions occupies a large part of the space that I have in mind when I talk about *political* political theory, and theoretical reflection on it is no doubt sponsored and sustained in the US by keen awareness of the possibly counter-majoritarian aspect of constitutional review, which plays such an important role in political life in that country.

Even those of us who are inclined to impugn the democratic credentials of judicial review are convinced that it is not a simple matter, and theoretical attempts to grapple with this have led to a deepening and an enrichment of our contestation about the true nature of democracy.[76] The debate is deepened also by the work of political theorists like Charles Beitz, writing about political equality and the extent to which it can and cannot underpin a purely procedural account of democracy, and Dennis Thompson bringing to vivid life theoretical issues about electoral justice (as opposed to justice generally) in the American polity.[77] Beyond democracy itself, we need much better theoretical understanding of the role of adjacent institutions and practices too: I have already mentioned Nancy Rosenblum's admirable work on political parties, breaking through a whole reef of theoretical indifference to that subject, which illuminates not only democratic competition but ideas about loyal opposition in American politics as well. Some of this work might be described as a cross-over from empirical political science to political theory: but I prefer to see Thompson's work, for example, and Rosenblum's as an attempt to reunite the study of political aims and political institutions under theoretical auspices that lose nothing in the way of ethical sensitivity and philosophical sophistication by being applied carefully and thoughtfully to real world institutional questions.

And that, it seems to me, is worth emphasizing, on both sides of the Atlantic. Political theory loses nothing if it is taught from start to finish in a way that focuses on questions about institutions, structures, and processes. It loses nothing by being made intelligible to our empirical colleagues and open to their input and interests. We political theorists lose nothing when we insist that our particular concerns and the values and principles that we particularly emphasize are concerns in the first instance about elections, parties, legislatures, courts, states, regimes, and agencies. We are political theorists, not poets, and though the values embodied in our reflections go well beyond the calculation of consequences, they are nevertheless political values, not the ends and virtues of ethical life.

XII Political Theory and the Canon

None of what I have said in this article is new: in some ways it is quite old-fashioned. Certainly the specific issues I have raised – about the rule of law, democracy, bicameralism, dignity in political participation, and the political process generally – are issues that have dominated the canonical writings of the philosophers we study in the history-of-ideas side of our discipline.

I have mentioned Mill a few times, particularly his *Considerations on Representative Government* – still the most important book on democracy in our tradition. But the study of political institutions has been the focus of the theory of politics since Aristotle. In the early modern tradition, we have Hobbes on the structure of sovereignty and the absolutist challenge to the rule of law. There is John Locke with his paradoxical combination of legislative supremacy and legislative constraint and his views on separation of powers. We have Rousseau on the difference between democratic law-making and democratic government, and his repudiation of representation at least so far as the first of these functions is concerned. And, opposed to Rousseau, we have Madison, of course, on the ways in which a popular republic can establish itself over a country of wide extent without becoming trapped in the pitfalls of direct democracy.

Of course there is a case for studying these issues directly, not just as ventriloquists for dead white males from the seventeenth and eighteenth centuries. There is a case for developing a political theory curriculum that encourages our students to approach the questions I have mentioned in their own twenty-first century voices. But at present that is not what we do (not in Oxford, at any rate). Instead we study different topics – Rawls's theory, the 57 different varieties of luck-egalitarianism, and global justice; we neglect the issues of structure, process, sovereignty, and constitution set out in *Leviathan*, or *The Social Contract, The Federalist Papers* or *Two Treatises of Government*. In this regard, by the way, it is quite remarkable that in all his great essays on history of ideas, Isaiah Berlin managed to avoid precisely those thinkers who were interested in political institutions. Or, in the case of Mill and Montesquieu, whom he did write about, Berlin seems to have chosen deliberately to focus on precisely those aspects of Mill's output that had least to do with representative government and those aspects of *The Spirit of the Laws* that were furthest from Montesquieu's concerns about the structures and processes of government.[78] I know that Berlin had distinct work of

his own to do in the history of ideas; but in retrospect, the balance seems a little one-sided.

XIII Hume Again, and Montesquieu

Montesquieu had a theory about all this. He believed that a lack of interest in forms, processes, and structures was typical of a society *en route* to a despotic form of government. And he said that, notwithstanding most people's love of liberty, most nations are subject to despotic government.

> This is easily accounted for. To form a moderate government, it is necessary to combine the several powers; to regulate, temper, and set them in motion; to give, as it were, ballast to one, in order to enable it to counterpoise the other. This is a masterpiece of legislation; rarely produced by hazard, and seldom attained by prudence. On the contrary, a despotic government offers itself, as it were, at first sight; it is uniform throughout; and as passions only *[such as fear and terror]* are requisite to establish it, this is what every capacity may reach.[79]

Despotism is not quite a default position in Montesquieu's scheme of things. But it is the one least characterized by institutional complexity, and it makes the least demands on our institutional imagination.

David Hume, who admired Montesquieu – in a letter he predicted that Montesquieu's work would in due course be regarded as "the wonder of all centuries"[80] – was inclined to agree. He believed, as we have seen, that forms and processes were important in public life as in private life. Even in the ordinary conduct of business,

> [i]n the smallest court or office, the stated forms and methods, by which business must be conducted, are found to be a considerable check on the natural depravity of mankind. Why should not the case be the same in public affairs?[81]

But in politics, nevertheless, "it may be proper to make a distinction." In an absolute government, said Hume, everything depends very much on the personal quality of the ruler, because there are no intermediate structures and no checks and balances to constrain him; just the acclamation of a leader whose qualities and policies happen to appeal to the people.[82]

The deliberative and deliberate processes of a free society slow things down; their articulated and articulate structures stretch things out; they cost money for salaries and furniture and buildings; they provide an irritating place for the raising of inconvenient questions; at their best they respect the dignity of the poorest he or the poorest she that is in England by providing a place for their petitions to be heard. The political institutions of a free society sometimes even require the government to retire from the field defeated, when its victory, in some courtroom or legislative battle, was supposed by political insiders to be a foregone conclusion. I think *all of this* is to be valued and cherished. Some colleagues and some politicians disagree; they celebrate the decline of parliamentarism and the rise of a more decisive executive politics that eschews the laborious channels of an inconvenient constitutionalism.[83] I am not laying odds on who is right. But I am saying that we should reasonably expect the theory of politics, as we teach it and write it, to make a contribution to this debate, the political politics of which confront us now at every turn.

Notes

1 David Hume, "That politics may be reduced to a science," in *Hume, Essays: Moral, Political Literary*, ed. E. F. Miller (Indianapolis: Liberty Classics, 1985), p. 14.
2 Ibid., pp. 14–15.
3 Ibid., p. 14n.
4 Max Weber, "Politics as a vocation," *From Max Weber: Essays in Sociology*, ed. H. H. Gerth and C. Wright Mills (Oxford: Oxford University Press, 1958), pp. 120–6.
5 Hume, "That politics may be reduced to a science," p. 15.
6 David Hume, "On the independence of parliament," *Essays: Moral, Political Literary*, p. 42.
7 James Madison, "Federalist No. 51," in James Madison, Alexander Hamilton, and John Jay, *The Federalist Papers*, ed. I. Kramnick (Harmondsworth: Penguin, 1987), p. 319. See also Immanuel Kant's insistence in the essay on *Perpetual Peace* that "[t]he problem of organizing a nation is solvable even for a people comprised of devils, if only they possess understanding." According to Kant, the problem is this: "So order and organize a group of rational beings who require universal laws for their preservation – though each is secretly inclined to exempt himself from such laws – that, while their private attitudes conflict, these nonetheless so cancel one

another that these beings behave publicly just as if they had no evil attitudes"; Immanuel Kant, *Perpetual Peace and Other Essays*, trans. Ted Humphrey (Indianapolis: Hackett, 1983), p. 124. For some skepticism about Madison's version of this idea see Daryl Levinson and Richard Pildes, "Separation of parties, not powers," *Harvard Law Review*, 119 (2006), 2312–86, at p. 2317: "Madison's vision of competitive branches balancing and checking one another has dominated constitutional thought about the separation of powers through the present. Yet it has never been clear exactly how the Madisonian machine was supposed to operate."

8 Hume, "That politics may be reduced to a science," p. 16.

9 Machiavelli, *The Prince*, ed. Q. Skinner and R. Price (Cambridge: Cambridge University Press, 1988), chs. 15–19, pp. 54–72.

10 See, for example, Montesquieu, *The Spirit of the Laws*, ed. A. M. Cohler, B. C. Miller and H. S. Stone (Cambridge: Cambridge University Press, 1989), bk. III, ch. 3, pp. 22–4.

11 G. A. Cohen, *Rescuing Justice and Equality* (Cambridge, MA: Harvard University Press, 2008), pp. 68–86, 116–50.

12 Jean-Jacques Rousseau, *The Social Contract*, trans. Maurice Cranston (Harmondsworth: Penguin, 1968), p. 1.

13 See John Rawls, *A Theory of Justice*, rev. edn. (Cambridge, MA: Harvard University Press, 1999), pp. 67–8.

14 Cohen, *Rescuing Justice and Equality*, pp. 121 ff.

15 Cohen, *On the Currency of Egalitarian Justice*, ed. M. Otsuka (Princeton, NJ: Princeton University Press, 2011), pp. 235–55, and p. 227.

16 There is not much by Cohen on political institutions – apart from some brief discussion of the proposition that fair value of political equality might require substantial material equality in the Rawlsian scheme: "I believe that … election regulation, of a sort that Rawls would endorse, can produce political democracy under a wide inequality of income and wealth" (Cohen, *Rescuing Justice and Equality*, p. 385).

17 Terminology can be a problem here, because it is possible to use the language of virtue to refer to something like justice. We can say with Rawls that justice is the first virtue of social institutions (*A Theory of Justice*, p. 3), but then we are not talking about personal characteristics in the way that Hume was, although we may be talking about personal characteristics in the way that Cohen was.

18 See, for example, Robert Nozick, *Anarchy, State and Utopia* (Oxford: Blackwell, 1974); Ronald Dworkin, *Sovereign Virtue* (Cambridge, MA: Harvard University Press, 2002) and *Justice for Hedgehogs* (Cambridge, MA: Harvard University Press, 2002); Amartya Sen, *The Idea of Justice* (Harmondsworth: Penguin, 2009); Michael Walzer, *Spheres of Justice* (New York: Basic Books, 1983); and Cohen, *Rescuing Justice and Equality*.

19 See Jeremy Waldron, "The primacy of justice," *Legal Theory*, 9 (2003), 269–94.

20 Ramin Jahanbegloo, *Conversations with Isaiah Berlin* (New York: Charles Scribner's Sons, 1991), p. 46.

21 Ibid.

22 I am told – by Peter Pulzer, in conversation – that Berlin had a considerable interest in political institutions, in the US, in the UK, and elsewhere, even if it did not make its way into his published writings. But see Berlin's introduction to *Washington Despatches, 1941–45: Weekly Political Reports from the British Embassy*, ed. H. G. Nichols (Chicago: University of Chicago Press, 1981), many of which he had himself written.

23 Jahanbegloo, *Conversations with Isaiah Berlin*, pp. 46–7.

24 See, e.g., Isaiah Berlin, "Political ideas in the twentieth century," in Isaiah Berlin, *Four Essays on Liberty* (Oxford: Oxford University Press, 1969), pp. 1–40, at p. 21.

25 The distinction between political theory and political philosophy didn't seem to make any difference to Berlin's agenda, for he also said that "political theory is about the ends of life, about values, about the goals of social existence, about what men in society live by and should live by, about good and evil, right and wrong"; Jahanbegloo, *Conversations with Isaiah Berlin*, pp. 57–8.

26 Compare the following observation by John Rawls in *Political Liberalism* (New York: Columbia University Press, 1993), p. 197n: "For Berlin the realm of values is objective, but values clash and 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 that can allow sufficient space for them all."

27 Jahanbegloo, *Conversations with Isaiah Berlin*, p. 143.

28 See Bernard Williams, "Realism and moralism," in a posthumous collection of his papers, *In the Beginning was the Word*, ed. G. Hawthorn (Princeton, NJ: Princeton University Press, 2006), pp. 1–17, at p. 8.

29 Ibid., p. 3.

30 Again, there is nothing inappropriate about Williams's emphasis on values like security. For an attempt to analyze it using some of Williams's own work, see my essay "Safety and security," in Waldron, *Torture, Terror and Trade-offs: Philosophy for the White House* (Oxford: Oxford University Press, 2010), pp. 111–65, esp. at p. 150. Still one wants this work to be complemented by an account of the institutional contexts in which this value might be pursued.

31 I have argued this at length in Jeremy Waldron, *Law and Disagreement* (Oxford: Oxford University Press, 1999).

32 See Nancy Rosenblum, *On the Side of the Angels: An Appreciation of Parties and Partisanship* (Princeton, NJ: Princeton University Press, 2008), where the author excoriates the lack of interest in political parties in modern political theory.

33 I stress "*British* political theory" because there is much more emphasis on these topics in American legal and political theory than there is in the UK. This is largely because of the prominence of constitutional politics in the US.

34 London: Pall Mall Press, 1962.
35 See text accompanying notes 6–8 above.
36 Lon Fuller, "Positivism and fidelity to law: A reply to Hart," *Harvard Law Review*, 71 (1957), 630–72, at p. 637. See also Lon Fuller, *The Morality of Law* (New Haven, CT: Yale University Press, 1964), ch. 2.
37 For criticisms, see H. L. A. Hart, *The Concept of Law, Second Edition* (Oxford: Clarendon Press, 1994), pp. 206–7 and Matthew Kramer, *In Defense of Legal Positivism* (Oxford: Oxford University Press, 1999).
38 Cf. Waldron, *Law and Disagreement*, pp. 224–31.
39 Daron Acemoglu and James Robinson, *Why Nations Fail* (New York: Crown Publishing, 2012).
40 See, for example, David Austen-Smith and Jeffrey S. Banks, *Positive Political Theory I: Collective Preference* (Ann Arbor: University of Michigan Press, 2008).
41 Rawls, *A Theory of Justice*, p. 230.
42 John Stuart Mill, *Considerations on Representative Government*, in Mill, *On Liberty and Other Essays* (Oxford: Oxford University Press, 1998), pp. 238–56 and Carole Pateman, *Participation and Democratic Theory* (Cambridge: Cambridge University Press, 1970).
43 See, most recently, "House of Lords reform 'will cost taxpayers £500 million,'" *Daily Telegraph*, July 3, 2012.
44 See the account in William Keith Jackson, *The New Zealand Legislative Council: A Study of the Establishment, Failure and Abolition of an Upper House* (Toronto: University of Toronto Press, 1972).
45 For a broad and critical account, see Jeremy Waldron, *Parliamentary Recklessness: Why We Need to Legislate More Carefully*, The 2008 John Graham Lecture (Auckland: Maxim Institute, 2008).
46 See the discussion in Jeremy Waldron, "How law protects dignity," *Cambridge Law Journal*, 71 (2012), 200–22, esp. pp. 208–12.
47 Mill, *Considerations on Representative Government*, pp. 329, 335.
48 Cf. Immanuel Kant, *Groundwork of the Metaphysics of Morals*, ed. M. Gregor (Cambridge: Cambridge University Press, 1998) 42–3 (4: 435 in the Prussian Academy Edition of Kant's works). See also Jeremy Waldron, *Dignity, Rank and Rights* (New York: Oxford University Press, 2012), pp. 23–7.
49 Elizabeth Gaskell, *Mary Barton* (Oxford: Oxford University Press, 2006), ch. viii, pp. 83–4.
50 Ibid., p. 84.
51 Ibid., pp. 95–6.
52 Ibid., p. 98.
53 Ibid., p. 96.
54 William Forbath, *Law and the Shaping of the American Labor Movement* (Cambridge, MA: Harvard University Press, 1991). Forbath lists more than 170 instances in which state or federal statutes of this kind that were struck down during this period (ibid., pp. 177 ff.).
55 Ibid., pp. 47, 56.
56 Ibid., p. 47n.
57 See, e.g., Ajume Wingo, *Veil Politics in Liberal Democratic States* (Cambridge: Cambridge University Press, 2003), ch. 1.
58 Here I have in mind Edmund Burke's admonition against too frequent change: "By this unprincipled facility of changing the state as often, and as much, and in as many ways, as there are floating fancies or fashions, the whole chain and continuity of the commonwealth would be broken. No one generation could link with the other. Men would become little better than the flies of a summer"; *Reflections on the Revolution in France*, ed. J. C. D. Clark (Stanford, CA: Stanford University Press, 2001), p. 259.
59 Hannah Arendt, *On Revolution* (New York: Viking Press, 1963), p. 199.
60 Jahanbegloo, *Conversations with Isaiah Berlin*, p. 82. See also Jeremy Waldron, "What would Hannah say?" *New York Review of Books*, March 15, 2007.
61 Hannah Arendt, *The Human Condition* (Chicago: University of Chicago Press, 1958), p. 52.
62 Cf. Jeremy Waldron, "Arendt's constitutional politics," *The Cambridge Companion to Hannah Arendt*, ed. D. Villa (Cambridge: Cambridge University Press, 2000), p. 205.
63 Mill, *Considerations on Representative Government*, p. 283.
64 Ibid.
65 See Waldron, *Law and Disagreement*, ch. 4, pp. 69–87.
66 David Simon et al., *The Wire* (HBO Television), series 3, episode 1: "Time after time."
67 Weber, *Politics as a Vocation*, p. 120: "We must be clear about the fact that all ethically oriented conduct may be guided by one of two fundamentally differing and irreconcilably opposed maxims: conduct can be oriented to an 'ethic of ultimate ends' or to an 'ethic of responsibility.' [T]here is an abysmal contrast between conduct that follows the maxim of an ethic of ultimate ends – that is, in religious terms, 'The Christian does rightly and leaves the results with the Lord' – and conduct that follows the maxim of an ethic of responsibility, in which case one has to give an account of the foreseeable results of one's action. … Politics is a strong and slow boring of hard boards."
68 Christian Meier, *Caesar*, trans. David McLintock (New York: Basic Books, 1996), pp. 358–9.
69 Ibid., pp. 360–3.
70 Arendt, *On Revolution*, p. 89.
71 The decision of the European Court of Human Rights in *Hirst v United Kingdom (No 2)* [2005] ECHR 681, requiring the UK parliament to revisit the provisions of its electoral legislation that disenfranchised prisoners, provoked a considerable backlash in Britain against the interference of courts in domestic constitutional issues.
72 Mill, "Of a second chamber," *Considerations on Representative Government*, ch. 13. *Jeremy Bentham to his Fellow-Citizens*

of France, *on Houses of Peers and Senates* (London: Robert Heward, 1830), XII §1 and XIII §8 (pp. 39 and 44 respectively); available at <http://oll.libertyfund.org/?option=com_staticxt&staticfile=show.php%3Ftitle=1925&chapter=116768&layout=html&Itemid=27>. I discuss both these texts in Jeremy Waldron, "Bicameralism and the separation of powers," *Current Legal Problems*, 65 (2012), 31–57.

73 I discuss this further in Jeremy Waldron "Separation of powers or division of power," *New York University School of Law Research Paper*, No. 12–20, April 2012; available at <http://ssrn.com/abstract=2045638>.

74 Cf. Eric Posner and Adrian Vermeule, *The Executive Unbound* (New York: Oxford University Press, 2011).

75 See David Estlund, *Democratic Authority* (Princeton, NJ: Princeton University Press, 2008) and Tom Christiano, *The Rule of The Many* (Boulder, CO: Westview Press, 1996) and *The Constitution of Equality* (Oxford: Oxford University Press, 2008).

76 See Jeremy Waldron, "The core of the case against judicial review," *Yale Law Journal*, 115 (2006), 1346–407 and Ronald Dworkin, *Freedom's Law* (Oxford: Oxford University Press, 1996), Introduction and chs. 17–18.

77 Charles Beitz, *Political Equality* (Princeton, NJ: Princeton University Press, 1989) and Dennis Thompson, *Just Elections* (Chicago: University of Chicago Press, 2002). Some comments in Thompson's "Preface" (ibid., pp. viii–ix) about the importance of institutional political theory exactly match the sentiments in this article.

78 See Isaiah Berlin, "John Stuart Mill and the ends of life," in Berlin, *Liberty*, p. 218 and Isaiah Berlin, "Montesquieu," in *Berlin, Against the Current: Essays in the History of Ideas* (Princeton, NJ: Princeton University Press, 2001), 130–61.

79 Montesquieu, *The Spirit of the Laws*, p. 63.

80 The letter is cited in the introduction to David Carrithers, Michael Mosher and Paul Rahe, "Introduction," *Montesquieu's Science of Politics* (New York: Rowman and Littlefield, 2001), p. 3.

81 Hume, "That politics may be reduced to a science," p. 24.

82 Ibid., p. 15.

83 Again, see Posner and Vermeule, *The Executive Unbound*.

PART II

State and Society

5

The State

Quentin Skinner

I

In the Preface to *De cive*, his first published work on government, Hobbes describes his own project as that of undertaking "a more curious search into the rights of states and duties of subjects."[1] Since that time, the idea that the confrontation between individuals and states furnishes the central topic of political theory has come to be almost universally accepted. This makes it easy to overlook the fact that, when Hobbes issued his declaration, he was self-consciously setting a new agenda for the discipline he claimed to have invented, the discipline of political science. His suggestion that the duties of subjects are owed to the state, rather than to the person of a ruler, was still a relatively new and highly contentious one. So was his implied assumption that our duties are owed exclusively to the state, rather than to a multiplicity of jurisdictional authorities, local as well as national, ecclesiastical as well as civil in character. So, above all, was his use of the term "state" to denote this highest form of authority in matters of civil government.

Hobbes's declaration can thus be viewed as marking the end of one distinct phase in the history of political theory as well as the beginning of another and more familiar one. It announces the end of an era in which the concept of public power had been treated in far more personal and charismatic terms. It points to a simpler and altogether more abstract vision, one that has remained with us ever since and has come to be embodied in the use of such terms as *état, stato, staat*, and state.[2] My aim in what follows will be to sketch the historical circumstances out of which these linguistic and conceptual transformations first arose.

II

As early as the fourteenth century, the Latin term *status* – together with such vernacular equivalents as *estat, stato*, and state – can already be found in general use in a variety of political contexts. During this formative period these terms appear to have been employed

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predominantly to refer to the state or standing of rulers themselves.[3] One important source of this usage was undoubtedly the rubric *De statu hominum* from the opening of Justinian's *Digest*. There the authority of Hermogenianus had been adduced for the fundamental claim that, "since all law is established for the sake of human beings, we first need to consider the *status* of such persons, before we consider anything else."[4] Following the revival of Roman Law studies in twelfth-century Italy, the word *status* came in consequence to designate the legal standing of all sorts and conditions of men, with rulers being described as enjoying a distinctive "estate royal," *estat du roi*, or *status regis*.[5]

When the question of a ruler's *status* was raised, this was generally in order to emphasize that it ought to be viewed as a state of majesty, a high estate, a condition of stateliness. Within the well-established monarchies of France and England, we encounter this formula in chronicles and official documents throughout the latter half of the fourteenth century. Froissart, for example, recalls in book I of his *Chroniques* that when the young king of England held court to entertain visiting dignitaries in 1327, "the queen was to be seen there in an *estat* of great nobility."[6] The same usage recurs poignantly in the speech made by William Thirnyng to Richard II in 1399, in which he reminds his former sovereign "in what presence you renounced and ceased of the state of King, and of lordship and of all the dignity and worship that [be] longed thereto" (Topham *et al*. 1783: 424, col. 1).

Underlying the suggestion that a distinctive quality of stateliness "belongs" to kings was the prevailing belief that sovereignty is intimately connected with display, that the presence of majesty serves in itself as an ordering force. This was to prove the most enduring of the many features of charismatic leadership eventually subverted by the emergence of the modern concept of an impersonal state.[7] As late as the end of the seventeenth century, it is still common to find political writers using the word "state" to point to a conceptual connection between the stateliness of rulers and the efficacy of their rule. As one might expect, exponents of divine-right monarchy such as Bossuet continue to speak of the *état* of *majesté* in just such terms (Bossuet 1967: 69, 72). But the same assumptions also survived even among the enemies of kingship. When Milton, for example, describes in his *History of Britain* the famous scene where Canute orders the ocean to "come no further upon my land," he observes that the king sought to give force to his extraordinary command by speaking "with all the state that royalty could put into his countenance" (Milton 1971: 365).

By the end of the fourteenth century, the term *status* had also come to be regularly used to refer to the state or condition of a realm or commonwealth.[8] This conception of the *status reipublicae* was of course classical in origin, appearing frequently in the histories of Livy and Sallust, as well as in Cicero's orations and political works.[9] It can also be found in the *Digest*, most notably under the rubric *De institia et iure*, where the analysis opens with Ulpian's contention that law is concerned with two areas, the public and the private, and that "public law is that which pertains to the *status rei Romanae*."[10]

With the revival of Roman Law, this further piece of legal terminology also passed into general currency. It became common in the fourteenth century, both in France and England, to discuss "the state of the realm" or *estat du roilme* (Post 1964: 310–22). Speaking of the year 1389, for example, Froissart remarks that the king decided at that point "to reform the country *en bon état*, so that everyone would be contented."[11] The idea of linking the good state of a king and his kingdom soon became a commonplace. By the middle of the fifteenth century, petitioners to the English parliament regularly ended their pleas by promising the king that they would "tenderly pray God for the good estate and prosperity of your most noble person of this your noble realm."[12]

If we turn from northern Europe to the Italian city-states, we encounter the same terminology at an even earlier date. The first known advice-books addressed to *podestá* and other city-magistrates in the early years of the thirteenth century already indicate that their main concern is with the *status civitatum*, the state or condition of cities as independent political entities.[13] The anonymous *Oculus pastoralis*, perhaps written as early as the 1220s,[14] repeatedly employs the phrase,[15] as does Giovanni da Viterbo in his treatise *De regimine civitatum*,[16] completed around the year 1250.[17] By the early fourteenth century we find the same concept widely expressed in the vernacular, with writers of *Dictamina* such as Filippo Ceffi offering extensive instruction to magistrates, in the form of model speeches, on how to maintain the *stato* of the city given into their charge (Giannardi 1942: 27, 47, 48, etc.).

Discussing the state or standing of such communities, the point these writers generally wish to stress is that chief magistrates have a duty to maintain their cities in a good, happy, or prosperous state.[18] This ideal of aspiring to uphold the *bonus* or even the *optimus status reipublicae* was again Roman in origin, and was largely taken over from Cicero and Seneca by the thirteenth-century writers of advice-books.[19] The author of the *Oculus pastoralis*

frequently speaks of the need to uphold the happy, advantageous, honorable and prosperous *status* of one's *civitas*.[20] Giovanni da Viterbo likewise insists on the desirability of maintaining the *bonus status* of one's community,[21] while Filippo Ceffi writes with equal confidence in the vernacular of the obligation to preserve a city "in a good and peaceful *stato*," in a "good *stato* and complete peace" (Giannardi 1942: 28).

These writers also provide the first complete restatement of the classical view of what it means for a *civitas* or *respublica* to attain its best state.[22] This requires, they all agree, that our magistrates should follow the dictates of justice in all their public acts, as a result of which the common good will be promoted, the cause of peace upheld, and the general happiness of the people assured. This line of reasoning was later taken up by Aquinas and his numerous Italian disciples at the end of the thirteenth century. Aquinas himself presents the argument at several points in his *Summa*, as well as in his commentary on Aristotle's *Politics*. A judge or magistrate, he declares, "has charge of the common good, which is justice," and ought therefore to act in such a way "as to exhibit a good aspect from the point of view of the *status* of the community as a whole."[23] But the same line of reasoning can already be found a generation earlier in advice-books for city-magistrates. Giovanni da Viterbo, for example, develops precisely the same theory of the *optimus status* in his treatise *De regimine civitatum*, while Brunetto Latini reiterates and enlarges on Giovanni's arguments in his chapter "Dou gouvernement des cités" at the end of his encyclopedic *Livres dou trésor* of 1266.[24]

This vision of the *optimus status reipublicae* later became central to *quattrocento* humanist accounts of the well-ordered political life. When Giovanni Campano (1427–77)[25] analyzes the dangers of faction in his tract *De regendo magistratu*, he declares that "there is nothing I count more unfavourable than this to the *status* and safety of a *respublica*."[26] If the good *status* of a community is to be preserved, he goes on, all individual or factional advantage must be subordinated to the pursuit of justice and "the common good of the city as a whole" (Campano 1502, fo. xxxxvii^{r-v}). Filippo Beroaldo (1453–1505) endorses the same conclusions in a treatise to which he actually gave the title *De optimo statu*. The best state, he argues, can be attained only if our ruler or leading magistrate "remains oblivious of his own good, and ensures that he acts in everything he does in such a way as to promote the public benefit."[27]

Finally, the Erasmian humanists imported precisely the same values and vocabulary into northern Europe in the early years of the sixteenth century. Erasmus (1974:162) himself contrasts the *optimus* with the *pessimus reipublicae status* in his *Institutio* of 1516, and argues that "the happiest *status* is reached when there is a prince whom everyone obeys, when the prince obeys the laws and when the laws answer to our ideals of honesty and equity."[28] His younger contemporary Thomas Starkey (1948: 63; also 65, 66–7) offers a very similar account in his *Dialogue* of what constitutes "the most prosperous and perfect state that in any country, city or town, by policy and wisdom may be established and set." And in More's *Utopia* the figure of Hythloday, the traveler to "the new island of Utopia," likewise insists that because the Utopians live in a society where the laws embody the principles of justice, seriously aim at the common good, and in consequence enable the citizens to live "as happily as possible," we are justified in saying that the Utopians have in fact attained the *optimus status reipublicae* – which is of course the title of More's famous book (More 1965: 244).

III

I now turn to consider the process by which the above usages – all of them common throughout late-medieval Europe – eventually gave rise to recognizably modern discussions of the concept of the state. I shall argue that, if we wish to trace both the acquisition of this concept and at the same time its expression by means of such terms as *status, stato* or state, we ought not to focus our main attention – as medieval historians have commonly done – on the evolution of legal theories about the *status* of kings in the fourteenth and fifteenth centuries.[29] It was rare even among civil lawyers of that period to use the Latin word *status* without qualification,[30] and virtually unheard of for political writers to employ such a barbarism at all. Even when we find *status* being used in such contexts, moreover, it is almost always evident that what is at issue is simply the state or standing of the king or his kingdom, not in the least the modern idea of the state as a separate apparatus of government.

I shall instead suggest that, in order to investigate the process by which the term *status* and its vernacular equivalents first came to acquire their modern range of reference, we need to keep our main attention fixed on the early histories and advice-books for magistrates I have already singled out, as well as on the later mirror-for-princes literature to which they eventually gave rise. It was within these traditions of practical political

reasoning, I shall argue, that the terms *status* and *stato* were first consistently used in new and significantly extended ways.[31]

These genres of political literature were in turn a product of the new and distinctive forms of political organization that arose within late-medieval Italy. Beginning in the early years of the twelfth century, a growing number of cities throughout the *Regnum Italicum* succeeded in acquiring for themselves the status of autonomous and self-governing republics.[32] It is true that these communities later proved unstable, and were widely reorganized in the course of the next century under the stronger and more centralized regimes of hereditary princes (Waley 1978: 128–40). But even in this later period, the great city-republics of Florence and Venice managed to preserve their traditional hostility to the idea of hereditary monarchy, and thereby carried the ideals of participatory republican government into the era of the high Renaissance.[33]

The development of these new political formations posed a new series of questions about the concept of political authority. One of the most pressing concerned the type of regime best suited to ensuring that an independent *civitas* or *respublica* is able to remain in its *optimus status* or best state. Is it wisest to opt for the rule of an hereditary *signore*, or ought one to retain an elective system of government based on a *podestá* or other such magistrate?

Although this question remained in contention throughout the history of Renaissance Italy, it is possible to distinguish two main phases of the debate. The earliest treatises intended for city-magistrates invariably assumed – in line with their Roman authorities – that the best state of a *civitas* can be attained only under an elective form of republican government. After the widespread usurpation of these regimes, however, by the rise of hereditary *signori* in the fourteenth century, this commitment increasingly gave way to the claim that the best means of ensuring the good standing of any political community must be to institute the rule of a wise prince, a *pater patriae*, whose actions will be governed by a desire to foster the common good and hence the general happiness of all his subjects.[34]

Building on this assumption, the writers of mirror-for-princes treatises in the Renaissance generally devoted themselves to considering two related points. Their loftiest aim was to explain how a good ruler can hope to reach the characteristically princely goals of honor and glory for himself while at the same time managing to promote the happiness of his subjects.[35] But their main concern was with a far more basic and urgent question of statecraft: how to advise the new *signori* of Italy, often in highly unsettled circumstances, on how to hold on to their *status principis* or *stato del principe*, their political state or standing as effectively governing rulers of their existing territories.

As a result, the use of the term *stato* to denote the political standing of rulers, together with the discussion of how such rulers should behave if they are to manage *mantenere lo stato*, began to resound through the chronicles and political literature of fourteenth-century Italy. When Giovanni Villani, for example, speaks in his *Istorie Fiorentine* of the civic dissensions that marked the city during the 1290s, he observes that they were largely directed against *il popolo in suo stato e signoria* – against the people in their positions of political power.[36] When Ranieri Sardo in his *Cronaca Pisana* describes the accession of Gherardo d'Appiano as leader of the city in 1399, he remarks that the new *capitano* continued to enjoy the same *stato e governo* – the same political standing and governmental authority – as his father had enjoyed before him (Sardo 1845: 240–1). By the time we reach such late contributions to the mirror-for-princes literature as Machiavelli's *Il principe* of 1513, the question of what a ruler must do if he wishes to maintain his political standing had become the chief topic of debate. Machiavelli's advice is almost entirely directed at new princes who wish *tenere* or *mantenere lo stato* – who wish to maintain their positions as rulers over whatever territories they may have managed to inherit or acquire.[37]

If such a ruler is to prevent the state in which he finds himself from being altered to his disadvantage, he must clearly be able to fulfil a number of preconditions of effective government. If we now turn to consider the ways in which these preconditions were formulated and discussed in the traditions of thought I am considering, we shall find the terms *status* and *stato* employed in an increasingly extended manner to refer to these various aspects of political power.[38] As an outcome of this process, we shall eventually find these writers deploying at least some elements of a recognizably modern conception of the state.

One precondition of maintaining one's standing as a ruler is obviously that one should be able to preserve the character of one's existing regime. We accordingly find the terms *status* and *stato* being used from an early period to refer not merely to the state or condition of princes, but also to the presence of particular regimes or systems of government.

This usage in turn appears to have arisen out of the habit of employing the term *status* to classify the various

forms of rule described by Aristotle. Aquinas has sometimes been credited with popularizing this development, since there are versions of his *Expositio* of Aristotle's *Politics* in which oligarchies are described as *status paucorum* and the rule of the people is identified as the *status popularis*.[39] Such usages later became widespread in humanist political thought. Filippo Beroaldo begins his *De optimo statu* with a typology of legitimate regimes, speaking of the *status popularis*, the *status paucorum* and even the *status unius* when referring to monarchy (1508, fos. xi^{r} and xii^{v}). Francesco Patrizi (1412–94) opens his *De regno* with a similar typology, one in which monarchy, aristocracy, and democracy are all characterized as types of *civilium status* or states of civil society (Patrizi 1594b: 16–17, 19, and esp. 21). Writing in the vernacular at the same period, Vespasiano da Bisticci (1421–98) likewise contrasts the rule of *signori* with the *stato populare*, while Guicciardini later invokes the same distinction in his *Discorsi* on the government of Florence (Vespasiano 1970–6, vol. I: 406; Guicciardini 1932: 274). Finally, Machiavelli used *stato* in just this fashion at a number of places in *Il principe*,[40] most notably in the opening sentence of the entire work, in which he informs us that "All the *stati*, all the dominions that have had or now have power over men either have been or are republics or principalities."[41]

By this stage, the term *stato* was also in widespread use as a way of referring simply to prevailing regimes. When Giovanni Villani, for example, notes that in 1308 "it was the members of the *parte Nera* who held control" in Florence, he speaks of the government they established as *lo stato de'Neri*.[42] When Ranieri Sardo (1845: 125) writes about the fall of the Nove in Siena in 1355, he describes the change of regime as the loss of *lo stato de'Nove*. When Vespasiano (1970–6, vol. II: 171, 173) relates how the enemies of Cosimo de'Medici succeeded in setting up a new government in 1434, he expresses the point by saying that "they were able to change *lo stato*." By the time we reach a theorist such as Machiavelli's friend Francesco Vettori, writing in the early part of the sixteenth century, both these usages of *stato* were firmly established. Vettori employs the term not only to refer to different forms of government, but also to describe the prevailing regime in Florence that he wished to see defended.[43]

A second precondition of maintaining one's existing state as a ruler is obviously that one should suffer no loss or alteration in the range of territories given into one's charge. As a result of this further preoccupation we find the terms *status* and *stato* pressed into early service as a way of referring to the general area over which a ruler or chief magistrate needs to exercise control. When the author of the *Oculus pastoralis*, for example, wishes to describe the duty of chief magistrates to look after their cities and localities, he already speaks of it as a duty to promote *suos status* (Franceschi 1966: 24). When the authors of the *Gratulatio* sent to the people of Padua in 1310 wish to express the hope that the entire province may be able to live in peace, they say that they are hoping for the *tranquillitas vestri status* (Muratori 1741: 131). Similarly, when Ambrogio Lorenzetti tells us, in the verses that accompany his celebrated frescoes of 1337–9 on the theme of good government, that a *signore* must cultivate the virtues if he is to succeed in levying taxes from the areas under his command, he expresses his point by saying that this is how he must act *per governare lo stato*.[44]

These early and isolated usages first begin to proliferate in the chronicles and political treatises of the high Renaissance. When Sardo (1845: 91), for example, wants to describe how the Pisans made peace throughout their territories in 1290, what he says is that the truce extended throughout *stato suo*. When Guicciardini (1933: 298) remarks in his *Ricordi* that the French revolutionized warfare in Italy after 1494, producing a situation in which the loss of a single campaign brought with it the forfeiture of all one's lands, he describes such defeats as bringing with them the loss of *lo stato*. So too with Machiavelli, who frequently uses the term *stato* in *Il principe* in order to denote the lands or territories of a prince. He clearly has this usage in mind when he talks at length in chapter 3 about the means a wise prince must adopt if he wishes to acquire new *stati*; and he evidently has in mind the same usage when he asks in chapter 24 why so many of the princes of Italy have lost their *stati* during his own lifetime (Machiavelli 1960: 18, 22, 24, 97).

Finally, due in large measure to these Italian influences, the same usage can be found in northern Europe by the early years of the sixteenth century. Guillaume Budé, for example, in his *L'Institution du prince* of 1519, equates the range of *les pays* commanded by Caesar after his victory over Antony with the extent of *son estat*.[45] Similarly, when Thomas Starkey (1948: 167) argues in his *Dialogue* of the early 1530s that everyone living in England should be represented by a Council, he remarks that such a body "should represent the whole state." And when Lawrence Humphrey warns in his tract *The Nobles* of 1563 that evil conduct on the part of a ruler can easily set a bad example throughout an entire community, he expresses his point by saying that the vices of a ruler can easily "spread the same into the whole state" (1973, sig. Q. 8^{r}).

As the writers of advice-books always emphasized, however, by far the most important precondition of maintaining one's state as a prince must be to keep one's hold over the existing power structure and institutions of government within one's *regnum* or *civitas*. This in turn gave rise to the most important linguistic innovation that can be traced to the chronicles and political writings of Renaissance Italy. This took the form of an extension of the term *stato* not merely to denote the idea of a prevailing regime, but also, and more specifically, to refer to the institutions of government and means of coercive control that serve to organize and preserve order within political communities.

Vespasiano speaks on several occasions in his *Vite* of *lo stato* as just such an apparatus of political authority. In his life of Alessandro Sforza, for example, he describes how Alessandro conducted himself "in his government of *lo stato*" (Vespasiano 1970–6, vol. I: 426). In his life of Cosimo de'Medici he speaks of "those who hold positions of power in *stati*," and praises Cosimo for recognizing the difficulties of holding on to power in *uno stato* when faced by opposition from influential citizens.[46] Guicciardini in his *Ricordi* similarly asks why the Medici "lost control of *lo stato* in 1527," and later observes that they found it much harder than Cosimo had done "to maintain their hold over *lo stato di Firenze*," the institutions of Florentine government.[47] Finally, Castiglione in *Il cortegiano* likewise makes it clear that he thinks of *lo stato* as a distinct power structure which a prince needs to be able to control and dominate. He begins by remarking that the Italians "have greatly contributed to discussions about the government of *stati*," and later advises courtiers that "when it comes to questions about *stati*, it is necessary to be prudent and wise" in order to counsel one's ruler about the best way to behave.[48]

Of all the writers of advice-books, however, it is Machiavelli in *Il principe* who shows the most consistent willingness to distinguish the institutions of *lo stato* from those who have charge of them. He thinks of *stati* as having their own foundations, and speaks in particular of each *stato* as having its own particular laws, customs, and ordinances (Machiavelli 1960: 53; 76, 84). He is willing in consequence to speak of *lo stato* as an agent, describing it as capable, among other things, of choosing particular courses of action and of calling in times of crisis upon the loyalty of its citizens (Machiavelli 1960: 48, 92). This means, as Machiavelli makes clear at several points, that what he takes himself to be discussing in *Il principe* is not simply how princes ought to behave; he also sees himself as writing more abstractly about statecraft (*dello stato*) and about *cose di stato* or affairs of state (Machiavelli 1960: 21, 25).

IV

It has often been argued that, by the time we reach the usages I have just been examining, we are already dealing with a recognizably modern conception of the state as an apparatus of power whose existence remains independent of those who may happen to have control of it at any given time. Gaines Post and others have even suggested that this conception is already present in a number of allusions to the *status regni* in the fourteenth century.[49] A similar claim has been advanced with even greater confidence about the employment of the term *stato* by Machiavelli and some of his contemporaries. As Chiappelli puts it, for example, "the word bears the meaning of 'State' in its full maturity" in a majority of the places where Machiavelli uses it.[50]

These claims, however, are I think greatly exaggerated. It is usually clear – except in the small number of deeply ambiguous cases I have cited[51] – that even when *status* and *stato* are employed by these writers to denote an apparatus of government, the power structure in question is not in fact viewed as independent of those who have charge of it. As Post himself concedes, the usual aim in early legal discussions of the *status regni* was to insist on a far more personal view of political power,[52] a view that was later to be revived by the proponents of absolute monarchy in the seventeenth century.[53] According to this argument, the ruler or chief magistrate, so far from being distinguishable from the institutions of the state, is said to possess and even embody those institutions himself. The same point can in most cases be made about Machiavelli's invocations of *lo stato* in *Il principe*. When he uses the term to refer to an apparatus of government, he is usually at pains to emphasize that it needs to remain in the hands of the prince: that *lo stato*, as he often puts it, remains equivalent to *il suo stato*, the prince's own state or condition of rulership.[54]

Even after the reception of humanist ideas about *lo stato* in northern Europe, the belief that the powers of government should be treated as essentially personal in character was to die hard. It is clearly this assumption, for example, which underlies many of the quarrels between kings and parliaments over the issue of taxation in the course of the sixteenth century. The basis of the parliamentary case was generally an assertion of the

form that, except in times of dire necessity, kings should be able "to live of their own."[55] They should be able, that is, to ensure that their personal revenues remain sufficient to uphold both their own kingly state and the good state of their government.

I conclude that, for all the importance of the writers I have been considering, they cannot in general be said to articulate a recognizable concept of the state with anything like complete self-consciousness. It would not perhaps be too bold to assert, indeed, that in all the discussions about the state and government of princes in the first half of the sixteenth century, there will be found scarcely any instance in which the *état, staat* or state in question is unequivocally separated from the status or standing of the prince himself.[56]

This is not to deny, however, that the crystallizing of a recognizable concept of the state was one of the legacies of Renaissance political thought. It is merely to suggest that, if we wish to follow the process by which this development took place, we need to focus not merely on the mirror-for-princes literature on which I have so far concentrated, but also on the other strand of thought about the *optimus status reipublicae* that I began by singling out. We need, that is, to turn our attention to the rival tradition of Renaissance republicanism, the tradition centering on the claim that, if there is to be any prospect of attaining the *optimus status reipublicae*, we must always institute a self-governing form of republican regime.

Among the republican theorists of Renaissance Italy, the main reason given for this basic commitment was that all power is liable to corrupt. All individuals or groups, once granted sovereignty over a community, will tend to promote their own interest at the expense of the community as a whole. It follows that the only way to ensure that the laws promote the common good must be to leave the whole body of citizens in charge of their own public affairs. If their government is instead controlled by an authority external to the community itself, that authority will be sure to subordinate the good of the community to its own purposes, thereby interfering with the liberty of individual citizens to attain their chosen goals. The same outcome will be no less likely under the rule of an hereditary prince. Since he will generally seek his own ends rather than the common good, the community will again forfeit its liberty to act in pursuit of whatever goals it may wish to set itself.

This basic insight was followed up within the republican tradition in two distinct ways. It was used in the first place to justify an assertion of civic autonomy and independence, and so to defend the *libertas* of the Italian cities against external interference. This demand was initially directed against the Empire and its claims of feudal suzerainty over the *Regnum Italicum*. It was first developed by such jurists as Azo, and later by Bartolus and his followers,[57] seeking to vindicate what Bartolus described as "the *de facto* refusal of the cities of Tuscany to recognize any superior in temporal affairs."[58] But the same demand for *libertas* was also directed against all potential rivals as sources of coercive jurisdiction within the cities themselves. It was claimed on the one hand against local feudatories, who continued to be viewed, as late as Machiavelli's *Discorsi*, as the most dangerous enemies of free government (Machiavelli 1960, 1.55: 254–8). And it was even more vehemently directed against the jurisdictional pretensions of the church. The most radical response, embodied for example in Marsilius's *Defensor pacis* of 1324, took the form of insisting that all coercive power is secular by definition, and thus that the church has no right to exercise civil jurisdictions at all (Marsilius 1956, esp. II.4: 113–26). But even in the more orthodox treatises on city government, such as that of Giovanni da Viterbo, the church is still refused any say in civic affairs. The reason, as Giovanni expresses it, is that the ends of temporal and ecclesiastical authority are completely distinct (Giovanni da Viterbo 1901: 266–7). The implication is that, if the church tries to insist on any jurisdiction in temporal matters, it will simply be "putting its sickle into another man's harvest."[59]

The other way in which the basic insight of the republican tradition was developed was in the form of a positive claim about the precise type of regime we need to institute if we are to retain our *libertas* to pursue our chosen goals. The essence of the republican case was that the only form of government under which a city can hope to remain "in a free state" will be a *res publica* in the strictest sense. The community as a whole must retain the ultimate sovereign authority, assigning its rulers or chief magistrates a status no higher than that of elected officials. Such magistrates must in turn be treated not as rulers in the full sense, but merely as agents of *ministri* of justice, charged with the duty of ensuring that the laws established by the community for the promotion of its own good are properly enforced.

This contrast between the freedom of republican regimes and the servitude implied by any form of monarchical government has often been viewed as a distinctive contribution of *quattrocento* Florentine thought.[60] But the underlying assumption that liberty can be guaranteed only within a republic can already be found in many Florentine writers of the previous century.[61] Dante

speaks in the *Inferno* of the move from seigneurial to republican rule as a move from tyranny to a *stato franco*, a state or condition of civic liberty (1966, xxvii. 54: 459). Ceffi repeatedly emphasizes in his *Dicerie* that the only means of guaranteeing civic *libertá* is to ensure that one's city remains under the guidance of an elected magistrate (Giannardi 1942: 32, 35, 41, 44). And Villani in his *Istorie Florentine* likewise contrasts the free *stato* of the Florentine republic with the tyranny imposed by the Duke of Athens as *signore* in 1342 (1802–3, vol. VIII: 11).

It is certainly true, however, that the equation between living in a republic and living "in a free state" was worked out with the greatest assurance by the leading republican theorists of Venice and Florence in the course of the high Renaissance. Among the Venetian writers, Gasparo Contarini furnished the classic statement of the argument in his *De republica Venetorum* of 1543. Owing to the city's elective system of government, he declares, in which "a mixture of the *status* of the nobility and of the people" is maintained, "there is nothing less to be feared in the city of Venice than that the head of the republic will interfere with the *libertas* or the activities of any of the citizens."[62] Among Florentine theorists, it was of course Machiavelli in his *Discorsi* who provided the most famous version of the same argument. "It is easy to understand," as he explains at the start of book II, "whence the love of living under a free constitution springs up in peoples. For experience shows that no cities have ever increased in dominion or in riches except when they have been established in liberty."[63] The reason, he goes on, "is easy to perceive, for it is not the pursuit of individual advantage but of the common good that makes cities great, and there is no doubt that it is only under republican regimes that this ideal of the common good is followed out."[64]

From the point of view of my present argument, these commitments can now be seen to be crucial in two different ways. It is within this tradition of thought that we encounter, for the first time, a vindication of the idea that there is a distinct form of "civil" or "political" authority which is wholly autonomous, which exists to regulate the public affairs of an independent community, and which brooks no rivals as a source of coercive power within its own *civitas* or *respublica*. It is here, in short, that we first encounter the familiar understanding of the state as a monopolist of legitimate force.

This view of "civil government" was of course taken up in France and England at an early stage in their constitutional development. It underlies their hostility to the jurisdictional power of the church, culminating in France in the "Gallican" Concordat of 1516, in England in the Marsiglian assumptions underpinning the Act of Appeals in 1533. It also underlies their repudiation of the Holy Roman Empire's claim to exercise any jurisdictions within their territories, a repudiation founded on a reworking of Azo's and later Bartolus's theories of *imperium* into the celebrated dictum that *Rex in regno suo est Imperator*.

For the origins of this view of civil government, however, we need to turn back to thirteenth-century Italy, and specifically to the political literature engendered by the self-governing city-republics of that period. Writing in the 1250s, Giovanni da Viterbo already takes his theme to be the analysis of civil power, that form of power which upholds the *civium libertas* or liberty of those who live together as citizens (Giovanni da Viterbo 1901: 218). Writing only a decade later, Brunetto Latini goes on to add that those who study the use of such power in the government of cities are studying "politics," "the noblest and the highest of all the sciences."[65] It is this neoclassical tradition to which later theorists of popular sovereignty are ultimately alluding when they speak of an autonomous area of "civil" or "political" authority, and offer to explicate what Locke (1967: 283) was to call "the true original, extent and end of civil government."

The other way in which the republican tradition contributed to crystallizing a recognizable concept of the state is of even greater importance. According to the writers I have been considering, a city can never hope to remain in a free state unless it succeeds in imposing strict conditions on its rulers and magistrates. They must always be elected; they must always remain subject to the laws and institutions of the city which elects them; they must always act to promote the common good – and hence the peace and happiness – of the sovereign body of its citizens. As a result, the republican theorists no longer equate the idea of governmental authority with the powers of particular rulers or magistrates. Rather they think of the powers of civil government as embodied in a structure of laws and institutions which our rulers and magistrates are entrusted to administer in the name of the common good. They cease in consequence to speak of rulers "maintaining their state" in the sense of maintaining their personal ascendancy over the apparatus of government. Rather they begin to speak of the *status* or *stato* as the name of that apparatus of government which our rulers may be said to have a duty to maintain.

There are already some hints of this momentous transition in the earliest treatises and *dictamina* intended for

chief magistrates of city-republics. Brunetto Latini insists in his *Trésor* of 1266 that cities must always be ruled by elected officials if the *bien commun* is to be promoted. He further insists that these *sires* must follow the laws and customs of the city in all their public acts (Latini 1948, esp. pp. 392, 408, 415; 402, 412). And he concludes that such a system is indispensable not merely to maintaining such officials in a good *estat*, but also to maintaining "the *estat* of the city itself."[66] A similar hint can be found in Giovanni da Vignano's *Flore de parlare* of the 1270s. In one of his model letters, designed for the use of city ambassadors when seeking military help, he describes the government of such communities as their *stato*, and accordingly appeals for support "in order that our good *stato* can remain in wealth, honor, greatness and peace."[67] Finally, the same hint recurs soon afterwards in Matteo dei Libri's *Arringa* on the identical theme. He sets out a very similar model speech for ambassadors to deliver, advising them to appeal for help "in order that our good *stato* may be able to remain in peace."[68]

It is only with the final flowering of Renaissance republicanism, however, that we find such usages occurring with their unequivocally modern sense. Even here, moreover, this development is largely confined to the vernacular literature. Consider, by contrast, a work such as Alamanno Rinuccini's Latin dialogue of 1479, *De libertate* (1957). This includes a classic statement of the claim that individual as well as civic liberty is possible only under the laws and institutions of a republic. But Rinuccini never stoops to using the barbarous term *status* to describe the laws and institutions involved; he always prefers to speak of the *civitas* or *respublica* itself as the locus of political authority. So too with such classic Venetian writers as Contarini in his *De republica Venetorum*. Although Contarini has a clear conception of the apparatus of government as a set of institutions independent of those who control them, he never uses the term *status* to describe them, but always prefers in a similar way to speak of their authority as embodied in the *respublica* itself.[69]

If we turn, however, to the rather less pure latinity of Francesco Patrizi's *De institutione reipublicae*, we encounter a significant development in his chapter on the duties of magistrates. He lays it down that their basic duty is to act "in such a way as to promote the common good," and argues that this above all requires them to uphold "the established laws" of the community.[70] He then summarizes his advice by saying that this is how magistrates must act "if they are to prevent the *status* of their city from being overturned."[71]

It is in the vernacular writers on republicanism of the next generation, however, that we find the term *stato* being used with something approaching full self-consciousness to express a recognizable concept of the state. Guicciardini's *Discorso* on how the Medici should act to improve their control over Florence provides a suggestive example. He advises them to gather around themselves a group of advisers who are loyal to the *stato* and willing to act on its behalf. The reason is that "every *stato*, every form of sovereign power, needs dependents" who are willing "to serve the *stato* and benefit it in everything."[72] If the Medici can manage to base their regime on such a group, they can hope to establish "the most powerful foundation for the defence of the *stato*" that anyone could aspire to set up.[73]

Finally, if we turn to Machiavelli's *Discorsi*, we find the term *stato* being used with even greater confidence to denote the same apparatus of political authority. It is of course true that Machiavelli continues largely to employ the term in the most traditional way to refer to the state or condition of a city and its way of life (Machiavelli 1960: 135, 142, 153, 192, 194, etc.). And even when he mentions *stati* in the context of describing systems of government, these usages are again largely traditional: he is generally speaking either about a species of regime,[74] or about the general area or territory over which a prince or republic holds sway.[75]

There are several occasions, however, especially in the analysis of constitutions at the start of book I, where he appears to go further. The first is when he writes in chapter 2 about the founding of Sparta. He emphasizes that the system of laws promulgated by Lycurgus remained distinct from, and served to control, the kings and magistrates entrusted with upholding the laws themselves. And he characterizes Lycurgus's achievement in creating this system by saying that "he established *uno stato* which then endured for more than eight hundred years."[76] The next instance occurs in chapter 6, where he considers whether the institutions of government in republican Rome could have been set up in such a way as to avoid the "tumults" which marked that city's political life. He puts the question in the form of asking "whether it might have been possible to establish *uno stato* in Rome" without that distinctive weakness.[77] That last and most revealing case occurs in chapter 18, where he considers the difficulty of maintaining *uno stato libero* within a corrupt city. He not only makes an explicit distinction between the authority of the magistrates under the ancient Roman republic and the authority of the laws "by means of which, together with the magistrates, the

citizens were kept under control."[78] He adds in the same passage that the latter set of institutions and practices can best be described as "the order of the government or, indeed, of *lo stato*."[79]

It has often been noted that, with the reception of Renaissance republicanism in northern Europe, we begin to encounter similar assumptions among Dutch and English protagonists of "free states" in the middle of the seventeenth century.[80] It has less often been recognized that the same assumptions, couched in the same vocabulary, can already be found more than a century earlier among the first writers who attempted to introduce the ideals of civic humanism into English political thought. Thomas Starkey, for example,[81] distinguishes at several points in his *Dialogue* between the state itself and "they which have authority and rule of the state" (Starkey 1948: 61; cf. also 57, 63). It is the "office and duty" of such rulers, he goes on, to "maintain the state established in the country" over which they hold sway, "ever looking to the profit of the whole body" rather than to their own good (Starkey 1948: 64). The only method, he concludes, of "setting forward the very and true commonweal" is for everyone to recognize, rulers and ruled alike, that they are "under the same governance and state" (Starkey 1948: 71).

The same assumptions can be found soon afterwards in John Ponet's *Short Treatise of Politic Power* of 1556. He too speaks of rulers simply as the holders of a particular kind of office, and describes the duty attaching to their office as that of upholding the state. He is thus prompted to contrast the case of "an evil person coming to the government of any state" with a good ruler who will recognize that he has been "to such office called for his virtue, to see the whole state well governed and the people defended from injuries" (Ponet 1942: 98).

Finally, and perhaps most significantly, we find the same phraseology in Tudor translations of the classic Italian treatises on republican government. When Lewes Lewkenor, for example, issued his English version of Contarini's *De republica Venetorum* in 1599, he found himself in need of an English term to render Contarini's basic assumption that the authority of the Venetian government remains inherent at all times in the *civitas* or *respublica* itself, with the Doge and Council serving merely as representatives of the citizen-body as a whole. Following standard humanist usage, he generally expresses this concept by the term "commonwealth." But in speaking of the relationship between a commonwealth and its own citizens, he sometimes prefers instead to render *respublica* as "state." When he mentions the possibility of enfranchising additional citizens in Venice, he explains that this can take place in special circumstances when someone can be shown to have been especially "dutiful towards the state." And when he discusses the Venetian ideal of citizenship, he feels able to allude in even more general terms to "the citizens, by whom the state of the city is maintained" (Lewkenor 1969: 18, 33).

V

For all the undoubted importance of these classical republican theorists, however, it would still be misleading to conclude that their use of the term *stato* and its equivalents may be said to express our modern concept of the state. That concept has come to embody a doubly impersonal character.[82] We distinguish the state's authority from that of the rulers or magistrates entrusted with the exercise of its powers for the time being. But we also distinguish its authority from that of the whole society or community over which its powers are exercised. As Burke (1910: 93) remarks in his *Reflections* – articulating a view already well entrenched by that time – "society is indeed a contract," but "the state ought not to be considered as nothing better than a partnership agreement" of a similar nature. Rather the state must be acknowledged to be an entity with a life of its own; an entity which is at once distinct from both rulers and ruled and is able in consequence to call upon the allegiances of both parties.

The republican theorists embrace only one half of this doubly abstract notion of the state. On the one hand there is, I think, no doubt that they constitute the earliest group of political writers who insist with full self-consciousness on a categorical distinction between the state and those who have control of it, and at the same time express that distinction as a claim about the *status, stato* or state. But on the other hand they make no comparable distinction between the powers of the state and those of its citizens. On the contrary, the whole thrust of classical republican theory is directed towards an ultimate equation between the two. Although this undoubtedly yields a recognizable concept of the state – one that many Marxists and exponents of direct democracy continue to espouse – it is far from being the concept we have inherited from the more conservative mainstream of early-modern political thought.

The differences can be traced most clearly in the literature in praise of "free states." Consider again, for example, one of the earliest English works of this

character, John Ponet's *Short Treatise of Politic Power*. As we have seen, Ponet makes a firm distinction between the office and person of a ruler, and even uses the term "state" to describe the form of civil authority our rulers have a duty to uphold. But he makes no analogous distinction between the powers of the state and those of the people. Not only does he maintain that "kings, princes and governors have their authority of the people"; he also insists that ultimate political authority continues to reside at all times in "the body or state of the realm or commonwealth" (Ponet 1942: 106, 105). If kings or princes are found to be "abusing their office," it is for the body of the people to remove them, since the ultimate powers of sovereignty must always remain lodged within "the body of every state" (Ponet 1942: 105; cf. also pp. 111, 124).

The same commitment is upheld even by the most sophisticated defenders of "free states" in the seventeenth century. A good example is furnished by Milton's *Ready and Easy Way to Establish a Free Commonwealth*. If we are to maintain "our freedom and flourishing condition," he argues, and establish a government "for preservation of the common peace and liberty," it is indispensable that the sovereignty of the people should never be "transferred." It should be "delegated only" to a governing Council of State (Milton 1980: 432–3, 456). The institutions of the state are thus conceived as nothing more than a means of expressing the powers of the people in an administratively more convenient form. As Milton had earlier emphasized in *The Tenure of Kings and Magistrates*, whatever authority our rulers may possess is merely "committed to them in trust from the people, to the common good of them all, in whom the power yet remains fundamentally" at all times (Milton 1962: 202). As a result, Milton, Harrington, and other defenders of "free states" hardly ever use the term "state" when speaking of the institutions of civil government. Believing as they do that such institutions must remain under the control of the whole community if its members are to preserve their birthright of liberty, they almost always prefer the term "commonwealth" as a means of referring not merely to bodies of citizens, but also to the forms of political authority by which they must be governed if they are to remain "in a free state."[83]

The same is no less true of the "monarchomachs" and other contractarian opponents of early-modern absolutism who first rose to prominence in the later sixteenth century, especially in Holland and France. Deriving their arguments mainly from scholastic rather than classical republican sources, these writers are not generally republican in the strict sense of believing that the common good of a community can never be satisfactorily assured under a monarchical form of government. Usually they are quite explicit in claiming that (to cite Marsilius of Padua's terminology) as long as the ultimate powers of a *legislator humanus* within a *civitas* or *respublica* remain in the hands of the *populus*, there is no reason to doubt that – as Aristotle had taught – a variety of different constitutional forms may be equally capable of promoting the common good, and hence the peace and happiness of the community as a whole. Some writers within this tradition, such as Marsilius himself, in consequence exhibit little interest in whether a republican or a monarchical regime is established, save only for insisting that if the latter type is chosen, the *pars principans* must always be elected.[84] Others, including François Hotman and other French monarchomachs who followed his lead in the 1570s, remain content to assume that the body of the commonwealth will normally have a monarchical head, and similarly concentrate on hedging the institution of monarchy in such a way as to make it compatible with the liberty and ultimate sovereignty of the people.[85] Still others, such as Locke in his attack on Filmer's absolutism in the *Two Treatises of Government*, suppose there to be good reasons for preferring a monarchical form of government with a liberal allowance of personal prerogative, if only to mitigate the rigors of an undiluted theory of distributive justice by allowing a "power to act according to discretion for the public good."[86]

In common with the defenders of "free states," however, these writers still assume that the apparatus of government in a *civitas* or *respublica* amounts to nothing more than a reflection of, and a device for upholding, the sovereignty of the people. Even in a theory such as Locke's, government is still viewed simply as a trust established by the members of a community for the more effective promotion of their own good, "the peace, safety and public good of the people" (Locke 1967: 371).

The effect of this commitment, in this tradition no less than in classical republicanism, is that no effective contrast is drawn between the power of the people and the powers of the state.[87] These writers do distinguish, of course, between the apparatus of government and the authority of those who may happen to have control of it at any one time. Just as strongly as the republican theorists, they insist on a complete separation between a ruler's person and his office, and argue that – as Locke puts it – even a supreme magistrate is merely a "public person" who is "vested with the power of the law" and

charged with directing the legislative toward the attainment of the common good.[88] They still assume, however, that the range of powers a community establishes over itself when its members consent to become subjects of a civil government must ultimately be identified with its own powers as a community. As Locke (1967: 369, 385) insists, we never "deliver up" our fundamental liberties in establishing a commonwealth, but merely depute or delegate a known and indifferent judge to safeguard them more effectively on our own behalf. Although this means that we commit ourselves to setting up a complex apparatus of government, it also means that the powers of such a government can never amount to anything more than "the joint power of every member of the society." This is how it comes about, as Locke concludes, that "the community perpetually retains a supreme power" over its prince or legislative, "and must, by having deputed him, have still a power to discard him when he fails in his trust" (Locke 1967: 375, 385, 445).

As a result, these writers never find themselves tempted to use the terms *status* or state when describing the powers of civil government. When they envisage the members of a *civitas* or community instituting what Locke (1967: 434) calls a form of umpirage for the settlement of their controversies, they conceive of them not as entering a new state, but simply as setting up a new form of society – a civil or political society within which the wealth or welfare of the community can be better secured. So they continue to invoke the terms *civitas* or *respublica* to refer to the apparatus of civil government, usually translating these terms as "city" or "commonwealth." As Locke (1967: 373) explicitly states, "by commonwealth I must be understood all along" to mean "any independent community which the Latins signified by the word *civitas*, to which the word which best answers in our language is commonwealth."

If we wish, therefore, to trace the process by which the powers of the state finally came to be described as such, and seen at the same time as distinct from both the powers of the people and of their magistrates, we need at this juncture to turn to a strongly contrasting tradition of early-modern political thought. We need to turn to those writers who addressed themselves critically to the thesis of popular sovereignty we have just been considering, whether in its republican guise as a claim about "free states," or in its neoscholastic form as a claim about the inalienable rights of communities. We need to turn, that is, to those theorists whose aspirations included a desire to legitimize the more absolutist forms of government that began to develop in western Europe in the early part of the seventeenth century. It was as a by-product of their arguments, and in particular of their efforts to insist that the powers of government must be something other than a mere expression of the powers of the governed, that the concept of the state as we have inherited it was first articulated with complete self-consciousness.

Some of these counter-revolutionary theorists were mainly concerned with the radical scholastic thesis – associated in particular with Marsilius and his successors – to the effect that the *populus* and the *legislator humanus* can be equated. The repudiation of this doctrine became one of the chief polemical aims of later sixteenth-century Thomism, with Suarez's *De legibus* of 1612 containing the fullest and most influential summary of the alleged counter arguments.[89] Others were more disturbed by the monarcho-mach theories of popular sovereignty thrown up by the religious wars in the latter part of the sixteenth century. Bodin in particular seeks in his *Six livres de la république* of 1576 to refute the arguments of those who were claiming that, as Knolles's translation of 1606 puts it, "princes sent by providence to the human race must be thrust out of their kingdoms under a pretence of tyranny."[90] Still others were no less perturbed by the implications of the republican allegation that, as Hobbes (1968: 369) scornfully paraphrases it in *Leviathan*, "the subjects in a popular commonwealth enjoy liberty," while "in a monarchy they are all slaves." Hobbes himself, like Grotius before him, engages with this as well as with the neoscholastic thesis of popular sovereignty, and undoubtedly offers the most systematic attempt to answer the question that preoccupies all these theorists: how to vindicate an account of civil government which at once concedes the original sovereignty of the people and is at the same time absolutist in its political allegiances.

If there is one thesis by which these writers are all especially agitated, it is the suggestion that the powers of civil government constitute nothing more than a reflection of the powers of the people. They concede, of course, that coercive authority must be justified by its capacity to ensure the common good, and in consequence the peace and happiness of the citizen-body as a whole. Hobbes believes no less firmly than Marsilius that, as he repeatedly declares in *Leviathan*, all governments must be judged by their "aptitude to produce the peace and security of the people, for which end they were instituted."[91] What none of these writers can accept, however, is the idea that the form of authority required to produce such benefits can appropriately be envisaged as nothing more than a trustee, a type of

official to whom the people delegate the exercise of their own authority purely as a matter of administrative convenience. Political power, they all admit, is originally instituted by the people, but never in the form of a trust. It is instituted by means of what Suarez calls "absolute transfer" of the people's sovereignty, one that takes the form of "a kind of alienation, not a delegation at all."[92] To set up a mere "depository" or "guardian" of sovereign power, as Bodin agrees, is not to set up a genuine "possessor" of sovereignty at all.[93] For the people to perform that particular act, as Hobbes similarly stresses at several points in *Leviathan*, it is essential for them to recognize that they are "renouncing and transferring" their own original sovereignty, with the implication that it is totally "abandoned or granted away" to someone else (Hobbes 1968: 190, 192).

Civil government, they insist, cannot therefore be seen as the powers of citizens under another guise. It must be seen as a distinct form of power, for reasons that Hobbes enunciates with complete assurance in *De cive* almost a decade before giving them classic expression in *Leviathan*. "Though a government," he declares, "be constituted by the contracts of particular men with particulars, yet its right depends not on that obligation only" (Hobbes 1983: 105). By constituting such a government, "that right which every man had before to use his faculties to his own advantages is now wholly translated on some certain man or council for the common benefit" (Hobbes 1983: 105). It follows that whatever power is thereby installed in authority must be recognized "as having its own rights and properties, insomuch as neither any one citizen, nor all of them together" can now be accounted its equivalent (Hobbes 1983: 89). This, as he was later to put it, "is the generation of that great Leviathan, or rather (to speak more reverently) of that mortal God, to which we owe, under the immortal God, our peace and defence. For by this authority, given him by every particular man in the commonwealth, he hath the use of so much power and strength conferred on him, that by terror thereof, he is enabled to form the wills of them all to peace at home and mutual aid against their enemies abroad" (Hobbes 1968: 227).

It is important, however, not to conflate this form of absolutism with that of the divine-right theorists who rose to such prominence during the same period. A writer like Bossuet, for example, deliberately sets out to obliterate the distinction between the office and person of a king. Echoing the celebrated remark attributed to Louis XIV, he insists that the figure of a ruler "embodies in himself the whole of the state": *tout l'état est en lui*.[94] By contrast, even Hobbes declares as unambiguously as possible that the powers of a ruler are never personal powers at all. They are owed entirely to his standing as holder of "the office of the sovereign," the principal duty of which, as Hobbes never tires of repeating, "consisteth in the end for which he was trusted with the sovereign power, namely the procuration of the safety of the people" (Hobbes 1968: 376).

With Hobbes no less than with Bodin, Suarez, Grotius, and the whole developing tradition of natural-law absolutism, we accordingly arrive at the view that the ends of civil or political association make it indispensable to establish a single and supreme sovereign authority whose power remains distinct not merely from the people who originally instituted it, but also from whatever office-holders may be said to have the right to wield its power at any particular time. What, then, is this form of political authority to be called?

Not surprisingly, these writers at first respond by reaching for traditional names. One suggestion, much canvassed by Bodin and later adopted by Hobbes in *De cive*, was that we should think of the authority in question as embodied in the *civitas*, the *ville* or the city as opposed to either its citizens or its magistrates.[95] But the most usual proposal was that we should think of it as that form of authority which inheres in the *respublica*, the *république* or the commonwealth. Suarez and Grotius, writing in Latin, both speak of the *respublica*.[96] Bodin, writing originally in French, speaks analogously of *la république*; translating his treatise into Latin in 1586, he rendered this as *respublica*; and when Knolles issued his English version in 1606, he in turn called the work *The Six Bookes of a Commonweale*.[97] Finally, Hobbes largely comes round to this terminology in *Leviathan*, speaking far less frequently of the city, and instead describing his work on its title-page as an enquiry into "the matter, form and power of a commonwealth" (Hobbes 1968: 73).

As these writers increasingly recognized, however, none of these traditional terms really served to render their meaning adequately. One obvious difficulty with "commonwealth" was the fact that, as Raleigh (1661: 3,8) complains in his *Maxims of State*, it had come to be used "by an usurped nickname" to refer to "the government of the whole multitude." To invoke it was thus to risk confusion with one of the theories of popular sovereignty they were most anxious to repudiate. Nor was it altogether satisfactory to speak instead of the city or *civitas*. It is true that Hobbes (1983: 89) consistently does so in *De cive*, declaring that "a city therefore (that we

may define it) is one person whose will, by the compact of many men, is to be received for the will of them all." But the obvious difficulty here – in the face of which even Hobbes's confidence seems to have evaporated – was the need to insist on such a purely stipulative definition so strangely at variance with the ordinary meaning of the term.

It was at this juncture, within this tradition of thought, that a number of these theorists began to resolve their difficulties by speaking instead of the *state*, while making it clear at the same time that they were consciously using the term to express their master concept of an impersonal form of political authority distinct from both rulers and ruled.

Bodin already hints at this final crystallizing of the concept at several points in his *République*.[98] Although he continues to write in traditional terms about rulers "who maintain their *estats*," he also uses the word *estat* on several occasions as a synonym for *république*.[99] Most significantly of all, he feels able to speak of "the state in itself" (*l'estat en soi*), describing it both as a form of authority independent of particular types of government, and as the locus of "indivisible and incommunicable sovereignty."[100] It is striking, moreover, that when Knolles came to translate these passages in 1606, he not only used the word "state" in all these instances, but also in a number of other places where Bodin himself had continued to speak in a more familiar vein of the authority of the *cité* or *république*.[101]

If we turn to English writers of the next generation, and above all to those "politic" humanists who were critical of classical republicanism, we find the same terminology used with increasing confidence. Raleigh, for example, not only speaks freely of the state in his *Maxims*, but makes it clear that he thinks of the state as an impersonal form of political authority, defining it as "the frame or set order of a commonwealth" (Raleigh 1661: 2). Bacon (1972: 89) writes in the final version of his *Essays* in a way that often suggests a similar understanding of political authority. He describes rulers as well as their councillors as having a duty to consider "the weal and advancement of the state which they serve." And he writes in a number of other passages about the state and its rulers, the state and its subjects, the "founders of states" and the "subversion of states and governments" (Bacon 1972: 11, 42, 160, 165).

It is above all in Hobbes, however, and in other theorists of *de facto* sovereignty in the English revolution, that we find this new understanding of the state being articulated with complete assurance. It is true, as we have seen, that if we turn to the body of Hobbes's texts, we still find him exhibiting a preference for the traditional terminology of "city" and "commonwealth." But if we turn instead to his Prefaces, in the course of which he stands back from his own arguments and reviews their structure, we find him self-consciously presenting himself as a theorist of the state.

This transition can already be observed in the Preface to *De cive*, in the course of which he describes his project as that of explaining "what the quality of human nature is, in what matters it is, in what not, fit to make up a civil government, and how men must be agreed among themselves, that intend to grow up into a well-grounded state" (Hobbes 1983: 22). But it is in the Introduction to *Leviathan* that he proclaims most unequivocally that the subject matter of his entire investigation has been "that great Leviathan, called a Commonwealth or State (in Latin Civitas)" (Hobbes 1968: 81). Hobbes's ambition as a political theorist had always been to demonstrate that, if there is to be any prospect of attaining civil peace, the fullest powers of sovereignty must be vested neither in the people nor in their rulers, but always in the figure of an "artificial man."[102] Surveying this final redaction of his political philosophy, he at last felt able to add that, in speaking about the need for such an impersonal form of sovereignty, what he had been speaking about all along could best be described as the state.

VI

As the above account suggests, the idea that the supreme authority within a body politic should be identified as the authority of the state was originally the outcome of one particular theory of politics, a theory at once absolutist and secular-minded in its ideological allegiances. That theory was in turn the product of the earliest major counter-revolutionary movement within modern European history, the movement of reaction against the ideologies of popular sovereignty developed in the course of the French religious wars, and, subsequently, in the English Revolution of the seventeenth century. It is perhaps not surprising, therefore, to find that both the ideology of state power and the new terminology employed to express it provoked a series of doubts and criticisms that have never been altogether stilled.

Some of the initial hostility derived from conservative theorists anxious to uphold the old ideal of *un roi, une foi, une loi*. They wished to repudiate any suggestion that the aims of public authority should be purely civil or

political in character, and thereby to reinstate a closer relationship between allegiance in church and state. But much of the hostility stemmed from those who wished to uphold a more radical ideal of popular sovereignty in place of the sovereignty of the state. Contractarian writers sought in consequence to keep alive a preference for speaking about the government of civil or political society,[103] while the so-called commonwealthmen maintained their loyalty to the classical ideal of the self-governing republic throughout much of the eighteenth century.[104]

It is true that, at the end of the century, a renewed counter-revolutionary effort was made to neutralize these various populist doubts. Hegel and his followers in particular argued that the English contractarian theory of popular sovereignty merely reflected a failure to distinguish the powers of civil society from those of the state, and a consequent failure to recognize that the independent authority of the state is indispensable if the purposes of civil society are to be fulfilled. But this hardly proved an adequate reassurance. On the one hand, the anxiety of liberal theorists about the relationship between the powers of states and the sovereignty of their citizens generated confusions which have yet to be resolved. And on the other hand, a deeper criticism developed out of these Hegelian roots, insisting that the state's vaunted independence from its own agents as well as from the members of civil society amounts to nothing more than a fraud. As a result, sceptics in the tradition of Michels and Pareto, no less than socialists in the tradition of Marx, have never ceased to insist that modern states are in truth nothing more than the executive arms of their own ruling class.

Given the importance of these rival ideologies and their distinctive vocabularies, it is all the more remarkable to observe how quickly the term "state" and its equivalents nevertheless became established at the heart of political discourse throughout western Europe. By the middle of the eighteenth century the new terminology had become virtually inescapable for all schools of thought. Even so nostalgic an exponent of classical republicanism as Bolingbroke found himself constrained in his pamphleteering of the 1720s to talk about the authority of the state, and about the need for the state to be supported, protected, and above all reformed (1967a: 19, 43, 93, 131). By the time we come to Hume's essays of the 1750s,[105] or Rousseau's *Contrat social* of a decade later,[106] we find the concept of the state and the terms *état* and *state* being put to work in a consistent and completely familiar way.

The immediate outcome of this conceptual revolution was to set up a series of reverberations in the wider political vocabularies of the western European states. Once "state" came to be accepted as the master noun of political argument, a number of other concepts and assumptions bearing on the analysis of sovereignty had to be reorganized or in some cases given up. To complete this survey, we need finally to examine the process of displacement and redefinition that accompanied the entrenchment of the modern idea of the state.

One concept that underwent a process of redefinition was that of political allegiance. A subject or *subditus* had traditionally sworn allegiance to his sovereign as liege lord. But with the acceptance of the idea that sovereignty is lodged not with rulers but with the state, this was replaced by the familiar view that citizens owe their basic loyalty to the state itself.

This is not to say that those who originally advanced this argument had any desire to give up speaking of citizens as *subditi* or subjects. On the contrary, the earliest theorists of the state retained a strong preference for this traditional terminology, using it as a means of countering both the contractarian inclination to speak instead about the sovereignty of the *populus* or people, and the classical republican contention that we ought to speak only of *civitates* and *cives*, of cities and their citizens. Hobbes, for example, with his usual cunning, maintains in the first published version of his political theory that he is writing specifically "about the citizen" – *de cive*. Yet he makes it one of his most important polemical claims that "each citizen, as also every subordinate civil person" ought properly to regard himself as "the subject of him who hath the chief command" (Hobbes 1983: 90).

Hobbes is in complete agreement with his radical opponents, however, when he goes on to argue that citizens ("that is to say, subjects") ought not to pay allegiance to those who exercise these rights of sovereignty, but rather to the sovereignty inherent in the state or commonwealth itself (Hobbes 1983: 151). Hotman and later "monarchomach" theorists had already insisted that even holders of offices under a monarchy must be viewed as councillors of the kingdom, not of the king, and as servants of the crown, not of the person wearing it.[107] Hobbes simply reiterates the same argument when he declares with so much emphasis in *De cive* that the "absolute and universal obedience" owed by each and every subject is due not to the person of their ruler, but rather "to the city, that is to say, to the sovereign power" (Hobbes 1983: 186).

A further and closely connected concept that was comparably transformed was that of treason. As long as the concept of allegiance was connected with that of doing homage, the crime of treason remained that of behaving treacherously towards a sovereign lord. By the end of the sixteenth century, however, this came to seem less and less satisfactory. Even in the case of England, still bound by the Statute of 1350 which defined treason as compassing or imagining the king's death, the judges began to place increasingly wide constructions upon the meaning of the original Act. The aim in almost every case was to establish a view of treason essentially as an offence against the king in virtue of his office as head of state.[108] Meanwhile the political writers of the same period, untrammeled by the need to wrestle with precedents, had already arrived by a more direct route at the familiar view of treason as a crime not against the king but against the state. As always, Hobbes states the new understanding of the concept most unequivocally. As he declares at the end of his analysis of dominion in *De cive*, those who are guilty of treason are those who refuse to perform the duties "without which the State cannot stand"; the crime of treason is the crime of those who act "as enemies to the Government" (Hobbes 1983: 181).

Finally, the acceptance of the state as both a supreme and an impersonal form of authority brought with it a displacement of the more charismatic elements of political leadership which, as I indicated at the outset, had earlier been of central importance to the theory and practice of government throughout western Europe.

Among the assumptions that suffered displacement, the most important was the claim I began by stressing: that sovereignty is conceptually connected with display, that majesty serves in itself as an ordering force. Machiavelli, for example, still assumes that a ruler can expect to derive protection from *la maestá dello stato*, from a connection between his own high state of stateliness and his capacity to maintain his state.[109] It proved impossible, however, for such beliefs about the charisma attaching to public authority to survive the transfer of that authority to the purely impersonal agency – the "purely moral person," in Rousseau's phrase[110] – of the modern state. By the start of the eighteenth century, we already find conservative writers lamenting that, as Bolingbroke (1967b: 333) puts it, "the state is become, under ancient and known forms, an undefinable monster," with the result that a monarchy like England finds itself left with "a king without monarchical splendour" as head of state.

It was of course possible to transfer these attributes of majesty to the state's agents, permitting them to conduct state openings of parliament, to be granted state funerals, to lie in state, and so forth. Once it became accepted, however, that even heads of state are simply holders of offices, the attribution of so much pomp and circumstance to mere functionaries came to be seen not merely as inappropriate but even absurd, a case not of genuine pomp but of sheer pomposity. This insight was first elaborated by the defenders of "free commonwealths" in their anxiety to insist that, in Milton's phrase, rulers should never be "elevated above their brethren" but should "walk the streets as other men" (1980: 425). More's *Utopia*, for example, contains an early and devastating portrayal of public magnificence as nothing more than a form of childish vanity (1965: 152–6). Ponet's *Politic Power* includes a more minatory reminder of the punishments God visited upon the Israelites for demanding "a gallant and pompous king" (1942: 87). And Milton in *The Ready and Easy Way* condemns with deep disdain those rulers who aspire "to set a pompous face upon the superficial actings of state" (1980: 426).

One outcome of distinguishing the authority of the state from that of its agents was thus to sever a time-honoured connection between the presence of majesty and the exercise of majestic powers. Displays of stateliness eventually came to be seen as mere "shows" or "trappings" of power, not as features intrinsic to the workings of power itself.[111] When Contarini concedes, for example, that the Doge of Venice is permitted to uphold the dignity of his office with a certain magnificence, he emphasizes that this is just a matter of appearances, and uses a phrase that Lewkenor translates by saying that the Doge is allowed a "royal appearing show."[112] Speaking with much greater hostility, Milton (1980: 426, 429) agrees that a monarch "sits only like a great cypher," with all his "vanity and ostentation" being completely inessential to the ordering force of public authority.

Finally, for the most self-conscious rejection of the older images of power, as well as the most unambiguous view of the state as a purely impersonal authority, we need to turn once more to Hobbes. Discussing these concepts in chapter 10 of *Leviathan*, Hobbes deploys the idea of an effective power to command in such a way as to absorb every other element traditionally associated with the notions of public honor and dignity. To hold dignities, he declares, is simply to hold "offices of command"; to be held honorable is nothing more than "an argument and sign of power" (Hobbes 1968: 152, 155). Here, as throughout, it is Hobbes who first speaks, systematically and unapologetically, in the abstract and unmodulated tones of the modern theorist of the state.

Notes

1 Hobbes (1983: 32). *De cive* was first published in Latin in 1642, in English in 1651. See Warrender (1983: 1). Warrender argues that the translation is at least mainly Hobbes's own work (1983: 4–8). But this is disputed by Tuck (1985: 310–12). Note that, in this as in most other quotations from primary sources, I have modernized spelling and punctuation.

2 On "the state as an abstract entity," and the political transformations that underlay the emergence of the concept, see further in Shennan (1974); and cf. Maravall (1961).

3 See Hexter (1973: 155) on "the first of its medieval political meanings."

4 Mommsen (1970, 1.5.2: 35): "Cum igitur hominum causa omne ius constitutum sit, primo de personarum statu ac post de ceteris … dicemus."

5 For example, see Post (1964: 333–67, 368–414).

6 Froissart (1972: 116): "La [sc. the queen] peut on veoir de l'estat grand noblece."

7 For a comparison between those systems of state power in which "the ordering force of display" is proclaimed, and those in which (as in the modern West) it is deliberately obscured, see Geertz (1980: 121–3), whose formulation I have adopted.

8 See Ercole (1926: 67–8). Hexter (1973: 115) similarly notes that *status* acquired this "second political meaning during the middle ages." Cf. Rubinstein (1971: 314–15), who begins his analysis by discussing this stage.

9 See for example Livy (1962, 30.2.8: 372; 1966, 23.24.2: 78); Sallust (1921, 40.2: 68); Cicero (1913, 2.1.3: 170).

10 Mommsen (1970, I.1.2: 29): "publicum ius est quod ad statum rei Romani spectat." Ercole (1926: 69) emphasizes the importance of this passage.

11 Froissart (1824–6, vol. XII: 93): "Le roi … réforma le pays en bon état tant que tous s'en contentèrent."

12 Petition from the abbey of Syon in Shadwell (1912, vol. I: 64). Cf. also vol. I: 66; I: 82, etc.

13 For a survey of this literature see Hertter (1910).

14 Sorbelli (1944) discusses this claim, originally put forward by Muratori; Sorbelli prefers a date in the 1240s.

15 See Franceschi (1966: 26, 27, 28, etc.).

16 Giovanni da Viterbo (1901: 230–2, etc.).

17 For a discussion of the date of composition see Sorbelli (1944).

18 See Ercole (1926: 67–8) and the similar discussions in Post (1964: 18–24, 310–32, 377–81), Rubinstein (1971: 314–16), and Mansfield (1983: 851–2).

19 There are references to the *optimus status reipublicae* in Cicero (1914, 5.4.11: 402 and 1927, 2.11.27: 174), and to the *optimus civitatis status* in Seneca (1964, 2.20.2: 92).

20 See Franceschi (1966: 26) on the need to act "ad … comodum ac felicem statum civitatis" and p. 28: "ad honorabilem et prosperum statum huius comunitatis."

21 See Giovanni da Viterbo (1901: 230) on the "bonus status totius communis huius civitatis."

22 Note that they begin to discuss this issue nearly a century earlier than such chroniclers as Giovanni Villani, one of the earliest sources usually cited in this context. See Ercole (1926: 67–8), Hexter (1973: 155), and Rubinstein (1971: 314–16). For Villani on the "buono et pacifico stato" see Villani (1802–3, vol. III: 159; vol. IV: 3, etc.).

23 Aquinas (1963, I.II.19.10: 104): "Nam iudex habet curam boni communis, quod est iustitia, et ideo vult occisionem latronis, quae habet rationem boni secundum relationem ad statum commune."

24 See Giovanni da Viterbo (1901: 220–2) on the attributes and policies to be demanded of an elected *rector*, and cf. Latini (1948: 402–5), paraphrasing Giovanni's account.

25 Note that, in providing dates for the more obscure humanists, I have taken my information from Cosenza (1962).

26 Campano (1502, fo. xxxxvii^{r}): "nihil existimem a statu et salute reipublicae alienius."

27 Beroaldo (1508, fo. xv^{v}): "oblitis suorum ipsius commodorum ad utilitatem publicam quicquid agit debet referre."

28 Erasmus (1974: 194): "felicissimus est status, cum principi paretur ab omnibus atque ipse princeps paret legibus, leges autem ad archetypum aequi et honesti respondent."

29 Cf. Kantorowicz (1957, esp. pp. 207–32, 268–72), Post (1964, esp. pp. 247–53, 302–9), Strayer (1970, esp. pp. 57–9), and Wahl (1977: 80). By contrast, see Ullmann (1968–9, esp. pp. 43–4) on traditional legal concepts as an obstacle to the emergence of the concept of the state.

30 Note how loftily Hotman still speaks of such usages in his *Francogallia* as late as the 1570s. Writing about the Public Council, he observes that its powers extend "to all those matters which the common people in vulgar parlance nowadays call Affairs of State" ("de iis rebus omnibus, quae vulgus etiam nunc Negotia Statuum populari verbo appellat") (1972: 332).

31 For the thesis that "*stato*, meaning a State, derives in the main … from *lo stato del principe*, meaning the status or estate of an effectively sovereign prince," see Dowdall (1923: 102). Cf. also Skinner (1978, vol. II: 352–8).

32 On this development see Waley (1978: 83–330).

33 On this "moment" see Pocock (1975: 83–330). Cf. also Skinner (1978, vol. I: 139–89).

34 On the *pater patriae*, see for example Beroaldo (1508, fos. xiv^{r} and xv^{r}) and Scala (1940: 256–8, 273).

35 Petrarch already states these twin ideals (1554: 420–1, 428). They become standard during the *quattrocento*, even recurring in Machiavelli's *Il principe* (1960: 102).

36 Villani (1802–3, vol. IV: 24). Cf. also vol. IV: 190–4.

37 For these phrases see Machiavelli (1960: 16, 19, 22, 25–6, 27, 28, 35, etc.).

38 Rubinstein (1971) similarly analyzes some of these extended usages. While I have avoided duplicating his examples, I am much indebted to his account.

39 See Aquinas (1966: 136–7, 139–40, 310–11, 319–21, 328–30). Rubinstein (1971: 322) credits Aquinas with popularizing these usages. But they were largely the product of the humanist revision of his text issued in 1492. See Mansfield (1983: 851), and cf. Cranz (1978: 169–73) for a full account.

40 See for example Machiavelli (1960: 28 and 29) on the *stato di pochi*.

41 Machiavelli (1960: 15): "Tutti li stati, tutti e'dominii che hanno avuto et hanno imperio sopra li uomini sono stati e sono o republiche o principati."

42 Villani (1802–3, vol. IV: 190–1). Cf. also vol. IV: 25; vol. VIII: 186.

43 Vettori (1842: 432, 436). Rubinstein (1971: 318) notes that these were already standard usages in late *quattrocento* Florence.

44 The verses are reproduced in Rowley (1958, vol. I: 127).

45 Budé (1966: 140). Although Budé's *Institution* was not published until 1547, it was completed by the start of 1519. See Delaruelle (1907: 201).

46 Vespasiano (1970–6, vol. I: 177, 192). On the latter passage see also Rubinstein (1971: 318).

47 Guicciardini (1933: 287, 293). Note that Guicciardini – though not Machiavelli – also speaks explicitly of *ragione di stato*. See Maffei (1964, esp. pp. 712–20). For the subsequent history of that concept in *cinquecento* Italy, see Meinecke (1957, esp. pp. 65–145).

48 Castiglione (1960: 10, 117–18). For other *cinquecento* uses see Chabod (1962, esp. pp. 153–73).

49 See Post (1964, esp. pp. viii, 247–53, 302–9, 494–8 and pp. 269, 333) for alleged "anticipations" of Machiavelli's thought. Cf. also Kantorowicz (1957, esp. pp. 207–32) on "polity-centered kingship."

50 Chiappelli (1952: 68). Cf. also Cassirer (1946: 133–7), Chabod (1962: 146–55), D'Entrèves (1967: 30–2).

51 It is important to emphasize, however, that in the cases cited in nn. 46 to 48, as in the case of Machiavelli, it would arguably be no less of an overstatement to insist that these are all unequivocally traditional usages. In the retreat from the type of overstatements cited in n. 50, this point seems in danger of being lost. Hexter in particular irons out a number of ambiguities that ought to be admitted (1973, esp. pp. 164–7 and cf. the corrective in Gilbert [1965, 329–30]). Mansfield (1983: 853) similarly concludes that we do not find anywhere in Machiavelli's writings "an instance of the impersonal modern state among his uses of *stato*." If by this he means that Machiavelli cannot unambiguously be said to express that concept, this is undoubtedly correct. My only objection is that there are several ambiguous passages; the history of the acquisition of the concept cannot be divided into such watertight compartments.

52 See Post (1964: 334), on *status* being used to stress that the king "was not only the indispensable ruler but also the essence of the territorial State which he ruled."

53 For this revival, see below, n. 94. Post claims that the medieval sources he discusses "anticipated the idea" of "l'état, c'est moi" (1964: 269; and cf. also pp. 333–5). But when this remark was uttered in seventeenth-century France (if it ever was) it was by then blankly paradoxical, and this would have been the point of uttering it. On this point see Mansfield (1983: 849) and cf. Rowen (1961) on Louis XIV as "proprietor of the state."

54 See Machiavelli (1960: 16, 47, 87, 95). Cf. on this point Mansfield (1983: 852).

55 In England this demand (and this phrase) can be found as late as early-Stuart arguments over royal revenues. See for example the parliamentary debate of 1610 quoted in Tanner (1930: 359).

56 Even in France, the country in which, after Italy, traditional assumptions about the *status* of princes first changed, this arguably remains true until the 1570s. On this point see below, section V, and cf. Lloyd (1983: 146–53). In Spain the old assumptions appear to have survived until at least the middle of the seventeenth century, *pace* Maravall (1961). See Elliott (1984: 42–5, 121–2). In Germany a purely patrimonial concept of government appears to have survived even longer. See the comments in Shennan (1974: 113–14).

57 See Calasso (1957: 83–123), and Wahl (1977). For analogous reinterpretations of the Decretals, see Mochi Onory (1951). For a survey see Tierney (1982).

58 See Bartolus (1562, 47.22: 779) on the "civitates Tusciae, quae non recognoscunt de facto in temporalibus superiorem."

59 Giovanni da Viterbo (1901: 266): "in alterius messem falcem suam mittere."

60 This is, for example, the main thesis of Baron (1966).

61 For this assumption in *trecento* Florentine diplomacy, see Rubinstein (1952).

62 Contarini (1626: 22 and 56): "temperandam … ex optimatum et populari statu … nihil minus urbi Venetae timendum sit, quam principem reipublicae libertati ullum unquam negocium facessere posse." On Contarini see Pocock (1975: 320–8).

63 Machiavelli (1960, II.2: 280): "E facil cosa è conoscere donde nasca ne' popoli questa affezione del vivere libero: perché si vede per esperienza le cittadi non avere mai ampliato né di dominio né di ricchezza se non mentre sono state in libertà."

64 Machiavelli (1960, II.11: 280): "La ragione è facile a intendere: perché non il bene particulare ma il bene comune è quello che fa grandi le città. E sanza dubbio questo bene comune non è osservato se non nelle republiche."

65 See Latini (1948: 391) on "politique … la plus noble et la plus haute science."

66 Latini (1948: 403) on "l'estat de vous et de cette ville." Cf. p. 411 on the idea of remaining "en bon estat."

67 Giovanni da Vignano (1974: 247): "che il nostro bom stato porà remanere in largheça, honore, grand-eça e reponso."

68 Matteo dei Libri (1974: 12): "ke'l nostro bon stato potrà romanire in reposo."

69 See Contarini (1626, at pp. 28 and 46), two cases where, in Lewkenor (1969), *respublica* is rendered as "state." On Lewkenor's translation see Fink (1962: 41–2).

70 Patrizi (1594a: 281) on the duty to uphold "veteres leges" and act "pro communi utilitate."

71 Patrizi (1594a: 292 and 279) on how to act "ne civitatis status evertatur" and "statum reipublicae everterunt."

72 Guicciardini (1932: 271–2): "ogni stato ed ogni potenzia eminente ha bisogno delle dependenzie … che tutti servirebbono a beneficio dello stato." Cf. also pp. 276, 279.

73 Guicciardini (1932: 273): "uno barbacane e fondamento potentissimo a difesa dello stato."

74 See for example Machiavelli (1960, I.2: 130–2, and also pp. 182, 272, 357, etc.).

75 See in particular Machiavelli (1960, II.24: 351–3).

76 Machiavelli (1960, I.2: 133): "Licurgo … fece uno stato che durò più che ottocento anni."

77 Machiavelli (1960, I.6: 141): "se in Roma is poteva ordinare uno stato …"

78 Machiavelli (1960, I.18: 180): "le leggi dipoi che con i magistrati frenavano i cittadini."

79 Ibid.: "l'ordine del governo o vero dello stato."

80 See Fink (1962: 10–20, 56–68); Raab (1964: 185– 217); Pocock (1975: 333–422); Haitsma Mulier (1980: 26–76).

81 I see no justification for the claim that Starkey merely "dressed up" his *Dialogue* in civic humanist terms. See Mayer (1985: 25) and cf. Skinner (1978, vol. I: 213–42) for an attempt to place Starkey's ideas in a humanist context.

82 A point emphasized by Shennan (1974: 9, 113–14) and Mansfield (1983: 849–50).

83 See Harrington (1977: 173) for the claim that "the interest of the commonwealth is in the whole body of the people," and his invariable preference, in the "Preliminaries" to *Oceana* for speaking of "the city" or "commonwealth" as the locus of political authority. See also pp. 161, 170, 171–2, 182–3.

84 Marsilius of Padua (1956, I.8 and 9: 27–34). For the special significance of Marsilius within this tradition of thought see Condren (1985: 262–9).

85 See esp. Hotman (1972: 287–321), where he lays out his view of the French constitution as a mixed monarchy.

86 Locke (1967: 393). On Locke's *Two Treatises* essentially as an attack on Filmerian absolutism, see Laslett (1967: 50–2, 67–78) and cf. Dunn (1969: 47–57, 58–76, 87–95). On the place of this concept in Locke's theory see Dunn (1969: 148–56).

87 Lloyd (1983: 155), while agreeing that this is true of Hotman, argues that two other "monarchomach" theorists – Beza and the author of the *Vindiciae contra tyrannos* – "implied the existence of the secular state as an entity distinct from ruler and people." I cannot see that either writer distinguished the powers of the state from those of the people. Cf. Skinner (1978, vol. II: 318–48).

88 Locke (1967: 386). Cf. also pp. 301, 360–1, 371, 381 for the idea of rulers as mere trustees. See also Hotman (1972: 154 and 402–4) on kings as magistrates "tied" by the duties of their office.

89 On this school of thought see Hamilton (1963) and Fernandez–Santamaria (1977). On the character of their natural-law (as opposed to divine-right) theories of absolutism see Sommerville (1982 and 1986: 59–80). For a contrast with later theories of popular sovereignty see Tully (1980: 64–8 and 111–16).

90 See Bodin (1962: A71). For Bodin's concern to refute the "monarchomachs" see Franklin (1973, esp. pp. vii. 50, 93) and Salmon (1973, esp. pp. 361, 364).

91 Hobbes (1968: 241). Cf. also pp. 192, 223, 237, etc.

92 Suarez (1612: 210): "Quocirca translatio huius potestatis a republica in principem non est delegatio, sed quasi alienatio … simpliciter illi conceditur."

93 Bodin (1576: 125) distinguishes between "possesseurs" of sovereignty and those who "ne sont que depositaires et gardes de cette puissance."

94 Bossuet (1967: 177). On this variety of absolutism see Keohane (1980: 241–61) and Sommerville (1986: 9–50).

95 See Bodin (1576: 9 *et passim*) on the "ville" and "cité." Cf. Hobbes (1983: 89–90 *et passim*) for the concept of "a city or civil society."

96 See Suarez (1612: 351–60) on the relations between the *princeps, leges* and *respublica*, and cf. Grotius (1625: 65) on *civitas* and *respublica* and p. 84 on the *romana respublica*.

97 Cf. the full titles of Bodin (1576), Bodin (1586), and Bodin (1962).

98 See Lloyd (1983: 156–62). Fell (1983, esp. pp. 92– 107, 175–205) lays all his emphasis on Bodin's contemporary Corasius, though without investigating the extent to which he used the term *status* to express his concept of "the legislative state." But by the next generation the use of the vernacular term *état* (or *estat*) to express such a concept had become well entrenched in France. See Church (1972: 13–80) and Keohane (1980: 54–82, 119–82). Dowdall (1923: 118) singles out Loyseau's discussion in his *Traité des seigneuries* (1608) of the relationship between "seigneuries souveraines" and "estats" as being of particular importance, and this point has been much developed. See Church (1972: 33–4) and Lloyd (1981 and 1983: 162–8).

99 Bodin (1576, e.g. at pp. 219, 438).

100 Bodin (1576: 282–3): "Et combien que le gouvernement d'une Republique soit plus ou moins populaire, ou Aristocratique, ou Royale, si est-que l'estat en soi ne reçoit compairison de plus ni de moins: car toujours la souveraineté indivisible et incommunicable est à un seul." Note also Bodin's use of the phrase "en matière d'estat" (1576: 281, 414).

101 See Bodin (1962: 184, 250, 451) and cf. pp. 10, 38, 409, 700 for some additional uses of "state."

102 Hobbes (1968: 82) states that the aim of *Leviathan* is "to describe the nature of this artificial man."

103 Benjamin Hoadly, for example, continues to speak about "the civil power," "civil government," and "the power of

the civil magistrate" rather than about the state. See "The Original and Institution of Civil Government, Discussed" in Hoadly (1773, vol. II: 189, 191, 201, 203 *et passim*).

104 See the usages in Robbins (1959: 125, 283) and cf. Kramnick (1968, esp. pp. 236–60) and Pocock (1975, esp. pp. 423–505).

105 Hume's main discussions of state power occur in his essays "Of Commerce" and "That Politics may be Reduced to a Science." See Hume (1875, vol. I: 100, 105 and 289, 294–5).

106 See Rousseau (1966, "De l'état civil", pp. 55–6). On "état" in the political vocabulary of Rousseau and his contemporaries see Derathé (1950: 380–2) and Keohane (1980, esp. pp. 442–9).

107 See Hotman (1972, e.g. pp. 254, 298, 402).

108 On this process see Holdsworth (1925: 307–33).

109 Machiavelli (1960: 74, and cf. also pp. 76, 93). The same applies even more strongly to Machiavelli's contemporaries among "mirror-for-princes" writers. See for example Pontano (1952: 1054–6), Sacchi (1608: 68).

110 Rousseau (1966: 54) on "la personne morale qui constitue l'Etat."

111 On the distinctiveness of this conception of public power see Geertz (1980: 121–3).

112 See Lewkenor (1969: 42), translating "specie regia" from Contarini (1626: 56). For invaluable help with earlier drafts I am greatly indebted to John Dunn and Susan James.

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6

State Simplification

James C. Scott

Certain forms of knowledge and control require a narrowing of vision. The great advantage of such tunnel vision is that it brings into very sharp focus certain limited aspects of an otherwise far more complex and unwieldy reality. This very simplification, in turn, makes the phenomenon at the center of the field of vision far more legible and, hence, far more susceptible to careful measurement, calculation, and manipulation.

The invention of scientific forestry in late eighteenth-century Prussia and Saxony serves as something of a model of this process.[1] While the history of scientific forestry is important in its own right, I plan to use it here as a metaphor for the forms of knowledge and manipulation characteristic of large institutions with sharply defined interests, of which the state is perhaps the outstanding example. Once we have seen how simplification, legibility and manipulation operate in forest management, we can then explore how a similar optic is applied by the modern state to urban planning, rural settlement, land administration, and agriculture.

I The State and Scientific Forestry: A Parable

The early modern European state, even prior to the development of scientific forestry, viewed its forests primarily through the fiscal lens of revenue needs. To be sure, other concerns such as timber for masts, shipbuilding, state construction, and sufficient fuel wood for the economic security of its subjects were not entirely absent from official management. These concerns, too, had heavy implications for state revenue and security.[2] Exaggerating only slightly, one might say that the crown's interest in forests was resolved through its fiscal lens into a single number: that number being the revenue yield of the timber which might be extracted annually.

The best way to appreciate exactly how heroic this constriction of vision is, is to notice what was left out of its field of vision. Lurking behind the number indicating revenue yield were not so much trees as "commercial wood," representing so many thousands of board feet of saleable timber and so many cords of firewood fetching a certain price. Missing, of course, were all those trees, bushes and plants holding little or no potential for state revenue. Missing as

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well, were all those parts of trees – even "revenue-bearing" trees – which might have been useful to the population but whose value could not be converted into fiscal receipts. Here I have in mind the uses of foliage as fodder and thatch, fruits as food for domestic animals and people, twigs and branches as bedding, fencing, hop poles and kindling, bark and roots for medicine and tanning, sap for resins, and so forth. The actual tree with its vast number of possible uses was replaced by an "abstract" tree representing a volume of lumber or firewood. If the princely conception of the forest was utilitarian, it was surely a utilitarianism confined to the direct needs of the state.

From a naturalist's perspective, nearly everything was missing from the state's picture. Gone were the vast majority of flora, the grasses, flowers, lichen, ferns, mosses, shrubs, and vines. Gone, too, were reptiles, birds, amphibians, and innumerable species of insects. Gone was the vast majority of fauna except, perhaps, those of interest to the crown's gamekeepers.

From an anthropologist's perspective, nearly everything touching on human interaction with the forest was also missing from the state's tunnel vision. Except for poaching, which did impinge on either the state's claim to revenue in wood or to royal game, the state typically ignored the vast and complex negotiated social uses of the forest for hunting and gathering, pasturage, digging valuable minerals, fishing, charcoal-making, trapping and food collection as well as its significance for magic, worship, refuge, etc.[3]

If the utilitarian state could not see the real existing forest for the (commercial) trees, if its view of its forests was abstract and partial, it was hardly unique in this respect. A certain level of abstraction is necessary for certain forms of analysis and it is not at all surprising that the abstractions of state officials should have reflected the paramount fiscal interests of their employer. The vocabulary used to organize nature typically betrays the overriding interests of its human users. In fact, the term "nature" is, in utilitarian discourse, replaced by the term "natural resources" in which the focus is on those aspects of nature that can be appropriated for human use. A comparable logic extracts from a more generalized natural world those flora or fauna that are of utilitarian value (usually marketable commodities) and, in turn, reclassifies those species which compete with, prey on, or otherwise diminish the yields of the valued species. Thus, *plants* which are valued become *crops*; the species which compete with them are reclassified as *weeds*, and the insects which ingest them are reclassified as *pests*. Thus, *trees* which are valued become *timber* while species which compete with them become "trash" trees or underbrush. The same logic applies to fauna. Those *animals* which are highly valued become *game* or *livestock*, while those animals which compete with or prey upon them become *predators* or "*varmints*."

The kind of abstracting, utilitarian logic which the state, through its officials, applied to the forest is thus not entirely distinctive. What is distinctive about it, however, is the narrowness of its field of vision, the degree of elaboration to which it can be subjected, and above all, as we shall see, the unique capacity of the state to impose (in part) its optic on the very reality it is observing.[4]

Scientific forestry was developed from about 1765 to 1800, largely in Prussia and Saxony. Eventually, it would become the basis of forest management techniques in France, England, the US, and throughout the Third World. Its emergence can hardly be understood outside the larger context of centralized state-making initiatives of the period. In fact, the new forestry science was a sub-discipline of so-called "cameral science" – an effort to reduce the fiscal management of a kingdom to scientific principles that would allow systematic planning.[5] Traditional domainal forestry had hitherto simply divided the forest into roughly equal plots – the number of plots coinciding with the number of years in the assumed growth cycle.[6] One plot was cut each year on the assumption of equal yields (and value) from plots of equal size. Owing to poor maps, the uneven distribution of the most valuable large trees (*Hochwald*) and very approximate cordwood (*Bruststaerke*) measures, the results were unsatisfactory for fiscal planning.

The first attempt at more precise measurement was made by Johann Gottlieb Beckmann on a carefully surveyed sample plot. Walking abreast, several assistants carried compartmentalized boxes with color-coded nails corresponding to five size-categories of trees which they had been trained to identify. Each tree was "tagged" with the appropriate nail until the whole sample plot was covered. Having begun with a specified number of nails, it was a simple matter to subtract those remaining from the initial total and arrive at an inventory of trees by size-class for the entire plot. The sample plot had been carefully chosen for its representativeness, allowing the foresters then to calculate the timber and, given certain price assumptions, the revenue yield of the whole forest. For the forest scientists (*Forstwissenschaftler*) the goal was always to "deliver the greatest possible *constant* volume of wood."[7]

The effort at precision was pushed further as mathematicians worked from the cone/volume principle to specify the volume of saleable wood contained by a standardized tree (*Normalbaum*). Their calculations were checked empirically against the actual volume of wood in

sample trees.[8] The final result of such calculations was the development of elaborate tables with data organized by classes of trees by size and age under specified conditions of normal growth and maturation. References to these tables coupled with field tests allowed the forester to estimate closely the inventory, growth and yield of a given forest. In the regulated, abstract forest of the *Forstwissenschaftler*, calculation and measurement prevailed and the three watchwords were "minimum diversity," "the balance sheet," and "sustained yield."

The achievement of German forestry science in standardizing techniques to calculate the sustainable yield of commercial timber and, hence, revenue, was impressive enough. What is decisive for our purposes, however, is the next logical step in forest management. That step was to attempt to create, through careful seeding, planting and cutting, a forest that was easier for state foresters to count, manipulate, measure and assess. The fact is that forest science and geometry, backed by state power, had the capacity to transform the real, disorderly, chaotic forest so that it more closely resembled the administrative grid of its techniques. To this end the underbrush was cleared, the number of species was reduced (often to monoculture), planting was done simultaneously and in straight rows for large tracts. These management practices, as Lowood observes,

> produced the monocultural, even-age forests that eventually transformed the *Normalbaum* from abstraction to reality. The German forest became the archetype for imposing on disorderly nature the neatly arranged constructs of science. Practical goals had encouraged mathematical utilitarianism, which seemed, in turn, to promote geometric perfection as the outward sign of the well-managed forest; in turn the rationally ordered arrangements of trees offered new possibilities for controlling nature.[9]

The tendency was toward "regimentation" in the strict sense of the word. The forest trees were drawn up into serried ranks, as it were, to be measured, counted off, felled and replaced by a new rank-and-file of look-alike conscripts. At the limit, the forest itself would not have to be seen; it could be "read" accurately from the tables and maps in the foresters' office.

This utopian dream of scientific forestry was, of course, only the *immanent* logic of its techniques. It was not, and could not, ever be realized in practice. Both nature and "the human factor" intervened. The existing topography of the landscape and the vagaries of fire, storms, blights, climatic changes, insect populations and disease conspired to thwart foresters and to shape the actual forest. Given the insurmountable difficulties of policing large forests, the adjacent human populations also typically continued to graze animals, poach firewood and kindling, make charcoal, and generally make use of the forest in ways that prevented the foresters' management plan from being fully realized.[10] Though, like all utopian schemes, it fell well short of attaining its goal, the critical fact is that it did partly succeed in stamping the actual forest with the imprint of its designs.

II Social Facts, Raw and Cooked

The administrators' forest cannot be the naturalists' forest. Even if the ecological interactions at play in the forest were known, they would constitute a reality so complex and variegated as to defy easy shorthand description. The intellectual filter necessary to reduce the complexity to manageable dimensions was provided by the state's interest in commercial timber and revenue.

If the natural world, however shaped by human use, is too unwieldy in its "raw" form for administrative manipulation, so too are the actual social patterns of human interaction with nature bureaucratically indigestible in their raw form. No administration system is capable of representing *any* existing social community except through a heroic and greatly schematized process of abstraction and simplification. It is not simply a question of capacity, though, like the forest, a human community is surely far too complicated and variable to yield its secrets easily to bureaucratic formulae. It is also a question of purpose. State agents have no interest – nor should they – in describing an entire social reality any more than the scientific forester has an interest in describing the ecology of a forest in detail. Their abstractions and simplifications are disciplined by a small number of objectives, the most prominent of which were, until the nineteenth century, typically: taxation, political control, and conscription. They needed only the techniques and understanding adequate to these tasks. Here, as we shall see, there are some instructive parallels between the development of modern "fiscal forestry" and modern forms of taxable property in land. Pre-modern states were no less concerned with tax receipts than modern states. But, like pre-modern state forestry, the techniques and reach of the state left much to be desired.

Absolutist France in the seventeenth century is a case in point.[11] Indirect taxes – for example, excise levies on

salt, tobacco, tolls, licenses and the sale of offices and titles – were favored forms of taxation inasmuch as they were easier to administer and required little or nothing in the way of information about landholding and income. The tax-exempt status of the nobility and clergy meant that a good deal of the landed property was not taxed at all, transferring much of the burden to wealthy commoner farmers and the peasantry. Common land, though it was a vitally important subsistence resource for the rural poor, yielded no revenue either. In the eighteenth century, the physiocrats would condemn all common property on two presumptive grounds: that it was inefficiently exploited and that it was fiscally barren.[12]

What must strike any observer of absolutist taxation is how wildly variable and unsystematic it was. Collins found that the major direct land tax, the *taille*, was frequently not paid at all and that no community paid more than one-third of what they were assessed.[13] The result was *routine* state reliance on exceptional measures to make good shortfalls in revenue or to pay for new expenses, particularly military campaigns. The crown exacted "forced loans" (*rentes, droits aliénés*) in return for annuities which it might or might not honor; it sold offices and titles (*vénalités d'office*); it levied exceptional hearth taxes (*fouages extraordinaires*); and, above all, it billeted troops directly on communities, often ruining them in the process.[14]

The billeting of troops, a common form of fiscal punishment, was to modern forms of systematic taxation as the drawing-and-quartering of would-be regicides (so strikingly described by Michel Foucault at the beginning of *Discipline and Punish*) was to modern forms of systematic criminal incarceration. Not that there was a great deal of choice involved. The state simply lacked both the information and administrative grid that would have allowed it to exact a reliable revenue from its subjects that was more closely tied to their actual capacity to pay. As with forest revenue, there was no alternative to rough and ready calculations with a corresponding fluctuation in yields. Fiscally, the pre-modern state was, to use Charles Lindblom's felicitous term, "all thumbs and no fingers"; it was incapable of fine tuning.

Here is where the rough analogy between forest management and taxation breaks down. In the absence of reliable information about sustainable timber yield, the state might either inadvertently overexploit its resources and threaten future supply, or else fail to realize the level of proceeds it might sustain.[15] The trees themselves, however, were not political actors while the taxable subjects of the crown most certainly were. They signaled their dissatisfaction by flight, by various forms of quiet resistance and evasion and, *in extremis*, by open revolt. A reliable format for taxation of subjects thus depended not just on discovering what their economic condition was, but also on trying to judge what exactions they would vigorously resist.

How were the agents of the state to begin measuring and codifying, throughout each region of an entire kingdom, its population, their land-holdings, their harvests, their wealth, the volume of commerce, and so on? The obstacles in the path of even the most rudimentary knowledge of these matters were simply enormous. The struggle to establish uniform weights and measures and to carry out a cadastral mapping of land-holdings can serve as diagnostic examples. Each required a large, costly, long run campaign against determined resistance.

Each undertaking also exemplified a pattern of relationships between local knowledge and practices on the one hand, and state administrative routines on the other that will find echoes throughout our subsequent analysis. In each case, local practices of measurement and land-holding were *illegible* to the state in their "raw" form. They exhibited a diversity and intricacy that reflected a great variety of purely local, not state, interests. That is to say, they could not be assimilated directly into an administrative grid without either being transformed or else reduced to a convenient, if partly fictional, shorthand. The logic behind the required shorthand was provided, as in scientific forestry, by the pressing material interests of rulers: fiscal receipts, military manpower, and state security. Finally, this shorthand functioned, in turn, like Beckmann's *Normalbaume*, not just as an (inadequate) description. Backed by state power through records, courts, and ultimately coercion, these state fictions transformed the reality they presumed to observe, though never so thoroughly as to precisely fit the grid.

III Popular Measures, State Measures

Non-state forms of measurement grew from the logic of local practice. As such, they shared some generic features despite their bewildering variety – features which made them an impediment to administrative uniformity. Thanks to the synthesis of the medievalist Witold Kula, the reasoning that animated local practices of measurement may be set out fairly succinctly.[16]

Most early measures were anthropomorphic. One sees this logic at work in surviving expressions such as "a stone's throw" or "within earshot" for distances and in expressions such as "a cartload," "a basketful," "a handful" for volume.

Given that the local cart or basket might vary from place to place and that local notions of "a stone's throw" might not be precisely uniform, these units of measurement varied geographically and temporally. Even measures which were apparently fixed might be deceptive.[17] The *pinte* in eighteenth century Paris, for example, was equivalent to 0.93 liters, whereas in Seine-en-Montagne it was 1.99 liters and in Precy-sous-Thil, an astounding 3.33 liters. The *aune*, a measure of length used especially for cloth, varied depending on the material (for example, the unit for silk being smaller than that for linen) and in France as a whole there were at least 17 different *aunes*.

Local measures were also relational or "commensurable."[18] Virtually any request for a judgment of measure allows a range of responses depending on the context of the request. A common response to the question, "How far is it to the next village?" in that part of Malaysia with which I am most familiar is, literally, "three rice-cookings." The answer assumes that the questioner is interested in how long it will take him to get there, not how many miles away it is. In varied terrain, of course, distance in miles is an utterly unreliable guide to travel time, especially when the traveler is on foot or bicycle. The answer also expresses time not in minutes – until recently wristwatches were rare – but in units that were locally meaningful. Everyone knows how long it takes to cook the local rice. Thus an Ethiopian response to a query about how much salt is required for a dish might be: "Half as much as to cook a chicken." The reply refers back to a standard which everyone is expected to know. Such measurement practices are irreducibly local inasmuch as regional differences in, say, the rice eaten or in the preferred way of cooking chicken will give different results.

Many local units of measurement are tied very practically to a particular activity. Maharashtran peasants, as Appadurai notes, express the desired distance between the onion sets they plant in terms of hand-spans. Moving along a row, the hand is, well, the most "handy," as a gauge. In similar fashion, a common measure for twine or rope is the distance between the thumb and elbow because this corresponds with how it is wrapped and stored. As with onion-sets the process of measuring is embedded in the activity itself and requires no separate operation. Such measurements are, moreover, often approximate; they are only as exact as the task at hand requires.[19] Rainfall may be said to be abundant or inadequate if the context of the query implies an interest in a particular crop. A reply in terms of inches of rainfall, however accurate, would fail to convey the desired information, inasmuch as it ignores vital matters like the timing of the rain. For many purposes, as well, an apparently vague measurement may communicate more valuable information than a statistically exact average. The cultivator who reports that his rice yield from a plot is anywhere between four and seven baskets is conveying more accurate information, if the focus of attention is on the variability of the yield, than if he reported a ten-year statistical average of 5.6 baskets.

There is, then, no single, all-purpose, correct answer to a question implying measurement unless we specify the relevant local concerns that give rise to the question. Particular customs of measurement are thus situationally, temporally, and geographically bound.

Nowhere is the particularity of customary measurement more evident than when it comes to cultivated land. Modern measures of land by abstract surface area – so many hectares or acres – are singularly uninformative figures to a family which proposes to make its living from these acres. Telling a farmer only that he is leasing 20 acres is about as helpful as telling a scholar that he has bought 6 kilos of books! Customary measures of land have, therefore, taken a variety of forms corresponding to those aspects of the land that are of greatest practical interest. Where land was abundant and manpower and/or draft-power scarce, the most meaningful gauge of land was often the number of days required to plough it or to weed it. A plot of land in nineteenth century France, for example, would be described as representing so many *morgen* or *journal(s)* (days of work), and the kind of work (*homée, bechée, fauchée*) required would be specified. How many *morgen* a field of, say, ten acres represented could vary greatly; if the land was rocky and steeply pitched it might require twice as much labor to work than if it were rich bottom land. The *morgen* would, moreover, differ from place to place depending on, say, the strength of local draftpower and the crops sown, and it would differ from time to time as technology (plough tips, yokes, harnesses) affected the work a man could accomplish in a day.

Land might also be evaluated according to the amount of seed required to sow it. If the soil was very good, a field would be densely sown, while poor land would be more lightly seeded. The amount of seed sown to a field is, in fact, a relatively good proxy for average yield, as the sowing is done in anticipation of average growing conditions, while the actual seasonal yield would be more variable. Given a particular crop regimen, the amount of seed sown would indicate roughly how productive a field had been, though it would indicate nothing directly about how arduous it was to cultivate or how variable the harvests were. The average yield from a plot of land is itself, however, a rather abstract figure. What most farmers near the subsistence margin

want, above all, to know is whether a particular farm will meet their basic needs reliably. Thus, small farms in Ireland were described as "a farm of one cow" or "a farm of two cows" to indicate their grazing capacity to those who lived largely by milk products (and potatoes). The physical area a farm might represent was of little interest compared to whether it would feed a particular family.[20]

To grasp the prodigious variety of customary ways of "measuring" land, we would have to imagine literally scores of "maps" constructed along very different lines than mere surface area. I have in mind the sorts of maps devised to capture our attention in which, say, the size of a country is made proportional to its population rather than its geographical size – a "fun house" effect for most viewers, in which China and India loom menacingly over Russia, Brazil and the USA, while Libya, Australia and Greenland virtually disappear. These customary maps (for there would be a great many) would construct the landscape according to units of work, yield, soil, accessibility and subsistence, none of which would necessarily accord with surface area. These measurements are decidedly *local, interested, contextual* and *historically specific*. What meets the subsistence needs of one family may not meet the subsistence needs of another. Factors such as local crop regimens, labor supply, agricultural technology, weather, etc. ensure that the standards of evaluation vary from place to place and over time. Directly apprehended by the state, they would represent a hopelessly bewildering welter of local standards. They decidedly would not lend themselves to aggregation into a single statistical series that would allow state officials to make meaningful comparisons.

(a) *Statecraft and the Hieroglyphics of Measurement*

Because local standards of measurement were tied to practical needs, because they reflected particular cropping patterns and agricultural technology, because they varied with climate and ecology, because they were "an attribute of power and an instrument of asserting class privilege" and because they were "at the center of bitter class struggle,"[21] they represented a mind-boggling problem for statecraft. Efforts to simplify or standardize measures recur like a leitmotif throughout French history – their reappearance a sure sign of previous failure. Even more modest attempts to simply codify local practices and create conversion tables were quickly overtaken and rendered obsolete by changes on the ground. The King's ministers were confronted, in effect, with a patchwork of local measurement codes, each of which had to be "cracked" separately. It was as if each district spoke its own local dialect: one that was unintelligible to outsiders and, at the same time, liable to change without notice. The central state either risked making large and potentially damaging miscalculations about local conditions or else it relied heavily on the advice of "local trackers" – the nobles and clergy in the crown's confidence – who, in turn, were not slow to take full advantage of their power.

The *illegibility* of local measurement practice was more than an administrative headache for the monarchy. It compromised the most vital and sensitive aspects of state security. Food supply was the Achilles heel of the early modern state; nothing short of religious war so menaced the state as food shortages and the resulting social upheaval. Without comparable units of measurement, it was difficult, if not impossible, to monitor markets, to compare regional prices for basic commodities, or to regulate food supplies effectively.[22] Obliged to grope its way on the basis of sketchy information, rumor and self-interested local reports, the state often responded late and inappropriately. Equity in taxation, another very sensitive political issue, was beyond the reach of a state which found it difficult to know the basic *comparative* facts about harvests and prices. A vigorous effort to collect taxes, to requisition for military garrisons or to relieve urban shortages, or any number of other measures might, given the crudeness of state intelligence, actually provoke a political crisis. Short of jeopardizing state security, the Babel of measurement produced gross inefficiencies and a pattern of either "undershooting" or "overshooting" fiscal targets.[23] No effective central monitoring or controlled comparisons were possible without standard, fixed units of measurement.

(b) *Simplification and Standardization of Measurement*

If scientific forestry's project of creating a simplified and legible forest encountered opposition from villagers whose use of such rights was being challenged, the political opposition to standard and legible units of measurement was even more refractory. The power to establish and impose local measures was an important feudal prerogative with material consequence which the aristocracy and clergy would not willingly surrender. Testimony to their capacity to thwart standardization is evident in the long series of abortive initiatives by "absolutist" rulers to insist on some degree of uniformity. The very particularity of local feudal practices and their impenetrability to would-be centralizers helped to underwrite the autonomy of local spheres of power.

Three factors, in the end, conspired to make what Kula calls the "metrical revolution" possible. First, the growth of market exchange encouraged uniformity in measures. Second, both popular sentiment and Enlightenment philosophy favored a single standard throughout France. And, finally, it was only the Revolution itself and, most especially, Napoleonic state-building that actually enforced the metric system in France and the Empire.

Large-scale commercial exchange and long distance trade tend to promote common standards of measurement. For relatively small-scale trade, grain dealers could trade with several suppliers so long as they knew the measure each was using. They might actually profit from their superior grasp of the profusion of units, much as smugglers take advantage of small differences in taxes and tariffs. Beyond a certain point, however, much of commerce is composed of long chains of transactions – often over great distances – between anonymous buyers and sellers. Such trade is greatly simplified and made legible by standard weights and measures. Whereas artisanal products were typically made by a single producer according to the desires of a particular customer and carried a price specific to that object, the mass produced commodity is made by no one in particular and is intended for any purchaser at all. The virtue, in a sense, of the mass commodity is its reliable uniformity. In proportion, then, as the volume of commerce grew and the goods exchanged became increasingly standardized (for example, a ton of wheat, a dozen plough tips, twenty cartwheels), there was a growing tendency to widely agreed upon units of measurement.

The perennial state project of unifying measures throughout the Kingdom received a large degree of popular support in the eighteenth century, thanks to the "reaction feodale." Owners of feudal domains – many of them bourgeois *arrivistes* – were under pressure to maximize the return on their estates and did so, in part, by manipulating units of measurement. This sense of victimization was evident in the *cahiers* of grievances prepared for the meeting of the Estates General just before the Revolution. Although it was hardly the major grievance of members of the Third Estate, they consistently called for equal measures whereas the *cahiers* of the clergy and nobility were silent, and presumably satisfied with the status quo, on this issue. The following petition from Brittany is typical of the way in which an appeal for unitary measures could be assimilated to devotion to the Crown.

> We beg them [i.e., the King, his "noble family" and his "esteemed" chief minister Necker] to join with us in checking the abuses being perpetrated by tyrants against that class of citizens which is kind and considerate and which, until this day has been unable to present its very grievances to the very foot of the throne, and now we call on the King to mete out justice, and *we express our most sincere desire for but one king, one law, one weight, and one measure*.[24]

The simplification of measures depended, however, on the other great and revolutionary political simplification of the modern era: the concept of a uniform, homogeneous citizenship. So long as each estate operated within a separate legal sphere, so long as different categories of people were unequal in law, it followed that they might have unequal rights with respect to measures as well.[25] Equal citizenship as an idea can be traced to Enlightenment ideas and is evident in the writings of the Encyclopedists. For the Encyclopedists, the cacophony of measurement, of institutions, of inheritance laws, of taxation, of market regulations was the great obstacle to France becoming a single people. They envisioned a series of centralizing and rationalizing reforms that would transform France into a national community where, everywhere, the same codified laws, measures, customs and beliefs would prevail. It is worth noting that this project forcibly implies the concept of *national* citizenship – a national French citizen perambulating the kingdom and encountering exactly the same fair, equal conditions as the rest of his compatriots. In place of a welter of incommensurable small communities, familiar to its inhabitants but mystifying to outsiders, there would rise a single national society perfectly legible from the center. The proponent of this vision well understood that it was not mere administrative convenience that was at stake, but rather the transformation of a people: "The uniformity of customs, viewpoints, and principles of action will, inevitably, lead to a greater community of habits and predispositions."[26] The abstract grid of equal citizenship would create a new reality: the French citizen.

The homogenization of measures was, then, part and parcel of a larger, emancipatory simplification. At one stroke the equality of all Frenchmen before the law was guaranteed by the state. All of the previous "natural" distinctions were now "denaturalized" and nullified, at least in law. In an unprecedented revolutionary context where an entirely new political system was being created from first principles, it was surely no great matter to legislate uniform weights and measures. As the revolutionary decree read: "The centuries old dream of the masses of only one just measure has come true! The Revolution has given the people the meter."[27]

Proclaiming the meter officially was far simpler than ensuring that it became the daily practice of French citizens. The state could insist on the exclusive use of its units in property deeds, legal contracts, tax codes, in the courts and in the state school system. Outside these official spheres the metric system made its way only very slowly. Despite a decree confiscating the use of the older "toise" sticks in shops and replacing them with meter sticks, the populace continued to use the older system, marking, for example, their meter sticks with the old measures. Even as late as 1828 the new measures were more a part of *le pays légal* than of *le pays réal*. As Chateaubriand remarked, "Whenever you meet a fellow who, instead of talking *arpents, toises*, and *pieds*, refers to hectares, meters, and centimeters, rest assured, the man is a prefect."[28]

IV Land Tenure: Local Practice and Fiscal Shorthand

The revenue of the early modern state came mainly from levies on commerce and land, the major sources of wealth. For commerce, this implied an array of excise taxes, tolls and market duties, licensing fees and tariffs. For landed wealth, this meant somehow attaching every parcel of taxable property to an individual or an institution responsible for paying the tax on it. As straightforward as this procedure seems in the context of the modern state, its achievement was enormously difficult for at least two reasons. First, the actual social facts of customary land tenure were frequently so varied and intricate as to virtually defy any simple one-to-one equation of taxpayer and taxable property. Second, there were, as in the case of units of measurement, social forces whose interests could only be damaged by the unified and transparent set of property relations desired by the state's fiscal agents. The centralizing state succeeded, in the end, in imposing a novel and legible (from the center) property system which, like the work of scientific foresters, not only radically abridged the actual tenure practices they described but, at the same time, transformed those practices to align them more closely with their shorthand, schematic reading.

(a) *An Illustration*

A hypothetical case of customary land tenure practices may help demonstrate how difficult it is to assimilate such practices to the bare-bones schema of a modern cadastral map. The patterns I describe below are an amalgam of practices I have encountered in the literature or in the course of field work in Southeast Asia. While the case is hypothetical, it is not unrealistic.

Let us imagine a community in which families have usufruct rights to parcels of cropland during the main growing season. Only certain crops, however, may be planted and every seven years the usufruct land is redistributed among resident families according to each family's size and number of able-bodied adults it comprises. After the harvest of the main season crop, all cropland reverts to common land where any family may glean, graze their fowl and livestock, and even plant quickly-maturing, dry-season crops. Rights to graze fowl and livestock on pasture land held in common by the village is extended to all local families. The number of animals grazed, however, is restricted according to size of family, especially in dry years when forage is scarce. Families not using their grazing rights can give them to other villagers but not to outsiders. Everyone has the right to gather firewood for normal family needs of heat and fuel, except for the village blacksmith and baker who have larger allotments. No commercial sale from village woodlands is permitted.

Trees which are known to have been planted are, together with their fruit, the property of the family which planted them, no matter where they are now growing. Fruit fallen from such trees, however, is the property of anyone who gathers it. When a family fells one of its trees or it is felled by wind, the trunk of the tree belongs to the family, branches to the immediate neighbors, and the "tops" (leaves, twigs, fronds) to any poorer villager who carries them off. Land is set aside, exceptionally, for use or leasing out by widows with children or dependents of conscripted males. Usufruct rights to land and trees may be "let" to anyone within the village but not to anyone outside the village unless no one in the community wishes to use it.

After a crop failure leading to severe food shortage, many of these arrangements are readjusted. Better off villagers are expected to assume some responsibility for poorer relatives – by sharing their land, by hiring them or by simply feeding them. Should the shortage persist, the council of lineage heads may inventory food supply and begin daily rationing. In case of an outright famine, the women who have married into the village but have not yet borne children will not be fed and are expected to return to their natal village.

This description could be further elaborated. It is itself a simplification, but it does convey some of the actual complexity of property relations in contexts

where customary local arrangements have tended to prevail. To describe the usual practices in this fashion, as if they were laws, is itself a serious distortion. They are better understood as a living, negotiated tissue of practices which are continually being adopted to new ecological and social circumstances – including, of course, power relations. Their very plasticity is the source of micro-adjustments which may or may not lead to shifts in prevailing practice.

Imagine a "law-giver" whose only concern was to respect land practices. Imagine, in other words, a written system of positive law that attempted to represent this complex skein of property relations and land tenure. The mind fairly boggles at the clauses, sub-clauses, and sub-sub-clauses that would be required to reduce these practices to a set of regulations which an administrator might understand, let alone enforce. If, in principle, they could nevertheless be codified, the resulting code would necessarily sacrifice much of the plasticity and subtle adaptability of practice. The circumstances that might provoke a new wrinkle in practices are too numerous to foresee, let alone to specify in a regulatory code. That code would, in effect, freeze a living process. Changes in the positive code designed to reflect evolving practice would, at best, represent a jerky and mechanical adaptation.

And what of the *next* village, and the village after that? Our hypothetical code giver, however devilishly clever and conscientious, would find that the code devised to fit one set of local practices would not travel well. Each village, with its own particular history, its own ecology, its particular cropping patterns, kinship alignments and economic activity would require a substantially new set of regulations. At the limit, there would be at least as many legal codes as there were communities.

Administratively, of course, such a cacophony of local property regulations would be a nightmare. Notice, especially, that the nightmare in question is not a nightmare experienced by those whose particular practices are being represented but rather by those – that is, state officials – who aspire to a uniform homogeneous, national administrative code. Local land tenure practice is, as were the "exotic" units of weights and measures discussed earlier, perfectly legible to all those inhabitants who "live" it on a day-to-day basis. Its details may often be contested and far from satisfactory to all of its local practitioners, but there is no doubting its familiarity; local residents have no difficulty in grasping its subtleties and using its flexible provisions for their own purposes. State officials, on the other hand, cannot be expected to decipher and then apply a new set of property hieroglyphs for each jurisdiction. The very concept of the modern state is inconceivable without a vastly simplified and uniform property regime that is legible, and hence manipulable from the center.

Use of the term "simple" to describe modern property law, whose intricacies provide employment to armies of legal professionals, will seem grossly misplaced. It is surely the case that property law has in any respects become an impenetrable thicket for ordinary citizens. The use of the term "simple" in this context is thus both *relative* and *perspectival*. Modern freehold tenure is tenure that is mediated through the state and therefore readily legible only to those who have sufficient training and grasp of the state statutes to allow them to decipher it. Its relative simplicity is lost on those who cannot break the code, just as the relative clarity of customary tenure to the villagers who live it is lost on the mystified outsider.

The fiscal/administrative goal toward which all modern states aspire is to measure, codify and simplify land tenure in much the same way as scientific forestry reconceived the forest. In no way could the state begin to incorporate the luxuriant variety of customary land tenure. The historical solution, at least for the liberal state, has typically been the heroic simplification of individual, freehold tenure. Land is owned by a legal individual who disposes of wide powers of use, inheritance or sale and whose ownership is represented by a uniform title deed enforced through the judicial and police institutions of the state. Just as the flora of the forest were reduced to *Normalbaum*, so were the complex tenure arrangements of customary practice reduced to freehold, transferrable title. In an agrarian setting, the administrative landscape was blanketed with a uniform grid of homogeneous land, each parcel of which has a legal person as owner and, hence, taxpayer. How much easier it then becomes to assess such property and its owner on the basis of its acreage, its soil class, the crops it *normally* bears and its assumed yield than to untangle the thicket of common property and mixed forms of tenure.

The crowning artifact of this mighty simplification is the *cadastral map*: a more or less complete and accurate survey of land-holdings conducted by trained surveyors and mapped to a given scale. Since the driving logic behind the map is to create a manageable and reliable format for taxation, the map is associated with a property register in which each specified (usually numbered) lot on the map is linked to an "owner" who is responsible for paying its taxes. The cadastral map and property register is to the taxation of land as the maps and tables of the scientific forester were to the fiscal exploitation of the forest.

(b) *The Code Rural that "Almost" Was*

The rulers of post-Revolutionary France confronted a rural society that was a nearly impenetrable web of feudal *and* revolutionary practices. It was inconceivable that they could catalogue its complexities let alone effectively eliminate them in the short run. Ideologically, their commitment to equality and liberty was contradicted by customary rural contracts that, as in craft guilds, still employed the terms "master" (*maître*) and "servant" (*serviteur*). As rulers of a new nation – not a kingdom – they were likewise offended by the utter absence of any overall legal framework for social relations. For some, a new civil code covering all Frenchmen would be sufficient.[29] But for bourgeois owners of rural property who had, like their noble neighbors, been threatened by the local uprisings of the Revolution and La Grand Peur and, more generally, by the aggressiveness of an emboldened and autonomous peasantry, an explicit Code Rural seemed necessary to underwrite their security.

In the end, no post-Revolutionary rural code attracted a winning coalition, even amidst a flurry of Napoleonic codes in nearly all other realms. The history of the stalemate is, for our purposes, very instructive. The first proposal for a code, drafted between 1803 and 1807, swept away most traditional rights (for example, common pasturage and free passage through others' property) and essentially recast rural property relations in the light of bourgeois property rights and freedom of contract.[30] Although it pre-figured modern French practice, many revolutionaries blocked it because, at the time, they feared that its hands-off liberalism would allow large landholders to recreate the subordination of feudalism in a new guise.

A re-examination of the entire issue was then ordered by Napoleon and presided over by Joseph Verneilh Puyrasseau. Concurrently, the Deputé Lalouette proposed to do precisely what I supposed, in the hypothetical example, was impossible. That is, he undertook to systematically gather information about all local practices, to classify and codify them, and then to sanction them by decree. The decree in question would become the *Code Rural*. Two problems undid this charming scheme to present the rural populace with a rural code that simply reflected its own practices. The first difficulty was to specify which aspects of the literally "infinite diversity"[31] of rural production relations to represent and codify. Even in a particular locality, practices varied greatly from farm to farm and over time; any codification would be quasi-arbitrary and artificially static. To codify local practices was, thus, a profoundly political act. Local notables would be able to sanction their preferences with the mantle of law while others would fear the loss of practices they depended on. Second, of course, Lalouette's plan was mortal threat to all those state-centralizers and economic modernizers for whom legible, national property regime was the precondition of progress. As Aberdam notes, "the Lalouette project would have brought about exactly what Merlin de Douai and the bourgeois, revolutionary jurists always sought to avoid."[32] Lalouette's proposal code was never passed, nor was the "official" proposal by Verneilh because it, like its predecessor in 1807, seemed to be designed exclusively to strengthen the hand of landowners.

(c) *The Illegibility of Communal Tenure*

The pre-modern and early modern state, as we have noted, dealt fiscally more with communities than with individuals. Some apparently individual taxes, such as the notorious Russian "soul tax" collected from all subjects, were actually paid by the community directly or through the nobles whose subjects they were. Failure to deliver the required sum would usually lead to collective punishment.[33] The only agents of taxation who regularly reached to the level of the household and its cultivated fields were the local nobility and clergy in the course of collecting feudal dues and the religious tithe. For its part, the state had neither the administrative tools nor the information to penetrate to this level.

The limitations on state knowledge were partly due to the complexity and variability of local production. This was not the most important reason, however. The collective form of taxation meant that it was generally in the interest of local officials to misrepresent their situation so as to minimize the local tax and conscription burden. To this end, they might minimize the local population, systematically understate the acreage under cultivation, hide new commercial profits, exaggerate crop losses after storms, droughts, etc.[34] The whole point of the cadastral map and land register was precisely to eliminate this fiscal feudalism and rationalize the fiscal take of the state. As the scientific forester needed an inventory of trees to realize the commercial potential of the forest, so the fiscal reformer needed a detailed inventory of landownership to realize the maximum, sustainable revenue yield.[35]

Assuming that the state had the will to challenge the resistance of the local nobles and elites and the financial resources to undertake a full cadastral survey, which was very time-consuming and expensive, it faced other obstacles as well. There were, in particular, communal

forms of tenure that could just not be adequately represented in cadastral form. Rural living in seventeenth and early eighteenth-century Denmark, for example, was organized by *ejerlav*, whose members had certain specified rights to use local arable, waste and forest land. It would have been impossible in such a community to associate a household or individual with a particular holding on a cadastral map. The Norwegian large farm (*gard*) posed similar problems. Households held rights to a given proportion of the value (*skyld*) of the farm, not to plots of land. "Normally the joint owners could not point to any part of the farm which was their own."[36] Although it was possible to estimate the arable land of a community and, making some assumptions about crop yields and subsistence needs, arrive at a plausible tax burden, these were villages which derived a substantial part of their livelihood from the "commons" – for example, fishing, forestry, resin collection, hunting, charcoal making, etc. Monitoring this kind of income was almost impossible. Nor would crude estimates of the value of the commons solve this problem, inasmuch as inter-commoning between several villages was (though outlawed) widely practiced. The mode of production in such communities was simply incompatible with the assumption of individual freehold tenure implicit in a cadastral map. It was claimed, though the evidence is not convincing, that common property was less productive than freehold property.[37] The state's case against communal forms of land tenure, however, was based on the correct observation that it is fiscally illegible and, hence, fiscally less productive. Rather than trying, like the hapless. Lalouette, to bring the map into line with reality, the historical resolution has generally been for the state to impose a property system in line with its fiscal grid.

Pre-revolutionary Russia provides a nearly textbook example of state attempts to create individual tenure in keeping with its convictions about agricultural growth and administrative order. Most of rural Russia, even after the emancipation of 1861, was a model of fiscal illegibility. Communal farms of tenure prevailed and the state had little or no knowledge of who cultivated which strips of land or what their yields and income were.

Maps of two villages *before* the consolidation of individual farms serve to illustrate the fiscal complexity of "open-field" land tenure.

Novoselok village had a varied economy of cultivation, grazing, and forestry while Khotynitsa village was limited to arable and some grazing. The complex welter of strips is designed to ensure that every village household receives a strip of land in each and every ecological zone. An individual household might have as many as ten to fifteen different plots constituting something of a representative sample of the village's ecological zones and micro-climates. The logic of distribution spread a family's risks prudently and, from time to time, the land was reshuffled as families grew or shrank.[38] It was enough to make the head of a cadastral surveyor swim. At first glance it would seem as if the village itself would need a staff of professional surveyors to get things right. In practice, the system was quite simple to those who lived it. The strips of land were generally straight and parallel so that a readjustment could be made by moving small stakes along just one side of a field without ever having to think of areal dimensions. Where the other end of the field was not parallel, the stakes would be shifted to compensation for the fact that the strip lay toward the narrower or wider end of the larger field. Irregular fields were divided, not according to area, but according to yield. Visually – and especially as a problem in cadastral mapping – the pattern seemed convoluted and irrational. But to those familiar with it, it was simple enough and worked admirably for their purposes.

The dream of state officials and agrarian reformers, at least since emancipation, was to transform the open field system into a series of consolidated, independent farmsteads on what they took to be the western European model. They were driven by the desire to break the hold of the community over the individual household and to move from collective taxation of the whole community to a tax on individual landholders. Fiscal goals were very much connected to reigning ideas of agricultural progress. Under Count Witte and Stolypin, plans for reform shared common premises which Yaney describes as follows:

> *First tableau*: poor peasants, crowded together in villages, suffering from hunger, running into each other with their plows on their tiny strips.
> *Second tableau*: agriculture specialist agent leads a few progressive peasants off to new lands, leaving those remaining more room.
> *Third tableau*: departing peasants, freed from restraints of strips, set up khutors [integral farmstead with dwelling] on new fields and adapt latest methods. Those who remain, freed of village and family restraints, plunge into a demand economy – all are richer, more productive, the cities get fed, and the peasants are not proletarianized.[39]

It was abundantly clear that the prejudicial attitude toward inter-stripping was based as much on the autonomy of the Russian village, its illegibility to outsiders and prevailing dogma about scientific agriculture as it was on hard evidence.[40] Once given a consolidated private plot, they reasoned, the peasant would suddenly want to get rich, would organize his household into an efficient workforce and take up scientific agriculture. The maps below (Figs. 1 and 2) illustrate the cadastral order brought to both villages in the wake of the Stolypin Reform.

In Novoselok village, seventeen independent farmsteads (*khutor*) were created in a way that aimed at giving each household a share of meadow, arable and forest. In Khotynitsa village, ten *khutor* were created as well as 78 farms (*otrub*) whose owners continued to dwell in the village center. As a cadastral matter, the new farms were mappable, easily legible from above and outside, and, since each was owned by an identifiable person, assessable.

These two maps, taken alone, are very misleading. Such model villages suggest an efficient cadastral machinery working its way diligently through the countryside turning open-field chaos into tidy little farms. Reality was something else. In fact, the dream of orderly, rectangular fields was only approximated on newly settled land, where the surveyor faced little geographical or social resistance.[41] Elsewhere, the reformers were generally thwarted despite tremendous pressure to produce integral farms. There were unauthorized consolidations, though they were forbidden; there were "paper" consolidations in which the new farmers continued to farm their strips as before. Inadvertently, the Peasant Bank, under great pressure to loan money to poor peasants, encouraged the older allotment system. The bank needed collateral it could seize in the event of a default, but poorer peasants farming village allotment land had no fixed land that could serve as security.[42] Faced with this quandary, the bank found itself loaning to whole villages or to groups of peasants farming adjacent, identifiable plots. The best evidence that the agricultural property system had *not* become legible to central tax officials was the immensely damaging procurement policies pursued by the Tsarist government during World War I. No one knew what a reasonable levy of grain or draft animals might be; as a result, some districts were ruined and others managed to hoard grain and livestock.[43] The same experience of forced procurement without any adequate knowledge of land-holdings and wealth was repeated again after the October Revolution during the period of "War Communism."[44]

(d) *The Cadastral Map as Objective Information for Outsiders*

The value of the cadastral map to the state lies in its abstraction and universality. In principle, at least, the same objective standard can be applied throughout the kingdom, regardless of local context, to produce a complete and unambiguous map of all landed property. The completeness of the cadastral map depends, in a curious way, on its very thinness. For, taken alone, it is essentially a geometric representation of the borders or frontiers between parcels of land. What lies inside the parcel is left blank – unspecified – since it is not germane to the map plotting itself.

There are surely many other things far more important to know about a parcel of land than its surface area and the location of its boundaries. What kind of soil it has, what crops can be grown on it, how hard it is to work and how close it is to a market are the first kinds of questions a potential purchaser might ask. These are also questions a tax assessor would want to ask as well. From a capitalist perspective, the physical dimensions of land are beside the point. But these other qualities only become relevant (especially to the state) once the terrain to which they apply has been located and measured. They also, unlike location and dimension, involve judgments that are complex (hence more open to fraud) and easily overtaken by events. Crop rotations and yields may change, new tools or machines may transform cultivation and markets may shift. The cadastral survey, by contrast, is precise, schematic, general and uniform. Whatever its other defects, it is the precondition of a tax regimen that comprehensively links every patch of land with its owner – and taxpayer.[45] In this spirit, the survey for a 1807 Dutch land tax (inspired by Napoleonic France) stresses that all surveyors were to use the same measurements, their instruments were to be periodically inspected to ensure conformity, and all maps were to be drawn up on a uniform scale of 1:2,880.[46]

Land maps in general and cadastral maps in particular are designed to make the local situation legible to an *outsider*. For purely local purposes, a cadastral map was redundant. Everyone knew who held, say, the meadow by the river and the feudal dues it carried; there was no need to know its precise dimensions. A substantial domain might have the kind of prose map, or *terrier*, one finds in old deeds ("from the large oak tree, north 120 feet to the river bank, thence …") with a notation about the holder's obligations to the domain. But a proper map seems to have come into use especially when a brisk

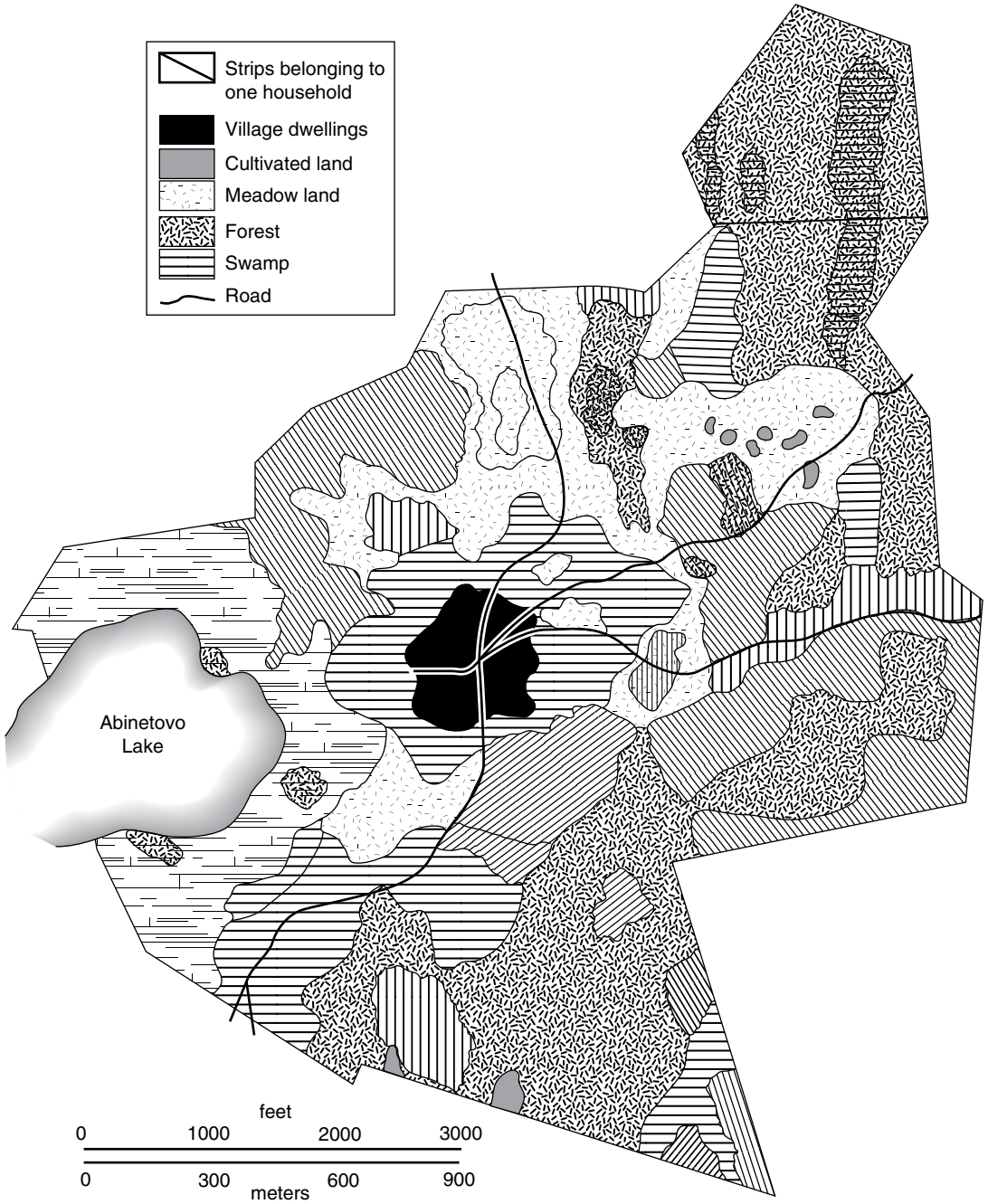


Figure 1. Novoselok village, before (above) and after (see below) the Reform. *Source*: Reproduced with permission from Yaney 1982, © 1992 Board of Trustees of the University of Illinois. Used with permission of the University of Illinois Press

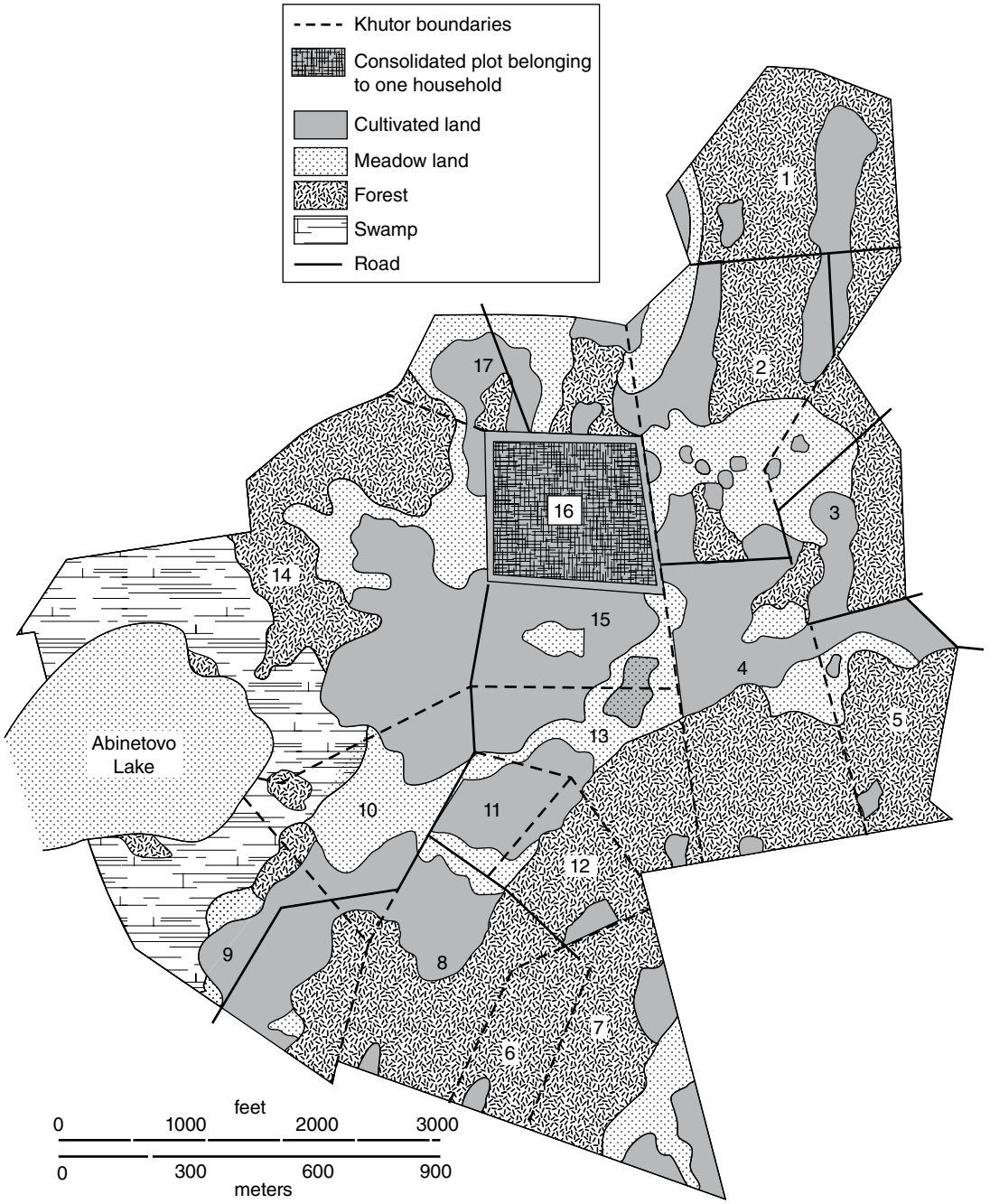


Figure 1. (*Continued*)



Figure 2. Khotynitsa village, before (above) and after (see below) the Reform. *Source*: Reproduced with permission from Yaney 1982, © 1992 Board of Trustees of the University of Illinois. Used with permission of the University of Illinois Press.

market in land developed. The Netherlands was thus a leader in land mapping because of its early commercialization and the unique fact that the draining of new land by windmills was often a speculative enterprise in which the land was surveyed so each investor would know his holding. The map was especially crucial to the new bourgeois owners of landed estates as it allowed them to survey a large territory at a glance. Its miniaturization served as an *aide-mémoire* when the property consisted of many small parcels and/or the owner was not intimately familiar with the terrain. As early as 1607, an English surveyor, John Norden, sold his services to the aristocracy on the premise that the map was a substitute for the tour of inspection.

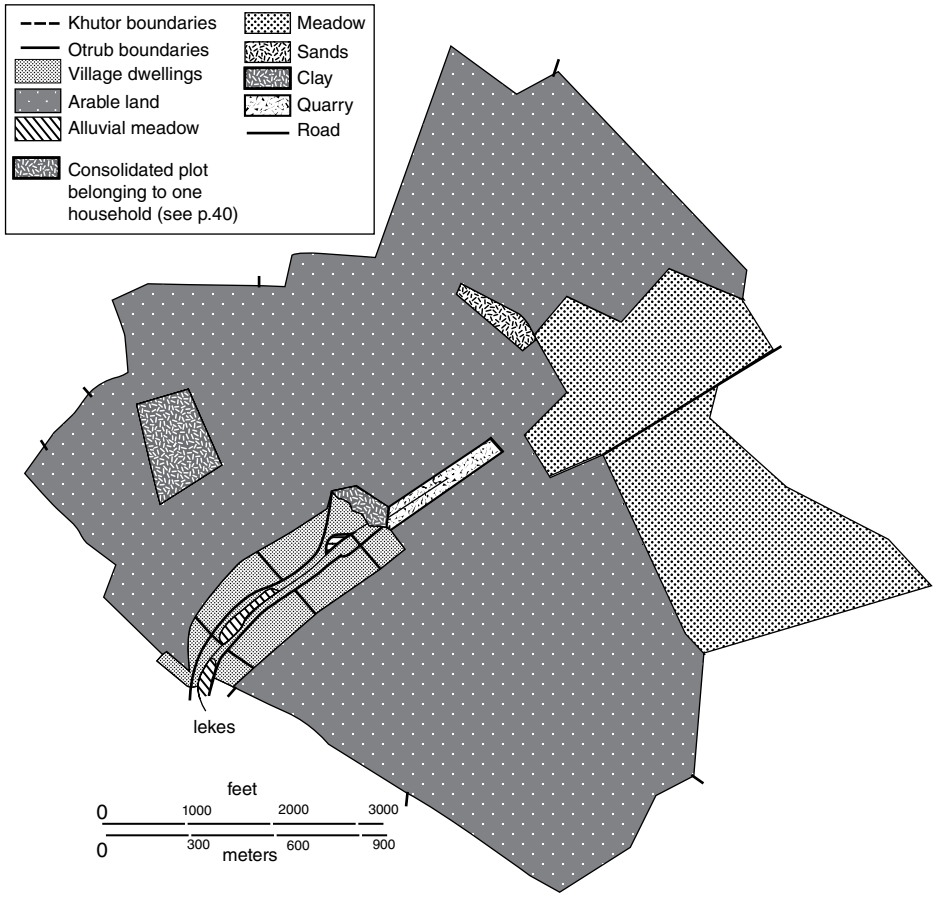


Figure 2. (*Continued*)

> A plot rightly drawne by true information, discribeth so the lively image of a mannor, and every branch and member of the same, as the lord sitting in his chayre, may see what he hath, and where and how he lyeth, and in whole use and occupation of every particular is upon suddaine view.[47]

A national tax administration requires the same logic: a legible bureaucratic formula which a new official can quickly grasp and administer from the documents in his office.

(e) *What's Missing in this Picture?*

Isaiah Berlin, in his study of Tolstoy, compared the hedgehog who knew "one big thing" to the fox who knew "many things." The sharply focused interest of the scientific foresters in commercial lumber and that of cadastral officials in land revenue constrain them, like the hedgehog, to find clear-cut answers to one question. The naturalist and the farmer are like the fox; they know many things about forests and cultivable land respectively. Although the *range* of knowledge of the forester and cadastral official is far narrower, we should not forget that they know what they do know in a systematic and comprehensive way – a way that allows them to see and understand things a fox would not grasp. What we want to emphasize here, however, is how this knowledge is gained at the expense of rather static and myopic view of land tenure.

The cadastral map is very much like a *still* photograph of the current in a river. It represents the parcels of land as they were arranged and owned at the moment the survey was conducted. But the current is always moving and, in periods of major social upheaval and growth, a

cadastral survey may freeze a scene of great turbulence. Changes are taking place on field boundaries; land is being sub-divided or consolidated by inheritance or purchase, new canals, roads and railways are being cut; land use is changing, and so forth. Inasmuch as these particular changes directly affect tax assessments, there are provisions for recording them on the map or in a title register. The annotations and marginalia at some point, render the map illegible, whereupon a more up-to-date, but still static, map must be drawn up and the process is repeated.

No operating land revenue system can, however, stop at the mere identification of parcel and ownership. Other schematic facts, themselves static, must be created to arrive at some judgment of a sustainable tax burden. Land may be graded by "soil class," how well watered it is, what crops are grown on it, and its presumed "average yield" – this last often checked by sample "crop-cuttings." These facts are themselves changing or they are averages that may mask great variation. Like the still photo of the cadastral map, they grow more unrealistic with time and must be re-examined.

These state simplifications, like all state simplifications, are always far more static and schematic than the actual social phenomena they presume to typify. The farmer very rarely experiences an average crop, an average rainfall, or average price for his crops. Much of the long history of rural "tax revolts" in early modern Europe and elsewhere can be illuminated by the lack of fit between an unyielding fiscal claim on the one hand and the often wildly fluctuating capacity of the rural population to meet that claim, on the other.[48] And yet, even the most equitable, well-intentioned cadastral system cannot be uniformly administered except on the basis of stable units of measurement and calculation. It can no more reflect the actual complexity of a farmer's experience than the scientific forester schemes can reflect the complexity of the naturalist's forest.[49]

Governed by a practical, concrete objective, the cadastral lens also ignored anything lying outside its sharply etched field of vision. This was reflected in a loss of detail in the survey itself. Surveyors, one recent Swedish study found, made the fields more "regular" geometrically than they in fact were. Ignoring small "jogs" and "squiggles" made their job easier and did not materially affect the outcome.[50] Just as the commercial forester found it convenient to overlook minor forest products, so the cadastral official tended to ignore all but the major commercial use of a field (for example, wheat, hay). That the field might also be a significant source of bedding straw, gleaning, rabbits, birds, frogs, mushrooms, etc., was not so much unknown as ignored lest it needlessly complicate a straightforward administrative formula.[51] The most significant myopia, of course, was that the cadastral map and assessment system considered only the dimensions of the land and its value as a productive asset or as a commodity for sale. Any value land might have for subsistence purposes or for the local ecology were bracketed as, of course, aesthetic, ritual or sentimental values.

(f) *Transformation and Resistance*

> The cadastral map is an instrument of control which both reflects and consolidates the power of those who commission it … The cadastral map is partisan: where knowledge is power, it provides comprehensive information to be used to the advantage of some and the detriment of others, as rulers and ruled were well aware in the tax struggles of the 18th and 19th centuries. Finally, the cadastral map is active: in portraying one reality, as in the settlement of the new world or in India, it helps obliterate the old.[52]

The shorthand formulas through which tax officials must apprehend reality are not mere tools of observation. By a kind of "fiscal Heisenberg principle," they frequently have the power to transform the facts they take note of.

The "door and window tax" established in France under the Directory and abolished only in 1917 is a striking case in point.[53] Its originator must have reasoned that the number of windows and doors in a dwelling was proportional to its size. Thus a tax assessor need not enter the house or measure it but merely count the doors and windows. As a simple, workable formula, it was a brilliant stroke, but it was not without consequences. Peasant dwellings were subsequently designed or renovated with the formula in mind so as to have as few openings as possible. While the fiscal losses could be recouped by raising the tax *per* opening, the long run effects on the health of the rural population lasted more than a century.

Novel state-imposed forms of land tenure were far more revolutionary than a door and window tax. It was a whole new institutional nexus. However simple and uniform the new tenure system was to an administrator, it flung villagers willy-nilly into a world of title deeds, land offices, fees, assessments and applications. They faced powerful new specialists in the form of land clerks, surveyors, judges and lawyers whose rules of procedure and decisions were unfamiliar.

Where the new tenure system was a colonial imposition – that is, where it was totally unfamiliar, where it was imposed by alien conquerors using an unintelligible language and institutional context, and where local practices bore no resemblance to freehold tenure – the consequences were far-reaching. The permanent settlement in India, for example, literally created a new class who, because they paid the revenue, became full owners with rights of inheritance and sale where none had existed earlier.[54] At the same time, literally millions of cultivators, tenants and laborers lost their customary rights of access to the land and its products. Those in the colonies who first plumbed the mysteries of the new tenure administration enjoyed unique opportunities. Thus the Vietnamese *secrétaires* and *interprètes* who served as intermediaries between the French officials in the Mekong Delta and their Vietnamese subjects were in a position to make great fortunes. By concentrating on getting the paperwork in order – the title deeds and appropriate fees – they occasionally became, overnight, landlords to whole villages of cultivators who had imagined they had opened common land free for the taking. They might, of course, occasionally use their knowledge to see their compatriots safely through the new legal thicket. Whatever their conduct their fluency in a language of tenure specifically designed to be legible and transparent to administrators, coupled with the illiteracy of the rural population under them to whom the new tenure was indecipherable, was a momentous shift in power relations.[55]

Freehold title and standard land measurement were to central taxation and the market in real estate what central bank currency was to the marketplace. By the same token, they threatened to destroy a great deal of local power and autonomy. No wonder then, that they should have been so vigorously resisted. In the eighteenth century European context, any general cadastral survey was, by definition, a gambit of centralization; the local clergy and nobility were bound to see both their own taxing powers and the exemptions they enjoyed menaced. Commoners were likely to see it as a pretext for an additional local tax. Colbert proposed to conduct a national cadastral survey of France but was thwarted in 1679 by the combined opposition of the aristocracy and clergy. More than a century later, after the Revolution, Babeuf, in his "Projet de cadastre perpetuel," dreamed of a perfectly egalitarian land reform in which everyone would get an equal parcel.[56] He too was thwarted.

We must keep in mind not only the capacity of state simplifications to transform the world, but also the capacity of the society to modify, subvert, block and even overturn the categories imposed upon them. Here it is useful to distinguish what might be called "facts-on-paper" from "facts-on-the-ground." As Sally Falk Moore and many others have emphasized, the land office records may serve as the basis for taxation, but they may have little to do with the actual rights to the land. Paper owners may not be the effective owners.[57] Russian peasants, as we saw, might register a "paper" consolidation while continuing to interstrip. Land invasions, squatting and poaching, if successful, represent the exercise of de facto property rights which are not represented on paper. Certain land taxes and tithes have been evaded or defied to the point where they have become a dead letter.[58] The gulf between land tenure "facts-on-paper" and facts-on-the-ground is probably greatest at moments of social turmoil and revolt. But even in more tranquil times there will always be a "shadow land tenure system" lurking beside and beneath the official account in the land records office. We must never assume that local practice conforms with state "theory."

All central states recognized the value of a uniform, comprehensive cadastral map. Carrying it out, however, was another matter. As a rule of thumb, cadastral mapping was earlier and more comprehensive where a powerful central state could impose itself on a relatively weak civil society. Where, by contrast, civil society was well organized and the state relatively weak, cadastral mapping was late, often voluntary, and fragmentary. Thus, Napoleonic France was mapped much earlier than England where the legal profession managed for a long time to stymie this threat to their local, income-earning function. It followed from the same logic that conquered colonies ruled by fiat would often be cadastrally mapped before the metropolitan nation which ordered it. Ireland may have been the very first. After the Cromwellian conquest, as Ian Hacking notes, "Ireland was completely surveyed for land, buildings, people, and cattle under the directorship of William Petty, in order to facilitate the rape of that nation by the English in 1679."[59]

Where the colony was a thinly populated settler-colony, as in North America or Australia, the obstacles to a thoroughgoing, uniform cadastral grid were minimal. It was a question, in this context, less of mapping pre-existing patterns of land use than of surveying parcels of land that would be given or sold to new arrivals from Europe and ignoring, of course, indigenous practices. Thomas Jefferson, with his rational Enlightenment eye, imagined dividing the United States west of the Ohio River into "hundreds" – squares ten miles on a

side – with settlers required to take an already designated parcel. The geometrical clarity of Jefferson's proposal was not merely an aesthetic choice; he "argued that irregular lots inspired fraud, and could point to the experience of Massachusetts which discovered that holdings in the country typically yielded 10% more land, and often 100% more land, than had been granted."[60] Not only did the regularity of the grid create legibility for the taxing authority but it was a convenient and cheap way to package land and market it in homogeneous units. Jefferson's plan was modified by Congress to provide for rectangular lots and townships that were 36 square miles and, in practice, land titling did not always follow the prescribed pattern.

The Torrens system of land titling, developed in Australia and New Zealand in the 1860s, provided a lithographed, pre-surveyed grid of allotments which had only to be registered by settlers on a first-come, first-served basis. It was the quickest and most economical means yet devised to sell land and it was later adopted in many British colonies. The more homogeneous and rigid the geometric grid, however, the more likely it was to run afoul of the actual natural features of the non-conforming landscape. The possibility for surprises was nicely captured in this satirical verse from New Zealand.[61]

> Now the road through Michael's section
> though it looked well on the map
> For the use it was intended
> wasn't really worth a rap
> And at night was not unlikely
> to occasion some mishap.
>
> It was nicely planned on paper
> and was ruled without remorse
> Over cliffs, and spurs and gullies
> with a straight and even course
> Which precluded locomotion
> on part of man or horse.

(g) *Cadastral Surveys and the Utilitarian State*

The cadastral survey was but one technique in the growing armory of the modern, utilitarian state. Where the pre-modern state was content with a level of intelligence sufficient to allow it to keep order, extract taxes and raise armies, the utilitarian state increasingly aspired to "take in charge" the physical and human resources of the nation and make them more productive. These more positive ends of statecraft required a much greater knowledge of the society. An inventory of land, people, incomes, occupations, resources and deviance was the logical place to begin. "The need for the increasingly bureaucratic state to organize itself and control its resources gave an impulse to the collection of vital and other statistics; to forestry and rational agriculture; to surveying and exact cartography; and to public hygiene and climatology."[62]

Although the purposes of the state were broadening, what the state wanted to know was still directly related to those purposes. The nineteenth century Prussian state was, for example, very much interested in the ages and sexes of immigrants and emigrants, but it was *not* interested in their religion or "race." What mattered to the state was keeping track of possible draft-dodgers and maintaining a supply of men of military age.[63] The increasing concern of the state with productivity, health, sanitation, education, transportation, mineral resources, grain production and investment was less an abandonment of the older objectives of statecraft than a broadening and deepening of what those objectives entailed in the modern world.

V Legibility and Centralization

(a) *Surnames*

Some of the most taken-for-granted categories with which we now routinely apprehend the social world around us had their origin in state projects of standardization and legibility. Consider something as fundamental as permanent surnames.

A vignette from the popular film *The Witness* illustrates how, among strangers, we rely on surnames as key navigational aids.[64] The police detective in the story is attempting to locate a young Amish boy who may have witnessed a murder in a bus station. Although he has a surname to go on, he is thwarted by several aspects of Amish traditionalism, including their antique dialect of German. His first instinct is, of course, to reach for the telephone book – a list of proper names and addresses – but the Amish don't have telephones! Furthermore, he learns that the Amish have a very small number of very common last names. His quandary reminds us that a great variety of surnames and "given-names" allow us to identify unambiguously a large number of individuals whom we may never have met. A world without such names is bewildering; the detective finds Amish society, for his purposes, so opaque that he needs a "native-tracker" to find his way.

Customary naming practices throughout much of the world are enormously rich. Among some peoples, it is not uncommon to have different infant names, childhood names, adult names and, in some cases, death names, joking names, ritual names, names to use with same-sex friends, names one is called by in-laws, sorrow names and so forth. Each name is specific to a stage of life, a social setting, or a particular interlocutor. Two people will frequently, in this context, use different names for the same individual. To the question, "What is your name?" – which has an unambiguous answer in the contemporary West – the only plausible answer is, "it depends."[65]

For the insider who grows up using these naming practices they are both legible and clarifying. Each name and the contexts of its use conveys important social knowledge. Like the network of alleys in Bruges, the assortment of local weights and measures and the intricacies of customary land tenure, its complexity has some very direct and often quite practical relationship to local purposes. For an outsider, however, the Byzantine complexity of local names is a formidable obstacle to understanding the local society. Finding someone, let alone situating him or her in a kinship network or tracing the inheritance of property, becomes a major production. If, in addition, the population in question has reason to conceal its identity and its activities from external authority, the camouflage value of such naming practices is considerable.

Until at least the fourteenth century, the great majority of Europeans did not have permanent patronymic. An individual's name was typically an amalgam of his (if male) given name and his father's given name. Thus, in the English case, William *Robertson's* male son might be called Thomas Williamson (son of William) while Thomas's son, in turn might be called Henry Thompson (Thomas's son). Note that the grandson's name, by itself, bears no evidence of his grandfather's identity, complicating the tracing of descent through names alone. The adoption of a *permanent* patronym – largely a state project connected to taxation and inheritance – greatly improved the legibility of kinship and property. At the time of their establishment, last names often had a kind of local logic to them: John who owned a mill became John Miller; John who made cartwheels became John Wheelwright; John who was physically very small became John Short, etc. As their male descendants retained the patronym, whatever their subsequent occupations or stature, the names later assumed an arbitrary cast.

The development of fixed surnames (literally, a name *added* to another) went hand-in-hand with the development of written official documents such as tithe records, marriage entries, censuses, tax records, land records, etc.[66] One source suggests that last names were established by statute in the fourteenth century under Edward II.[67] A brief anecdote by the same source illustrates the kinds of official situations that might create a fixed patronymism where none existed before. A Welshman appearing in an English court in the early sixteenth century was asked to identify himself. He replied in Welsh – and in Old Testament style, "Thomas Ap [son of] William, Ap Thomas, Ap Richard, Ap Hoel, Ap Evan Vaghan" and was admonished by the judge. "Whereupon he after called himself Moston, according to the name of his principal house, and left that surname to his posteritie."[68] For this newly-minted Thomas Moston, it is entirely plausible that the official surname remained on the official court records but was never known or used by his own local contemporaries. Colonial situations and religious conversions routinely produce new names that are specific to the new context. Thus in many British colonies with a substantial Chinese population, all school pupils were assigned an English given-name at school which served both to make the class more legible to an English-speaking instructor and to emphasize that the colonists' school required a new identity. Those who came most frequently into contact with officials and documents were, one suspects, the most likely to take permanent surnames first.[69] In the West, women, domestic servants and tied laborers were typically the last to adopt surnames (and to be given the vote) precisely because they were legally subsumed as minors in the charge of the head-of-family.

Universal last names are a fairly recent historical phenomenon. They were a great step forward in the legibility of the entire population. The tracking of property ownership and inheritance, the collection of the title and other taxes, police work, conscription, court records, and the control of epidemics were all made immeasurably easier by the clarity of full names and, increasingly, fixed addresses. While the utilitarian state was committed to a complete inventory of its population, liberal ideas of citizenship, which implied voting rights and conscription, also contributed greatly to the standardization of naming practices. The legislative imposition of permanent surnames is particularly clear in the case of Jews in Western Europe who had no tradition of last names. A Napoleonic decree "concernant les Juifs qui n'ont pas de nom de famille et de prénoms fixes," in 1808, mandated last names. Austrian legislation of 1787, as part of the emancipation process, required

Jews to choose last names or, if they refused, to have fixed last names chosen for them. In Prussia the emancipation of the Jews was contingent upon the adoption of surnames.[70] Many of the immigrants (Jewish and non-Jewish) to the United States had no permanent surnames when they set sail. Very few, however, made it through the initial paperwork without an official last name that they and their descendants continued to carry.

The process of creating fixed last names continues today in much of the Third World and on the "tribal frontiers" of more developed countries.[71] Reze Shah, the father of the deposed Shah, ordered all Iranians to take the last name of their town of residence in order to "rationalize the country's family names." Ali Akbar Rafsanjani thus means Ali Akbar from Rafsanjan.[72] Today, of course, there are now many other state-impelled standard designations which have vastly improved the capacity of the state to identify an individual. The creation of birth and death certificates, specific addresses (for example, not John-on-the-hill), identity cards, internal passports, social security numbers, photographs, fingerprints and, finally, DNA profiles, have superseded the rather crude instrument of the permanent surname. That surname was, however, a first and crucial step in making individual citizens officially legible and it is, along with the photograph, the first fact on documents of identity.

(b) *The Creation of a Standard Official Language*

The great cultural barrier posed by a separate and unintelligible language is perhaps the most effective guarantee that a social world, easily accessible to insiders, will remain opaque to outsiders.[73] Just as the stranger or state official might need a local guide to find his way around sixteenth century Bruges, he would need a local interpreter to understand or be understood in an unfamiliar linguistic environment. A real language barrier is, however, a far more powerful basis for autonomy than a complex residence pattern. It is also the bearer of a distinct history, a cultural sensibility, a literature, a mythology, a musical past, etc. In this respect, a unique language represents a formidable obstacle to state knowledge, let alone colonization, control, manipulation, instruction and propaganda.

Of all state simplifications, then, the imposition of a single, official language may be the most powerful and the precondition of many other simplifications. This process should probably be viewed, as Eugen Weber suggests in the case of France, as a process of domestic colonization in which various foreign provinces (for example, Brittany, Occitanie) were to be linguistically subdued and culturally incorporated.[74] The first efforts to insist on the use of French make it very clear that the objective of the state was the legibility of local practice. Officials insisted, above all, that every legal document, will, inquest, document of sale, debt, contract, annuity, and property deed be drawn up in French. So long as these documents remained in local vernaculars they were daunting to an official sent from Paris and virtually impossible to bring into conformity with central schemes of legal and administrative standardization. The campaign of linguistic centralization was virtually assured some success since it went hand-in-hand with an expansion of state power. By the late nineteenth century, dealing with the state was all but unavoidable for any but a small minority of the population. Petitions, court cases, school documents, applications, correspondence with officials were all necessarily in French. One can hardly imagine a more effective formula for immediately devaluing local knowledge and privileging all those who had mastered the official linguistic code. It was a gigantic shift in power. Those at the periphery lacking competence in French were rendered mute and marginal. They were now in need of a local guide to the new "state-culture" which appeared in the form of lawyers, *notaires*, schoolteachers, clerks, soldiers, etc.

A cultural project, as one might suspect, lurked behind linguistic centralization. French was seen as the bearer of a national civilization; the purpose of imposing it was not merely to have provincials digest the Code Napoleon but also to bring them Voltaire, Racine, Parisian newspapers and a national education. As Weber provocatively puts it, "There can be no clearer expression of imperialist sentiment, a white man's burden of Francophony, whose first conquests were to be right at home."[75] Where the command of Latin had once defined participation in a wider culture for a small elite, the command of French now defined full participation in French culture. The implicit cultural logic of the move was to define a hierarchy of cultures, relegating local languages and their regional cultures to, at best, a quaint provincialism. At the apex of this implicit pyramid was Paris and its institutions: ministries, schools, academies (including the guardian of the language, the Académie Française). The relative success of this cultural project hinged on both coercion and inducements. "It was centralization," said Alexandre Sanguinetti, "which permitted the making of France despite the French, or in the midst of their indifference … France is a deliberate political construction for whose creation the central power has never ceased to fight."[76] Standard (Parisian) French and Paris were not only focal points of power;

they were also magnets. The growth of markets, physical mobility, new careers, political patronage, public service, and a national educational system all meant that facility in French and connections to Paris were the paths of social advancement and material success. It was a state simplification that promised to reward those who complied with its logic and penalize those who ignored it.

(c) *The Centralization of Traffic Patterns*

The linguistic centralization impelled by the imposition of Parisian French as the official standard was replicated in a centralization of traffic. Just as the new dispensation in language made Paris the hub of communication, so the new road and rail systems increasingly favored movement to and from Paris over interregional or local traffic. State policy resembled, in computer parlance, a "hardwiring" pattern which made the provinces far more accessible – far more legible – to central authorities than even the absolutist kings had imagined.

Let us contrast, in an ideal-typical fashion, a relatively uncentralized network of communication on the one hand, with a relatively centralized network on the other. The uncentralized pattern, if mapped, would be the physical image of the actual movements of goods and people along routes not created by administrative fiat. Such movements would not be random; they would necessarily reflect the ease of movement along valleys, by watercourses and defiles, and the location of important resources and ritual sites. Eugen Weber captures the wealth of human activities that animate these movements across the landscape:

> … not that traffic was lacking. On the contrary, much traffic and a poor communication network were characteristic of the old society. Trails, packs, tracks, lanes, and causeways covered the countryside … They served private needs going from village to village, from farm or hamlet to field, orchard, pasture, or bourg: They served professional pursuits, like the special trails followed by glassmakers, carriers or sellers of salt, potters, or those that led to forges, mines, quarries and hemp fields, or those along which flax, hemp, linen and yarn were taken to market. There were pilgrimage routes and procession trails …[77]

If we can imagine, for the sake of argument, physical resources being evenly distributed and their being no great physical barrier to movement (for example, mountains, swamps), then the map of paths in use might come to approximate a dense capillary network. The tracing would, of course, never be entirely random. Market towns based on location and resources would constitute small hubs and so would religious shrines, quarries, mines, etc.[78] In the French case, as well, the network of roads would long have reflected the centralizing ambitions of local lords and national monarchs. The point of this simplification is merely to indicate a landscape of communication routes that is only lightly marked by state centralization. It would resemble, in many ways, the complex urbanscape of a late medieval city like Bruges.

The modernizers of nineteenth century France, most notably Napoleon, superimposed on this pattern a carefully planned grid of administrative centralization. This grid of road and rail lines (for example, Gare du Nord, Gare de l'Est) radiated from the capital city like the spokes of a wheel.

The similarity between such a grid and the grids cleared in "well-managed" state forests are not accidental. They were both built to maximize access and to facilitate central control. The kind of "simplification" involved is, again, entirely relative to location. For an official at the hub, it is now vastly easier to go to "A" or to "B" along the new routes. The layout was designed "to serve the government and the cities and lacking a network of supporting thoroughfares had little to do with popular habit or need. Administrative highways, a historian of the center called them, made for troops to march on and for tax revenues to reach the treasury."[79] For anyone wanting to travel or move goods between A and B on the periphery, however, things were not so simple. Just as all documents had to "pass through" the official French legal language, so did much of the commercial traffic have to pass through the capital. This "retrofitting" of traffic patterns had enormous consequences. It further empowered and privileged Paris and the state at the expense of the provinces; it greatly affected the economics of location; it facilitated central fiscal and military control; and it severed or weakened lateral cultural and economic ties while favoring hierarchical links. At a stroke it marginalized some areas the way that official French marginalized local dialects.

VI Conclusion

Officials of the modern state are, of necessity, at least one step – and often several steps – removed from the society they are charged with governing. They observe and assess the life of their society by a series of typifications that are always some distance from the full reality these

abstractions are meant to capture. Thus the foresters' charts and tables, despite their power to distill many individual facts into a larger pattern, do not quite capture (nor are they meant to) the real forest in its full diversity. Thus the cadastral survey and the title deed are a very rough, and sometimes misleading, representation of actual existing rights to land use and disposal. The functionary of any large organization actually "sees" the human activity of interest to him largely through the simplified approximations of documents and statistics: for example, tax proceeds, lists of taxpayers, land records, average income, unemployment numbers, mortality rates, trade and productivity figures, the cases of cholera in a certain district.

These typifications are indispensable to statecraft as well as being potentially valuable. State simplifications such as maps, censuses, cadastral-lists, and standard units of measurement represent techniques for grasping a large and complex reality that *must be reduced to schematic categories* of some kind to allow officials to comprehend aspects of the ensemble. There is no other way of accomplishing this end than to reduce an infinite array of detail to a set of categories that will facilitate summary descriptions, comparisons, and aggregation. Such is the power of these techniques that they discover social truths as well as merely summarizing known facts. The Center for Disease Control in Atlanta is a striking case in point. Its structure of sample reporting hospitals allowed it to first "discover" – in the epidemiological sense – such hitherto unknown diseases as toxic shock syndrome, legionnaire's disease, and AIDS. Stylized facts of this kind are a very powerful form of state knowledge, making it possible for officials to intervene early in epidemics, to understand economic trends that greatly affect public welfare, to gauge whether their policies are having the desired effect, and to make policy with many of the crucial facts at hand.[80]

The techniques devised to enhance the legibility of a society to its rulers have become vastly more sophisticated, but the political motives driving them are little changed. Appropriation, control, and manipulation remain the most prominent. If we imagine a state that has no reliable means of enumerating its population, gauging its wealth, mapping its land, resources and settlements, and locating specific individuals, we are imagining a state whose interventions in that society are necessarily crude and ineffective. A society which is relatively opaque to the state is thereby insulated from some forms of finely tuned state interventions (both benign – for example, universal vaccinations – and resented – for example, personal income taxes). The interventions it does experience will typically be mediated by "local trackers" who know the society from inside and who are likely to interpose their own particular interests. Without this mediation – and often with it – state action is liable to be inept, greatly overshooting or undershooting its objective.

An illegible society is, then, a hindrance to *any* effective intervention by the state, whether the purpose of that intervention is plunder or public welfare. So long as the state's interest was largely confined to grabbing a few tons of grain and rounding up a few conscripts, the state's ignorance might not be fatal. When, however, the state's interest required changing the daily habits (for example, sanitation practices) or work performance (for example, quality labor and machine maintenance), then such ignorance was frequently fatal.

Legibility implies a *viewer* whose place is central. State simplifications of the kind we have examined are designed to provide authorities with a schematic view of their society: a view not afforded to those without authority. Rather like the intimidating one-way mirrored glasses of some US highway police, the authorities enjoy a quasi-monopolistic picture of selected aspects of the whole society. This privileged vantage point is typical of all institutional settings where command and control of complex human activities is paramount. The monastery, the barracks, the factory floor, the administrative bureaucracy (private or public) exercise many state-like functions and often mimic its information structure as well.

State simplifications can be considered part of an ongoing "project of legibility": a project that is never fully realized. The actual data from which such simplifications arise are, to a varying degree, riddled with inaccuracies, missing data, faulty aggregation, fraud, negligence, political distortion, etc. A project of legibility is thus "immanent" in any statecraft that aims at manipulating society. But it is undermined by intra-state rivalries, technical obstacles, and, above all, the active resistance of its subjects.

State simplifications, by their very nature, have a particular character. Most obviously, they are observations of those aspects, and only those aspects, of social life that are of official interest. They are *interested*, utilitarian facts. They are also, of course, nearly always written or numerical facts recorded in documents. Third, they are typically static facts. Even when they appear dynamic, they are typically the result of multiple static observations through time. Observation of, say, land records or income figures over two or more points in time may reveal a greater inequality in landownership or an increase in income, but it will not reveal how this new state-of-affairs came about or whether it will persist.

Finally, most stylized state facts are *aggregate* facts. Aggregate facts may be impersonal (for example, the density of transportation networks) or simply a collection of facts about individuals – for example, employment rates, literacy rates, residence patterns. For most purposes, state officials need to group citizens in a way that permits them to make a collective assessment.

Facts that can be aggregated and presented as averages or distributions *must* forcibly be *standardized* facts. However unique the actual circumstances of the various individuals who make up the aggregate, it is their sameness or, more precisely, their differences along a standardized scale or continuum that are of interest. Take, for example, simplifications about employment. The working lives of many people are exceptionally complex and may change from day to day. For the purposes of official statistics, however, "gainfully employed" is a stylized fact; one is or is not gainfully employed. The problems of how to categorize many rather exotic working lives are, in the final analysis, obscured by the categories reflected in the aggregate statistics.[81] Those who gather and interpret such aggregate data understand that there is a certain fictional and arbitrary quality to each of the categories they must employ – that they hide a wealth of problematic variation. Once set, however, these thin categories operate unavoidably *as if all* cases similarly classified are in fact, homogeneous and uniform. All *Normalbaum* in a given size range are the same; all the soil in a defined soil-class is statistically identical, all autoworkers (if we are classifying by industry) are the same, all Catholics (if we are classifying by religious faith) are the same.

To this point, I have been making a rather straightforward, even banal, point about the simplifications, abstractions and standardizations which are necessary for the observation by state officials of the circumstances of some or all of the population. I want, however, to make a further claim, analogous to that made for scientific forestry, that *the modern state, through its officials, attempts – with varying success – to create a population with precisely those standardized characteristics which will be easier to monitor, count, assess, and manage*. The utopian (immanent) tendency of the modern state, continually frustrated, is to reduce the chaotic, disorderly, constantly changing social reality beneath it to something more closely resembling the administrative grid of its observations. As the scientific forester may have dreamed of a perfectly legible forest[82] planted with same age, single species, uniform trees growing in straight lines in a rectangular flat space cleared of all underbrush and poachers, so one might conjure up an exacting state official aspiring to a perfectly legible population with registered, unique names and addresses, living in grid settlements, pursuing single occupations, owning rectangular lots and planting a single crop, all of whose transactions are documented according to the designated formula and in the official language. This caricature of society as a military parade ground is overdrawn, but the grain of truth it embodies may help us understand grandiose development plans.[83]

This tendency is perhaps one shared by many large hierarchical organizations. As Chisholm, reviewing the literature on administrative coordination, concludes, "Central coordinating schemes do work effectively under conditions where the task environment is known and unchanging, where it can be treated as a closed system."[84] The more static, standardized and uniform a population or social space is, the more legible it is to the techniques of state officials. I am suggesting that many state activities aim at transforming the population, space and nature under their jurisdiction into the closed system without surprises that can best be observed and controlled. The reason that state officials can, to some considerable degree, make their categories stick and impose their simplifications, is because the state, of all institutions, is best equipped to insist on treating people according to its schema. If you want to defend your claim to real property you are normally obliged to defend it with a document called a property deed, and in the courts and tribunals created for that purpose. If you wish any standing in law, you must have the documents (for example, birth certificate, passport, identity card) that officials accept as a claim of citizenship. The categories used by state agents are not merely a means to make their environment legible; they are an authoritative tune to which much of the population must dance.

Notes

1 The following account is largely drawn from Lowood's (1991) fine analysis.

2 The most striking exception was the royal attention to the supply of "noble game" (e.g., deer, boar, fox) for the hunt and hence to the protection of its habitat. Lest one imagine this to be a quaint pre-modern affectation, it is worth recalling the enormous social importance of the hunt to such recent "monarchs" as Erich Honneker and Tito.

3 For an evocative and wide-ranging attempt to explore the changing cultural meaning of the forest in the West, see Harrison 1992.

4 This last is a kind of reverse Heisenberg principle. Instead of altering the phenomenon observed through the act of observation, so that the pre-observation state of the phenomenon is unknowable in principle, the effect of (interested) observation in this case is to alter the phenomenon in question over time so that it, in fact, more closely resembles the stripped down, abstract image the lens had revealed.

5 The more general process of codifying the principles of state administration in seventeenth and eighteenth-century Europe is examined by Michel Foucault under the (misleading) heading of "police state" (from *Polizeiwissenschaft*) in his lectures on "governmentality" at the Collège de France. See the collection by Bucchell et al. 1991, esp. ch. 4.

6 In the late seventeenth century Colbert had extensive plans to "rationalize" forest administration both to prevent poaching and to generate a more reliable revenue yield. To this end, Etienne Dralet's *Traité du Régime Forestier* proposed regulated plots (*tire-aire*) "so that the growth is regular and easy to guard." Despite these initiatives, nothing much came of it in France until 1820 when the new German techniques were imported. See Sahlins 1992.

7 Lowood 1991, p. 338.

8 Various techniques were tried: cutting an actual tree into very tiny bits and then compressing it to find its volume; putting wood in a barrel of known volume and adding measured amounts of water to calculate the volume of the barrel *not* occupied by the wood, etc. Lowood 1991, p. 328.

9 Lowood 1991, p. 341; see also Harrison 1992, pp. 122–3.

10 See for example: Balzac 1949; Thompson 1975; Hay 1975; and Hahn 1982. For a directly apposite German case, see one of Karl Marx's first published articles linking the theft of wood to the business cycle and unemployment in the Rhineland: reported in Linebaugh 1976.

11 This brief description is drawn largely from Collins 1988.

12 Jones 1988, p. 17.

13 Collins 1988, pp. 201, 204. It was precisely this capacity to evade taxes that gave the fiscal regime a degree of unintended (from the top at least) flexibility and avoided even more open rebellion in the troubled seventeenth century.

14 Heilbron (1991a, p. 13) notes that in 1791 an English colonel of the militia obliged the Scottish clergy to send him inventories of their population by threatening to quarter troops upon their parish.

15 This assumes that the crown wants to maximize its long run proceeds. It was and is common, of course, for regimes in political or military crises to mortgage their future by squeezing as much as possible from their forests and/or their subjects.

16 Kula 1986.

17 Heilbron 1991b, pp. 207–8.

18 For an illuminating discussion along these lines see Appadurai (forthcoming).

19 Appadurai forthcoming.

20 The same motive was at work in the folk-categories of stratification used by Javanese villagers: the *Kekurangons* (those-who-have-less-than-enough) and the *Kecukupans* (those-who-have-enough). See Geertz 1963.

21 Geertz 1963, pp. 98–9.

22 Geertz 1963, p. 173.

23 It was, in fact, the active evasion of regions that were fiscally hard-pressed that provided the "drag" or gyroscope that often prevented an ill-considered tax claim from provoking an actual resistance.

24 Quoted in Kula 1986, p. 203–4.

25 Kula 1986, p. 122–3.

26 Kula 1986, p. 211.

27 For all the advance in human rights that equal citizenship carried with it, it is worth recalling that this momentous step also undercut the intermediary structures between the state and the citizen and gave the state, for the first time, direct access to its subjects. Equal citizenship not only implied legal equality and universal suffrage, it also implied universal conscription, as those mobilized into Napoleon's armies were shortly to discover. From the heights of the state the society increasingly appeared as an endless series of nationally equal "*particuliers*" with whom it dealt in their capacity as subjects, taxpayers, and potential military draftees. See Poggi 1978, p. 78

28 Kula 1986, p. 286.

29 The *Code Civil* did not deal with agriculture explicitly, with the single exception of specifying guidelines for tenant farming (*fermage*), in recognition of the wealthy and influential large tenants in the Paris Basin and to the north. I am grateful to Peter Jones for bringing to my attention the study on which this brief discussion is based: Aberdam 1979.

30 "En résumé, la ligne générale du projet de 1807 est de refuser toute specificité ou droiten rural ramenant, autant que possible, les rapports sociaux à la campagne à la forme d'authorité legale que la bourgeoisie projette sur l'ensemble de la population" (Aberdam 1979, p. 19).

31 Aberdam 1979, p. 18.

32 Aberdam 1979, p. 22.

33 In colonial Vietnam, the head tax or "capitation" was levied on whole communities on the basis of their presumed population. If the sum was not remitted, the police came and held an auction of whatever they could seize (e.g., water buffalos, furniture, jewelry) until the required sum was reached. This system gave the village notables, who owned most of the goals worth seizing, an incentive to make sure the taxes were remitted on time.

34 The same generalization has considerable validity for modern socialist forms of collective farming as well. Thus a considerable amount of farm land "disappeared" from the books when Hungary's collective farms were created. (See Rev 1987.) In China, after the deadly Great Leap Forward, many collective farms systematically hid production from central authorities in the interest of local survival. (See Kelliher 1992.)

35 Cadastral surveys might also be undertaken by *large* (i.e., state-like) aristocratic fief-holders who were convinced that they could thereby uncover taxable land and subjects which had hitherto eluded them.
36 Both the Danish and Norwegian examples are from the valuable historical analysis in Kain and Baigent (1992, p. 116).
37 The great efficiency of the Hutterite communal grain farmers in the Northern plain states and Canada is but one of many pieces of conflicting evidence. For some other evidence, see Yaney (1982, pp. 165–9).
38 Here I am guilty of conveying a false sense of uniformity: there were, in fact, a host of land arrangements, even in "black earth" Russia and many villages did not redistribute land at all (Yaney, 1982, p. 169).
39 Yaney 1982, p. 212.
40 Yaney (1982, p. 160) points out that Mennonite land was interstripped and was just as productive as Mennonite land organized into consolidated farms.
41 And not always here inasmuch as *group* land settlement, against the government's wishes, was also common.
42 Yaney 1982, chs. 7 and 8. It is worth noting in this context that the modern credit system, as the modern state tax system, requires a legible property regime for its functioning.
43 Yaney 1982, pp. 412 ff.
44 Figes 1989, ch. 6 ("The Rural Economy under War Communism").
45 There were, before comprehensive cadastral surveys, land that was open to all and belonged to no one, though social arrangements might regulate its use. By and large, such land was designated state land with the first cadastral map. All the land was "accounted for"; everything not owned privately became the property of the state.
46 Kain and Baigent 1992, p. 33. Seas, rivers and wastes were to be omitted since they did not bear revenue. The whole operation was guided by a manual entitled, "Mode d'arpentage pour l'impot foncier."
47 Quoted in Kain and Baigent 1992, p. 5.
48 In an earlier work I have examined this problem in some detail in its Southeast Asian context. See Scott, 1976, ch. 4.
49 In 1785 Austria's Franz Joseph had to choose between using net income or gross income as a basis or land taxation. Gross income was chosen because it was far simpler (e.g., average crop per unit of land x units of land x average grain price = gross income). It was necessary to sacrifice accuracy and fairness to create a procedure that was administratively feasible. Kain and Baigent 1992, p. 193.
50 Kain and Baigent 1992, p. 59.
51 Issue of mineral rights and mineral income from sub-soil deposits was a significant exception to this generalization.
52 Kain and Baigent 1992, p. 344.
53 Weber 1976, p. 156.
54 See Guha 1976.
55 For a remarkably thoughtful and thorough examination of how the colonial legal code transformed land dispute settlement, land tenure and social structure, see Moore 1986.
56 The equality was, of course, purely areal! See Kain and Baigent 1992, p. 225.
57 In Malaysia Chinese are legally barred from owning certain kinds of agricultural land. To get around this they register land in the name of a Malay confederate. To ensure that the confederate does not attempt to exercise his formal property rights, they have him sign, simultaneously, loan papers worth far more than the property, with the Chinese as creditor.
58 Revolutionary legislation in France, rather than abolishing the tithe outright, attempted to phase them out with temporary "tithe redemption payments"! Popular defiance was so massive and intractable that they were, finally, abandoned altogether. See Scott 1987.
59 Hacking 1990, p. 17.
60 Heilbron 1991a, p. 17.
61 Quoted in Kain and Baigent 1992, p. 320.
62 Heilbron 1991a, p. 22–3.
63 Hacking 1990, p. 145. Napoleon avoided conducting a census after 1806 for fear that its results would show the catastrophic demographic impact of his wars.
64 I owe this astute observation about *The Witness* to Ben Anderson.
65 See, for example, Wormsley 1980.
66 I am indebted to Kate Stanton, an astute research assistant, for her background research on this issue.
67 Camden 1605/1984. If Camden's supposition is correct it is nonetheless true that the statute was only episodically enforced for some time.
68 Camden 1605/1984, p. 122.
69 Readers of colonial documents come across many names followed by one or more "aka" or "alias." While viewed suspiciously as a means of escaping detection, many of these aliases were undoubtedly acquired innocently in the course of a complex social life.
70 Chazon 1972.
71 The exception which proves the rule appears to be China. Having the oldest elaborate state system, it has mandated designated family names for more than two millennia. "Laobaixing," meaning literally "the old hundred (many) surnames" and now designating more generally "the common people," may well have been the official list. Personal Communication from Bill (W. J. F.) Jenner and Ian Wilson.
72 Although this system has the advantage of designating "home town" for the generation that takes it, it certainly does not clarify much locally in Rafsanjan. It may well be that the state is particularly concerned with monitoring those who are mobile or "out of place."
73 Dietary laws that all but preclude commensality are also very powerful social exclusionary devices. If one were designating a set of cultural rules to wall off a group from surrounding groups, making sure its members cannot easily speak to or eat with other groups is a splendid beginning!
74 Weber (1976, ch. 6) points out that in the last 25 years of the nineteenth century, fully half of the Frenchmen reaching adulthood had a native tongue other than French.

75 Weber 1976, p. 73.
76 Quoted in Weber 1976, p. 113.
77 Weber 1976, p. 197.
78 For a careful depiction of the geography of standard marketing areas, see Skinner 1975.
79 Weber 1976, p. 195.
80 See Hacking 1975.
81 There are at least three problems here. The first is the hegemony of the categories. How does one classify someone who works largely for relatives who may sometimes feed him, let him use some land as his own, and sometimes pay him in crops or cash? The decisions, sometimes quite arbitrary, about how to classify such cases are obscured by the final result in which only the prevailing categories appear. The second problem, and one to which we shall return, is how the categories – more particularly, the state power behind the categories – shape the data. For example, during the recession of the 1970s in the US there was some concern that the official unemployment rate which had reached 13% was greatly exaggerated. A major reason, it was claimed, was that many nominally unemployed were working in the informal economy "off-the-books" and would not report their income or employment for fear of being taxed. One could say then and today that the fiscal system had provoked an "off-stage" reality that was designed to stay out of the data bank. The third problem is that those who collect and assemble the information may have very special interests in what the data show. During the Vietnam War the importance of "body-counts" and "pacified villages" as a measure of counter-insurgency success led commanders to produce inflated figures which pleased their superiors – in the short run – but increasingly bore little relation to the facts-on-the-ground.
82 Indicative of this tendency is the substantial literature on "optimum control theory" imported from management science into scientific forestry. For an application and bibliography, see Donnelly and Betters 1991.
83 The caricature is not so far-fetched that it does not capture the lyrical utopianism of early advocates of state-sciences. I quote the "father" of Prussian statistics, Ernst Engel: "in order to obtain an accurate representation, statistical research accompanies the individual through his entire earthly existence. It takes account of his birth, his baptism, his vaccination, his schooling and the success thereof, his diligence, his leave of school, his subsequent education and development; and, once he becomes a man, his physique and his ability to bear arms. It also accompanies the subsequent steps of his walk through life; it takes note of his chosen occupation, where he sets up his household and his management of the same; if he saved from the abundances of his youth for his old age, if and when and at what age he marries and whom he chooses as his wife – statistics look after him when things go well for him and when they go awry. Should he suffer shipwreck in his life, undergo material, moral or spiritual ruin, statistics takes note of the same. Statistics leaves a man only after his death – after it has ascertained the precise age of his death and noted the causes that brought about his end" (quoted in Hacking 1990, p. 34). One could hardly ask for a more complete list for the early nineteenth century, of state interests in its population and the paper trail it generated.
84 Chisholm 1989, p. 10.

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7

The Liberal State

Catharine A. MacKinnon

The difference between the judges and Sir Isaac [Newton] is that a mistake by Sir Isaac in calculating the orbit of the earth would not send it spinning around the sun with an increased velocity … while if the judges … come to a wrong result, it is none the less law.

John Chipman Gray (1909)

Political revolutions aim to change political institutions in ways that those institutions themselves prohibit.

Thomas Kuhn (1962)

Feminism has no theory of the state. Just as feminism has a theory of power but lacks a specific theory of its state form, marxism has a theory of value which (through the organization of work in production) becomes class analysis, but also a problematic theory of the state. Marx himself did not address the state much more explicitly than he addressed women. Women were substratum, the state epiphenomenon.[1] He termed the state "a concentrated expression of economics,"[2] a reflection of the real action, which occurred elsewhere; it was "the official résumé of society,"[3] a unity of ruptures; it, or its "executive," was "but a committee for managing the common affairs of the whole bourgeoisie."[4] Engels frontally analyzed women and the state, and together. But just as he presumed the subordination of women in every attempt to reveal its roots, he presupposed something like the state, or statelike society, in every attempt to find its origins.[5]

Marx tended to use the term *political* narrowly to refer to the state or its laws, criticizing as exclusively political interpretations of the state's organization or behavior which took them as sui generis, as if they were to be analyzed apart from economic conditions. He termed "political power" as embodied in the modern state "the official expression of antagonism in civil society."[6] Changes on this level could, therefore, emancipate the individual only within the framework of the existing social order, termed "civil society."[7] Revolution on this level was "partial, merely political revolution."[8] Accordingly, until recently, most marxist theory has tended to consider as political that which occurs between classes and the state as the instrument of the economically dominant class.[9] That is, it has interpreted the political in terms of the marxist view of social inequality and the state in terms of the class that controls it. The marxist theory of social inequality has been its theory of politics. The state as such was not seen as furthering particular interests through its form. This theory does not so much collapse the state into society

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(although it goes far in that direction) as conceive the state as determined by the totality of social relations of which the state is one determined and determining part – without specifying which, or how much, is which.

After 1848, having seen the bourgeoisie win revolutions but then not exercise state power directly, Marx tried to understand how states could plainly serve the bourgeoisie's interest yet not represent it as a class.[10] His attempts form the basis for much contemporary marxist work that has tried to grasp the specificity of the institutional state: how it wields class power or operates within class strictures or supplements or moderates class rule or transforms class society or responds to approach by a left aspiring to rulership or other changes. While much liberal theory has seen the state as emanating power, and traditional marxism has seen the state as expressing power constituted elsewhere, recent marxism, much of it structuralist, has tried to analyze state power as specific to the state as a form, yet integral to a determinate social whole understood in class terms.

Politics becomes "an autonomous phenomenon that is constrained by economics but not reducible to it."[11] This state is found "relatively autonomous"; that is, the state, expressed through its functionaries, has a definite class character, is definitely capitalist or socialist, but also has its own interests, which are to some degree independent of those of the ruling class and even of the class structure.[12] The state as such, in this view, has a specific power and interest, termed "the political," such that class power, class interest expressed by and in the state, and state behavior, though inconceivable in isolation from one another, are nevertheless not linearly linked or strictly coextensive. Thus Jon Elster argues that Marx saw that the bourgeoisie perceived their interests best furthered "if they remain outside politics."[13] Much of this work locates "the specificity of the political" in a mediate "region" between the state and its own ground of power (which alone, as in the liberal conception, would set the state above or apart from class) and the state as possessing no special supremacy or priority in terms of power, as in the more orthodox marxist view.[14] For Nicos Poulantzas, for example, the "specific autonomy which is characteristic of the function of the state … is the basis of the specificity of the political"[15] – whatever that means.

The idea that the state is relatively autonomous, a kind of first among equals of social institutions, has the genius of appearing to take a stand on the issue of reciprocal constitution of state and society while straddling it.[16] Is the state essentially autonomous of class but partly determined by it, or is it essentially determined by class but not exclusively so? Is it relatively constrained within a context of freedom or relatively free within a context of constraint?[17] As to who or what fundamentally moves and shapes the realities and instrumentalities of domination, and where to go to do something about it, what qualifies what is as ambiguous as it is crucial. When this work has investigated law as a particular form of state expression, it has served to relieve the compulsion to find all law – directly or convolutedly, nakedly or clothed in unconscious or devious rationalia – to be simply "bourgeois," without undercutting the notion that it, with all state emanations, is determinately driven by interest.[18]

Feminism has not confronted, on its own terms, the relation between the state and society within a theory of social determination specific to sex. As a result, it lacks a jurisprudence, that is, a theory of the substance of law, its relation to society, and the relationship between the two. Such a theory would comprehend how law works as a form of state power in a social context in which power is gendered. It would answer the questions: What is state power? Where, socially, does it come from? How do women encounter it? What is the law for women? How does law work to legitimate the state, male power, itself? Can law do anything for women? Can it do anything about women's status? Does how the law is used matter?

In the absence of answers, feminist practice has oscillated between a liberal theory of the state on the one hand and a left theory of the state on the other. Both theories treat law as the mind of society: disembodied reason in liberal theory, reflection of material interest in left theory. In liberal moments, the state is accepted on its own terms as a neutral arbiter among conflicting interests. The law is actually or potentially principled, meaning predisposed to no substantive outcome, or manipulable to any ends, thus available as a tool that is not fatally twisted. Women implicitly become an interest group within pluralism, with specific problems of mobilization and representation, exit and voice, sustaining incremental gains and losses. In left moments, the state becomes a tool of dominance and repression, the law legitimating ideology, use of the legal system a form of utopian idealism or gradualist reform, each apparent gain deceptive or cooptive, and each loss inevitable.

Liberalism applied to women has supported state intervention on behalf of women as abstract persons with abstract rights, without scrutinizing the content and limitations of these notions in terms of gender. Marxism applied to women is always on the edge of counseling abdication of the state as an arena altogether – and with it those women whom the state does not ignore or who are

in no position to ignore it. As a result, feminism has been left with these tacit alternatives: either the state is a primary tool of women's betterment and status transformation, without analysis (hence strategy) of it as male; or women are left to civil society, which for women has more closely resembled a state of nature. The state, and with it the law, have been either omnipotent or impotent: everything or nothing. The feminist posture toward the state has therefore been schizoid on issues central to women's status. Rape, abortion, pornography, and sex discrimination are examples.[19] To grasp the inadequacies for women of liberalism on the one hand and marxism on the other is to begin to comprehend the role of the liberal state[20] and liberal legalism[21] within a post-marxist feminism of social transformation.

Gender is a social system that divides power. It is therefore a political system. That is, over time, women have been economically exploited, relegated to domestic slavery, forced into motherhood, sexually objectified, physically abused, used in denigrating entertainment, deprived of a voice and authentic culture, and disenfranchised and excluded from public life. Women, by contrast with comparable men, have systematically been subjected to physical insecurity; targeted for sexual denigration and violation; depersonalized and denigrated; deprived of respect, credibility, and resources; and silenced – and denied public presence, voice, and representation of their interests. Men as men have generally not had these things done to them; that is, men have had to be Black or gay (for instance) to have these things done to them as men. Men have done these things to women. Even conventional theories of power – the more individuated, atomistic, and decisional approaches of the pluralists, as well as the more radical theories, which stress structural, tacit, contextual, and relational aspects of power – recognize such conditions as defining positions of power and powerlessness.[22] If one defines politics with Harold Lasswell, who defines a political act as "one performed in power perspectives,"[23] and with Robert Dahl, who defines a political system as "any persistent pattern of human relationships that involves, to a significant extent, power, rule, or authority,"[24] and with Kate Millett, who defines political relationships as "power structured relationships,"[25] the relation between women and men is political.

Unlike the ways in which men systematically enslave, violate, dehumanize, and exterminate other men, expressing political inequalities among men, men's forms of dominance over women have been accomplished socially as well as economically, prior to the operation of law, without express state acts, often in intimate contexts, as everyday life. So what is the role of the state in sexual politics? Neither liberalism nor marxism grants women, as such, a specific relation to the state. Feminism has described some of the state's treatment of the gender difference but has not analyzed the state's role in gender hierarchy. What, in gender terms, are the state's norms of accountability, sources of power, real constituency? Is the state to some degree autonomous of the interests of men or an integral expression of them? Does the state embody and serve male interests in its form, dynamics, relation to society, and specific policies? Is the state constructed upon the subordination of women? If so, how does male power become state power? Can such a state be made to serve the interests of those upon whose powerlessness its power is erected? Would a different relation between state and society, such as may exist under socialism, make a difference? If not, is masculinity inherent in the state form as such, or is some other form of state, or some other way of governing, distinguishable or imaginable? In the absence of answers to these questions, feminism has been caught between giving more power to the state in each attempt to claim it for women and leaving unchecked power in the society to men. Undisturbed, meanwhile, like the assumption that women generally consent to sex, is the assumption that women consent to this government. The question for feminism is: what is this state, from women's point of view?

The state is male in the feminist sense:[26] the law sees and treats women the way men see and treat women. The liberal state coercively and authoritatively constitutes the social order in the interest of men as a gender – through its legitimating norms, forms, relation to society, and substantive policies. The state's formal norms recapitulate the male point of view on the level of design. In Anglo-American jurisprudence, morals (value judgments) are deemed separable and separated from politics (power contests), and both from adjudication (interpretation). Neutrality, including judicial decision making that is dispassionate, impersonal, disinterested, and precedential, is considered desirable and descriptive.[27] Courts, forums without predisposition among parties and with no interest of their own, reflect society back to itself resolved. Government of laws, not of men, limits partiality with written constraints and tempers force with reasonable rule-following.

At least since Langdell's first casebook in 1871, this law has aspired to be a science of rules and a science with rules, a science of the immanent generalization subsuming the emergent particularity, of prediction and control of social regularities and regulations, preferably

codified. The formulaic "tests" of "doctrine" aspire to mechanism, classification to taxonomy, legislators to Linnaeus. Courts intervene only in properly "factualized" disputes,[28] cognizing social conflicts as if collecting empirical data; right conduct becomes rule-following.[29] But these demarcations between morals and politics, science and politics, the personality of the judge and the judicial role, bare coercion and the rule of law, tend to merge in women's experience.[30] Relatively seamlessly they promote the dominance of men as a social group through privileging the form of power – the perspective on social life – which feminist consciousness reveals as socially male. The separation of form from substance, process from policy, adjudication from legislation, judicial role from theory or practice, echoes and reechoes at each level of the regime its basic norm: objectivity.

Formally, the state is male in that objectivity is its norm. Objectivity is liberal legalism's conception of itself. It legitimates itself by reflecting its view of society, a society it helps make by so seeing it, and calling that view, and that relation, rationality. Since rationality is measured by point-of-viewlessness, what counts as reason is that which corresponds to the way things are. Practical rationality, in this approach, means that which can be done without changing anything. In this framework, the task of legal interpretation becomes "to perfect the state as mirror of the society."[31] Objectivist epistemology is the law of law. It ensures that the law will most reinforce existing distributions of power when it most closely adheres to its own ideal of fairness. Like the science it emulates, this epistemological stance cannot see the social specificity of reflexion as method or its choice to embrace that which it reflects. Such law not only reflects a society in which men rule women; it rules in a male way insofar as "the phallus means everything that sets itself up as a mirror."[32] Law, as words in power, writes society in state form and writes the state onto society. The rule form, which unites scientific knowledge with state control in its conception of what law is, institutionalizes the objective stance as jurisprudence.

The state is male jurisprudentially, meaning that it adopts the standpoint of male power on the relation between law and society. This stance is especially vivid in constitutional adjudication, thought legitimate to the degree it is neutral on the policy content of legislation. The foundation for its neutrality is the pervasive assumption that conditions that pertain among men on the basis of gender apply to women as well – that is, the assumption that sex inequality does not really exist in society. The Constitution – the constituting document of this state society – with its interpretations assumes that society, absent government intervention, is free and equal; that its laws, in general, reflect that; and that government need and should right only what government has previously wronged. This posture is structural to a constitution of abstinence: for example, "Congress shall make no law abridging the freedom of … speech." Those who have freedoms like equality, liberty, privacy, and speech socially keep them legally, free of governmental intrusion. No one who does not already have them socially is granted them legally.

In this light, once gender is grasped as a means of social stratification, the status categories basic to medieval law, thought to have been superseded by liberal regimes in aspirational nonhierarchical constructs of abstract personhood, are revealed deeply unchanged. Gender as a status category was simply assumed out of legal existence, suppressed into a presumptively pre-constitutional social order through a constitutional structure designed not to reach it. Speaking descriptively rather than functionally or motivationally, the strategy is first to constitute society unequally prior to law; then to design the constitution, including the law of equality, so that all its guarantees apply only to those values that are taken away by law; then to construct legitimating norms so that the state legitimates itself through noninterference with the status quo. Then, so long as male dominance is so effective in society that it is unnecessary to impose sex inequality through law, such that only the most superficial sex inequalities become *de jure*, not even a legal guarantee of sex equality will produce social equality.

The posture and presumptions of the negative state, the view that government best promotes freedom when it stays out of existing social arrangements, reverberates throughout constitutional law. Doctrinally, it is embodied in rubrics like the "state action" requirement of equal protection law, in the law of freedom of speech, and in the law of privacy. The "state action" requirement restricts the Constitution to securing citizens' equality rights only from violations by governments, not by other citizens. The law of the First Amendment secures freedom of speech only from governmental deprivation. In the law of privacy, governmental intervention itself is unconstitutional.[33]

In terms of judicial role, these notions are defended as the "passive virtues":[34] courts should not (and say they do not) impose their own substantive views on constitutional questions. Judges best vindicate the Constitution when they proceed as if they have no views, when they reflect society back to itself from the angle of vision at

which society is refracted to them. In this hall of mirrors, only in extremis shall any man alter what any other man has wrought. The offspring of proper passivity is substancelessness. Law produces its progeny immaculately, without messy political intercourse.

Philosophically, this posture is expressed in the repeated constitutional invocation of the superiority of "negative freedom" – staying out, letting be – over positive legal affirmations. Negative liberty gives one the right to be "left to do or be what [he] is able to do or be, without interference from other persons." The state that pursues this value promotes freedom when it does not intervene in the social status quo. Positive freedom, freedom to do rather than to keep from being done to, by distinction, gives one the right to "control or … determine someone to do, or be, this rather than that."[35] If one group is socially granted the positive freedom to do whatever it wants to another group, to determine that the second group will be and do this rather than that, no amount of negative freedom legally guaranteed to the second group will make it the equal of the first. For women, this has meant that civil society, the domain in which women are distinctively subordinated and deprived of power, has been placed beyond reach of legal guarantees. Women are oppressed socially, prior to law, without express state acts, often in intimate contexts. The negative state cannot address their situation in any but an equal society – the one in which it is needed least.

This posture is enforced through judicial methodology, the formative legal experience for which is *Lochner v. New York*, a case that arose out of the struggle of the working class to extract livable working conditions from a capitalist state through legislated reform.[36] Invalidating legislation that would have restricted the number of hours bakers could work on grounds of freedom of contract, the Supreme Court sided with capitalism over workers. The dissenters' view, ultimately vindicated, was that the majority had superimposed its own views on the Constitution; they, by contrast, would passively reflect the Constitution by upholding the legislation. Soon after, in *Muller v. Oregon*, the Supreme Court upheld restrictive hours legislation for women only.[37] The opinion distinguished *Lochner* on the basis that women's unique frailty, dependency, and breeding capacity placed her "at a disadvantage in the struggle for subsistence." A later ruling, *West Coast Hotel v. Parrish*, generally regarded as ending the *Lochner* era, also used women as a lever against capitalism. Minimum-wage laws were upheld for women because "the exploitation of a class of workers who are in an unequal position with respect to bargaining power and are thus relatively defenseless against the denial of a living wage … casts a direct burden for their support upon the community."[38]

Concretely, it is unclear whether these special protections, as they came to be called, helped or hurt women.[39] These cases did do something for some workers (female) concretely; they also demeaned all women ideologically. They did assume that women were marginal and second-class members of the workforce; they probably contributed to keeping women marginal and second-class workers by keeping some women from competing with men at the male standard of exploitation. This benefited both male workers and capitalists. These rulings supported one sector of workers against all capitalists by benefiting male workers at the expense of female workers. They did help the working class by setting precedents that eventually supported minimum-wage and maximum-hours laws for all workers.[40] They were a victory against capitalism and for sexism, for some women perhaps at the expense of all women (maybe including those they helped), for the working class perhaps at women's expense, at least so long as they were "women only."

The view of women in *Muller* and *West Coast Hotel* was that of the existing society: demeaning, paternalistic, and largely unrealistic; as with most pedestalization, its concrete benefits were equivocal at best.[41] The view of workers in *Lochner* left capitalism unchecked and would have precluded most New Deal social reforms men wanted. (Protecting all workers was not considered demeaning by anyone.) For these reasons, these cases have come to stand for a critique of substantivity in adjudication as such. But their methodological solution – judicial neutrality – precludes from constitutional relief groups who are socially abject and systematically excluded from the usual political process. Despite universal rejections of "Lochnering," this substantive approach in neutral posture has continued to be incorporated in constitutional method, including in the law of equality. If over half the population has no voice in the Constitution, why is upholding legislation to give them a voice impermissibly substantive and activist, while striking down such legislation is properly substanceless and passive? Is permitting such an interpretation of, for example, the equality principle in a proper case activism, while not permitting it is properly nonsubstantive? Overruling *Lochner* was at least as judicially active as *Lochner* itself was. Further, why are legislation and adjudication regarded as exercises of state power, but passivity in the face of social inequality – even under a constitutional equality principle – is not? The result is,

substantivity and activism are hunted down, flailed, and confined, while their twins, neutrality and passivity, roam at large.

To consider the "passive virtues" of judicial restraint as a tool for social change suggests that change for workers was constitutional only because workers were able to get power in legislatures. To achieve such changes by constitutional principle before achieving them socially and politically would be to engage in exactly the kind of substantive judicial activism that those who supported the changes said they opposed. The reasoning was: if courts make substantive decisions, they will express their prejudices, here, exploitive of workers, demeaning and unhelpful of women. The alternatives have been framed, then, as substantive adjudication that demeans and deprives on the one hand, or as substanceless adjudication that, passively virtuous, upholds whatever power can get out of the political process as it is.

The underlying assumption of judicial neutrality is that a status quo exists which is preferable to judicial intervention – a common law status quo, a legislative status quo, an economic status quo, or a gender status quo. For women, it also tends to assume that access to the conventional political realm might be available in the absence of legal rights. At the same time it obscures the possibility that a substantive approach to women's situation could be adequate to women's distinctive social exploitation – ground a claim to civil equality, for example – and do no more to license judicial arbitrariness than current standards do. From women's point of view, adjudications are already substantive; the view from nowhere already has content. *Lochner* saw workers legally the way capitalists see workers socially: as free agents, bargaining at arm's length. *Muller* saw women legally the way men see women socially: as breeders, marginal workers, excludable. If one wants to claim no more for a powerless group than what can be extracted under an established system of power, one can try to abstract them into entitlement by blurring the lines between them and everyone else. Neutrality as pure means makes some sense. If, however, the claim is against the definition and distribution of power itself, one needs a critique not so much of the substantivity of cases like *Lochner* and *Muller*, but of their substance. Such a critique must also include that aspect of the liberal tradition in which one strategy for dominance has been substancelessness.[42]

If the content of positive law is surveyed more broadly from women's point of view, a pattern emerges. The way the male point of view frames an experience is the way it is framed by state policy. Over and over again, the state protects male power through embodying and ensuring existing male control over women at every level – cushioning, qualifying, or *de jure* appearing to prohibit its excesses when necessary to its normalization. *De jure* relations stabilize de facto relations. Laws that touch on sexuality provide illustrations of this argument. As in society, to the extent possession is the point of sex, rape in law is sex with a woman who is not yours, unless the act is so as to make her yours. Social and legal realities are consistent and mutually determinate: since law has never effectively interfered with men's ability to rape women on these terms, it has been unnecessary to make this an express rule of law. Because part of the kick of pornography involves eroticizing the putatively prohibited, obscenity law putatively prohibits pornography enough to maintain its desirability without ever making it unavailable or truly illegitimate. Because the stigma of prostitution is the stigma of sexuality is the stigma of the female gender, prostitution may be legal or illegal, but so long as women are unequal to men and that inequality is sexualized, women will be bought and sold as prostitutes, and law will do nothing about it.

Women as a whole are kept poor, hence socially dependent on men, available for sexual or reproductive use. To the extent that abortion exists to control the reproductive consequences of intercourse, hence to facilitate male sexual access to women, access to abortion will be controlled by "a man or The Man."[43] So long as this is effectively done socially, it is unnecessary to do it by law. Law need merely stand passively by, reflecting the passing scene. The law of sex equality stays as far away as possible from issues of sexuality. Rape, pornography, prostitution, incest, battery, abortion, gay and lesbian rights: none have been sex equality issues under law.[44] In the issues the law of sex discrimination does treat, male is the implicit reference for human, maleness the measure of entitlement to equality. In its mainstream interpretation, this law is neutral: it gives little to women that it cannot also give to men, maintaining sex inequality while appearing to address it. Gender, thus elaborated and sustained by law, is maintained as a division of power. The negative state views gender and sexual relations as neutrally as *Lochner* viewed class relations.

The law on women's situation produced in this way views women's situation from the standpoint of male dominance. It assumes that the conditions that pertain among men on the basis of sex – consent to sex, comparative privacy, voice in moral discourse, and political equality on the basis of gender – apply to women.

It assumes on the epistemic level that sex inequality in society is not real. Rape law takes women's usual response to coercion – acquiescence, the despairing response to hopelessness to unequal odds – and calls that consent. Men coerce women; women "consent." The law of privacy treats the private sphere as a sphere of personal freedom. For men, it is. For women, the private is the distinctive sphere of intimate violation and abuse, neither free nor particularly personal. Men's realm of private freedom is women's realm of collective subordination. The law of obscenity treats pornography as "ideas."[45] Whether or not ideas are sex for men, pornography certainly is sex for men. From the standpoint of women, who live the sexual abuse in pornography as everyday life, pornography is reality. The law of obscenity treats regulation of pornography from the standpoint of what is necessary to protect it: as regulation of morals, as some men telling other men what they may not see and do and think and say about sex. From the standpoint of women, whose torture pornography makes entertainment, pornography is the essence of a powerless condition, its effective protection by the state the essence of sexual politics. Obscenity law's "moral ideas" are a political reality of women's subordination. Just as, in male law, public oppression masquerades as private freedom and coercion is guised as consent, in obscenity law real political domination is presented as a discourse in ideas about virtue and vice.

Rape law assumes that consent to sex is as real for women as it is for men. Privacy law assumes that women in private have the same privacy men do. Obscenity law assumes that women have the access to speech men have. Equality law assumes that women are already socially equal to men. Only to the extent women have already achieved social equality does the mainstream law of equality support their inequality claims. The laws of rape, abortion, obscenity, and sex discrimination show how the relation between objectification, understood as the primary process of the subordination of women, and the power of the state is the relation between the personal and the political at the level of government. These laws are not political because the state is presumptively the sphere of politics. They are integral to sexual politics because the state, through law, institutionalizes male power over women through institutionalizing the male point of view in law. Its first state act is to see women from the standpoint of male dominance; its next act is to treat them that way. This power, this state, is not a discrete location, but a web of sanctions throughout society which "control[s] the principal means of coercion" that structures women's everyday lives.[46] The Weberian monopoly on the means of legitimate coercion, thought to distinguish the state as an entity, actually describes the power of men over women in the home, in the bedroom, on the job, in the street, throughout social life. It is difficult, actually, to find a place it does not circumscribe and describe. Men are sovereign in society in the way Austin describes law as sovereign: a person or group whose commands are habitually obeyed and who is not in the habit of obeying anyone else.[47] Men are the group that has had the authority to make law, embodying H. L. A. Hart's "rule of recognition" that, in his conception, makes law authoritative.[48] Distinctively male values (and men) constitute the authoritative interpretive community that makes law distinctively lawlike to the likes of Ronald Dworkin.[49] If one combines "a realistic conception of the state with a revolutionary theory of society,"[50] the place of gender in state power is not limited to government, nor is the rule of law limited to police and courts. The rule of law and the rule of men are one thing, indivisible, at once official and unofficial – officially circumscribed, unofficially not. State power, embodied in law, exists throughout society as male power at the same time as the power of men over women throughout society is organized as the power of the state.

Perhaps the failure to consider gender as a determinant of state behavior has made the state's behavior appear indeterminate. Perhaps the objectivity of the liberal state has made it appear autonomous of class. Including, but beyond, the bourgeois in liberal legalism, lies what is male about it. However autonomous of class the liberal state may appear, it is not autonomous of sex. Male power is systemic. Coercive, legitimated, and epistemic, it *is* the regime.

Notes

1 Illustrative examples can be found in Karl Marx, *The German Ideology* (New York: International Publishers, 1972), pp. 48–52; idem, *Critique of Hegel's Philosophy of Right*, ed. Joseph O'Malley, trans. Annette Jolin (Cambridge: Cambridge University Press, 1970), p. 139 ("substratum"); idem, "Introduction to Critique of Political Economy," in *German Ideology*, ed. C. J. Arthur (New York: International Publishers, 1972), p. 142; idem, *Eighteenth Brumaire of Louis Bonaparte*, in *Selected Works*, ed. V. Adoratsky, vol. 2 (New York: International Publishers, 1936), 344 ("superstructure"); letter from

Marx to P. V. Annenkov, December 28, 1846, in *The Poverty of Philosophy* (New York: International Publishers, 1963), p. 181. The concept also occurs pervasively if mostly implicitly throughout *Capital*.

2 In *Selected Works*, 3: 527.

3 Marx, *Poverty of Philosophy*, p. 156.

4 Karl Marx and Friedrich Engels, *The Communist Manifesto, in Collected Works* (London: Lawrence & Wishart, 1900), p. 486.

5 See *Origin*, pp. 125–46.

6 *Origin*, p. 174.

7 See also Karl Marx, *Early Writings*, ed. and trans. T. B. Bottomore (New York: McGraw-Hill, 1964), p. 20.

8 Marx, *Critique of Hegel's Philosophy of Right*, p. 139. See also Max Adler, *Die Staatsauffassung des Marxismus* (Darmstadt, 1964), p. 49.

9 Lenin urged taking over the state mechanism for the proletariat, but not changing its form. For a discussion of Lenin's *The State and Revolution*, see L. Kolakowski, *Main Currents of Marxism*, vol. 2: *The Golden Age*, trans. P. S. Falla (Oxford: Clarendon Press, 1978), 498–509.

10 This analysis of the political manuscripts is indebted to Eric Hobsbawm, "Marx, Engels and Politics," in *The History of Marxism*, ed. E. Hobsbawm, vol. 1 (Brighton: Harvester Press, 1982), p. 245.

11 Jon Elster, *Making Sense of Marx* (Cambridge: Cambridge University Press, 1985), p. 57. Elster attributes this insight to post-1850 Marx.

12 Representative works include Fred Block, "The Ruling Class Does Not Rule: Notes on the Marxist Theory of the State," *Socialist Revolution* 7 (May–June 1977): 6–28; Ralph Miliband, *The State in Capitalist Society* (New York: Basic Books, 1969); Nicos Poulantzas, *Classes in Contemporary Capitalism* (London: New Left Books, 1975) and *Political Power and Social Classes*, trans. Timothy O'Hagan (London: Verso, 1978); Perry Anderson, *Lineages of the Absolutist State* (London: New Left Books, 1975); Goran Therborn, *What Does the Ruling Class Do When It Rules?* (London: New Left Books, 1978); Claus Offe and Volker Ronge, "Theses on the Theory of the State," *New German Critique* 6 (1975): 137–47; David A. Gold, Clarence Y. H. Lo, and Erik Olin Wright, "Recent Developments in Marxist Theories of the Capitalist State," *Monthly Review* 27 (October 1975): 29–43 and (November 1975): 36–51; Norberto Bobbio, "Is There a Marxist Theory of the State?" *Telos* 35 (Spring 1978): 5–16. Theda Skocpol, *States and Social Revolution: A Comparative Analysis of France, Russia and China* (Cambridge: Cambridge University Press, 1979), pp. 24–33, ably reviews much of this literature. Applications to law include Isaac Balbus, "Commodity Form and Legal Form: An Essay on the 'Relative Autonomy' of the Law," *Law and Society Review* 11 (Winter 1977): 571–88; Mark Tushnet, "A Marxist Analysis of American Law," *Marxist Perspectives* 1, no. 1 (Spring 1978): 96–116; and Karl Klare, "Law-Making as Praxis," *Telos* 40 (Summer 1979): 123–35.

13 Elster, *Making Sense of Marx*, p. 411.

14 Poulantzas' formulation follows Althusser; Louis Althusser and Etienne Balibar, *Reading Capital*, trans. Ben Brewster (London: New Left Books, 1970).

15 Poulantzas, *Political Power and Social Classes*, pp. 14, 16.

16 This discussion usually terms economic realities the "base" and the state and its laws parts of the "superstructure." Base determines superstructure. An interesting reworking of these relations is Gerald A. Cohen, *Karl Marx's Theory of History: A Defense* (Oxford: Oxford University Press, 1978), p. 216.

17 Ernesto Laclau makes a similar point. Criticizing Ralph Miliband: "It would seem that Miliband is working with a simplistic contraposition, in which the adjective 'relative' constitutes a simple restriction to an autonomy conceived in terms of freedom." Clarifying Poulantzas: "For Poulantzas, on the contrary, the 'relative' character of an autonomy indicates that it belongs to a world of structural determinations, and it is only within this, as a particular moment of it, that the concept of autonomy must be elaborated"; Ernesto Laclau, *Politics and Ideology in Marxist Theory* (London: New Left Books, 1977), p. 65.

18 The Critical Legal Studies movement has worked with these issues without getting much further on this question than this paragraph discloses. See Mark Kelman's able synthesis, *A Guide to Critical Legal Studies* (Cambridge, MA: Harvard University Press, 1987), summarizing the criticisms of standard legal discourse by these left scholars. See also David Kairys, ed., *The Politics of Law* (New York: Pantheon, 1982); Duncan Kennedy and Karl Klare, "A Bibliography of Critical Legal Studies," 94 *Yale Law Journal* 461 (1984); Critical Legal Studies Symposium, 36 *Stanford Law Review* 1 (1984). The lack of centrality of a critique of gender to this group's critique of law and society (indeed its lack of encounter with the real world in general) makes this school less useful to theory than it might otherwise be. The olympian conceptual discourse of Roberto Unger, *The Critical Legal Studies Movement* (Cambridge, MA: Harvard University Press, 1986), for example, does not advance any substantive theory of power (class or gender) as a basis for his criticisms of the formalism and objectivism of mainstream legal discourse. It is entirely unclear, as a result, just what is at stake in social hierarchy; that is, how and in what way some are concretely benefited, hence enforce and hold onto their position, while others are concretely deprived, hence have an interest in change but may be systematically terrorized and despairing – all in ways that are fundamental to the relation between law and society, the social nature of the state, and legal thinking. Some of the concepts and comments of Critical Legal Studies, such as the "interpenetrated" nature of state and society, are useful. See Kelman, pp. 258–62. Others, such as the "indeterminacy" of law, are less useful for those for whom law is all too determinate. For one attempt within this tradition, see Clare Dalton, "An Essay in the

Deconstruction of Contract Law," 94 *Yale Law Journal* 997 (1985).

19 Each of these issues is discussed in detail in later chapters in this section.

20 Recent work attempting to criticize and yet rehabilitate the liberal state, such as Bruce Ackerman, *Social Justice in the Liberal State* (New Haven: Yale University Press, 1980), does not solve these problems. Ackerman, for example, does not question the social sources and sites of power, but only its distribution.

21 Klare, "Law-Making as Praxis"; Judith Shklar, *Legalism* (Cambridge, MA: Harvard University Press, 1964).

22 Scholars of power in its political aspect traditionally analyze legitimated physical force. Thus, the organization called "government," the science of which is political science, after Weber became that which successfully upholds its claim to regulate exclusively the legitimate use of physical force in a physical territory; Robert A. Dahl, *Modern Political Analysis* (Englewood Cliffs, NJ: Prentice-Hall, 1976), p. 3. (See Max Weber, *Theory of Social and Economic Organization* [New York: Free Press of Glencoe, 1957], p. 154.) Dahl and C. E. Lindblom use "control" in a similar way: "In loose language, A controls the responses of B if A's acts cause B to respond in a definite way"; *Politics, Economics, and Welfare* (New York: Harper & Brothers, 1953), p. 94. Pluralist theorists of power have been critical of treating power as a lump in a zero-sum game: you either have it or you don't. Still, for them, it has to do with getting what one wants, with rewards and deprivations, with A getting B to do something A wants independent of what B wants, either from A telling B or from B anticipating what A wants. "A power relation, actual or potential, is an actual or potential causal relation between the preferences of an actor regarding an outcome and the outcome itself"; Jack H. Nagel, *A Descriptive Analysis of Power* (New Haven: Yale University Press, 1975), p. 29. Because he wants it, it happens. On other causal aspects, see Herbert A. Simon, "Notes on the Observation and Measurement of Political Power," *Journal of Politics* 15 (1953): 500–16. Carl J. Friedrich similarly formulates a "rule of anticipated reactions": "if A's desire for X causes B to attempt to bring about X"; *Constitutional Government and Democracy* (New York: Harper & Brothers, 1937), pp. 16–18. According to Dahl, "A has power over B to the extent that he can get B to do something that B would not otherwise do"; Robert A. Dahl, "A Critique of the Ruling Elite Model," in *Political Power*, ed. Roderick Bell, David Edwards, and Harrison Wagner (New York: Free Press, 1969), p. 80. See also Nelson Polsby, *Community Power and Political Theory* (New Haven: Yale University Press, 1962), and R. Dahl, "Power," *International Encyclopedia of the Social Sciences*, vol. 12 (New York: Macmillan, 1968), 405–15. These formulations, while envisioning a somewhat atomistic and individuated social world and a discrete set of decisional interactions, nevertheless do characterize many of the behaviors claimed by feminists as exhibiting power relations between women and men.

Other concepts of power urged by critics of the traditional approaches capture further dimensions of male power as a political system, emphasizing the more structural, contextual, tacit, and relational dimensions of power. See, e.g., Peter Bachrach and Morton Baratz, "Two Faces of Power," in Bell, Edwards, and Wagner, *Political Power*, p. 94. To these facets, Steven Lukes adds control over agenda, latent as well as observable conflict, and objective as well as subjective interests, emphasizing the "sheer weight of institutions" over explicit decisions; *Power: A Radical Analysis* (London: Macmillan, 1974), p. 18. These concepts also characterize gender relations as power, hence political, relations.

Given the heated disagreements among these men, it is remarkable the extent to which Robert Dahl is correct in characterizing them all when he observes that political science (which is the study of politics, which is, inter alia, about power) has defined the man/woman division outside its confines, because it is seen to relate to "ancient and persistent biological and physiological drives, needs and wants … to satisfy drives for sexual gratification, love, security and respect are insistent and primordial needs. The means of satisfying them quickly and concretely generally lie outside political life"; *Modern Political Analysis*, pp. 103–4. In other words, because the subordination of women is seen as universal and natural, it is not seen as a system of domination, hence a system of power, hence as political at all.

23 Harold D. Lasswell and Abraham Kaplan, *Power and Society* (New Haven: Yale University Press, 1950), pp. xiv, 240.

24 Dahl, *Modern Political Analysis*, p. 3. See also Dahl and Lindblom, *Politics, Economics, and Welfare*. Of course, this is not to say that power is all there is to politics.

25 Kate Millett, *Sexual Politics* (Garden City, NY: Doubleday, 1970), p. 31.

26 See Susan Rae Peterson, "Coercion and Rape: The State as a Male Protection Racket," in *Feminism and Philosophy*, ed. Mary Vetterling-Braggin, Frederick A. Elliston, and Jane English (Totowa, NJ: Littlefield, Adams, 1977), pp. 360–71; Janet Rifkin, "Toward a Theory of Law and Patriarchy," 3 *Harvard Women's Law Journal* 83–96 (Spring 1980). Additional work of interest on this subject includes Sherry B. Ortner, "The Virgin and the State," *Feminist Studies* 4 (October 1978): 19–36; Viana Muller, "The Formation of the State and the Oppression of Women: Some Theoretical Considerations and a Case Study in England and Wales," *Review of Radical Political Economics* 9 (Fall 1977): 7–21; Irene Silverblatt, "Andean Women in the Inca Empire," *Feminist Studies* 4 (October 1978): 37–61; Karen Sacks, "State Bias and Women's Status," *American Anthropologist* 78 (September 1976): 565–9.

27 Herbert Wechsler, "Toward Neutral Principles of Constitutional Law," 73 *Harvard Law Review* 1 (1959), though a defense of legalized racism, is taken as axiomatic.

28 Peter Gabel, "Reification in Legal Reasoning" (Mimeograph, New College Law School, San Francisco, 1980), p. 3.
29 Shklar, *Legalism*, p. 1.
30 Rawls's "original position," for instance, is a version of my objective standpoint; John Rawls, *A Theory of Justice* (Cambridge, MA: The Belknap Press of Harvard University Press, 1971). Not only apologists for the liberal state, but also some of its most trenchant critics see a real distinction between the rule of law and absolute arbitrary force; E. P. Thompson, *Whigs and Hunters: The Origin of the Black Act* (New York: Pantheon Book, 1975), pp. 258–69. Douglas Hay argues that making and enforcing certain acts as illegal reinforces a structure of subordination; D. Hay et. al., eds., *Albion's Fatal Tree: Crime and Society in Eighteenth-Century England* (New York: Pantheon books, 1975), pp. 17–31. This seems particularly apparent for criminal law. Michael D. A. Freeman applies this argument to domestic battery of women; "Violence against Women: Does the Legal System Provide Solutions or Itself Constitute the Problem?" (Mimeograph, Madison, WI, 1980), p. 12 n. 161.
31 Laurence Tribe, "Constitution as Point of View" (Mimeograph, Harvard Law School, 1982), p. 13.
32 Madeleine Gagnon, "Body I," in *New French Feminisms*, ed. Elaine Marks and Isabelle de Courtivron (Amherst: University of Massachusetts Press, 1980), p. 180. The mirror trope has served as metaphor for the epistemological/political reality of objectification in feminist work. "Into the room of the dressing where the walls are covered with mirrors. Where mirrors are like eyes of men, and the women reflect the judgments of mirrors"; Susan Griffin, *Woman and Nature: The Roaring inside Her* (New York: Harper & Row, 1978), p. 155. "She did suffer, the witch / trying to peer round the looking / glass, she forgot / someone was in the way"; Michelène, "Réflexion," quoted in Sheila Rowbotham, *Woman's Consciousness, Man's World* (Harmondsworth: Penguin, 1973), p. 2; see also ibid., pp. 26–9, and Mary Daly, *Beyond God the Father: Toward a Philosophy of Women's Liberation* (Boston: Beacon Press, 1973), pp. 195, 197. Virginia Woolf wrote the figure around ("So I reflected …"), remarking "the necessity that women so often are to men" of serving as a looking glass in which a man can "see himself at breakfast and at dinner at least twice the size he really is." Notice the doubled sexual/gender meaning: "Whatever may be their use in civilized societies, mirrors are essential to all violent and heroic action. That is why Napoleon and Mussolini both insist so emphatically upon the inferiority of women, for if they were not inferior, they would cease to enlarge"; *A Room of One's Own* (New York: Harcourt, Brace & World, 1969), p. 36.
33 *Olmstead v. US*, 277 US 438, 478 (1928) (Brandeis J. dissenting).
34 Alexander M. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (New Haven: Yale University Press, 1986).
35 Isaiah Berlin, "Two Concepts of Liberty," in *Four Essays on Liberty* (London: Oxford University Press, 1969), pp. 121–2.
36 *Lochner v. New York*, 198 US 45 (1905). Bickel, *The Least Dangerous Branch*, and others have argued for judicial restraint on many grounds. This is my interpretation of the reality that gave this view the preeminence it has attained.
37 *Muller v. Oregon*, 208 US 412 (1908).
38 *West Coast Hotel v. Parrish*, 300 US 379, 399 (1937). Cass Sunstein's insightful analysis of Lochner is extremely helpful. See "Lochner's Legacy," 87 *Columbia Law Review* 873 (1987). A similar set of perceptions underlies Owen Fiss, "Why the State?" 100 *Harvard Law Review* 781 (1987).
39 Judith A. Baer, *The Chains of Protection: The Judicial Response to Women's Labor Legislation* (Westport, Conn.: Greenwood Press, 1978); Clara M. Beyer, *History of Labor Legislation for Women in Three States*, US Department of Labor, Women's Bureau, Bulletin no. 66 (Washington, DC, 1929). See J. Landes, "The Effect of State Maximum-Hours Laws on the Employment of Women in 1920," *Journal of Political Economy* 88 (1980): 476. In international perspective, see Tove Stang Dahl, *Women's Law* (Oslo: Norwegian University Press, 1987), p. 94.
40 *West Coast Hotel v. Parrish*, 300 US 379 (1937), overruled the previous rejection of minimum wage laws for women (*Adkins v. Children's Hospital*, 261 US 525 [1923]), finding a minimum wage for women reasonable because the state has a special interest in protecting women from exploitive work contracts because the health of women "becomes an object of public interest and care in order to preserve the strength and vigor of the race" (p. 394). It is thought that this opened the door for later upholding of the Fair Labor Standards Act under constitutional attack in *US v. Darby*, 312 US 100 (1940). *West Coast Hotel* was also used to uphold state constitutional amendments that make it unlawful to deny employment on the basis of union membership. *American Federation of Labor v. American Sash and Door Co*., 335 US 538 (1949). See also *Lincoln Federal Labor Union v. Northwestern Iron and Metal Co*., 335 US 525, 536 (1948) ("that wages and hours can be fixed by law is no longer doubted since West Coast Hotel").
41 For an excellent discussion of this history, see Mary E. Becker, "From *Muller v. Oregon* to Fetal Vulnerability Policies," 63 *University of Chicago Law Review* 1219 (1986).
42 See, in a different key, Michael Sandel, *Liberalism and the Limits of Justice* (Cambridge: Cambridge University Press, 1982): "The idealist metaphysic, for all its moral and political advantage, cedes too much to the transcendent, and in positing a noumenal realm wins for justice its primacy at the cost of denying it its human situation" (p. 13).
43 Johnnie Tillmon, "Welfare Is a Women's Issue," *Liberation News Service*, February 26, 1972; reprinted in Rosalyn Baxandall, Linda Gordon, and Susan Reverby, eds., *America's Working Women* (New York: Random House, 1976), pp. 355–8.

44 Sexual harassment, designed in pursuit of the jurisprudential approach argued here, is an exception. So is a recent decision by the Ninth Circuit, *Watkins v. Army*, 837 F.2d 1429 (9th Cir. 1988), which holds that to deprive gays of military employment on the basis of homosexual status is a violation of the Equal Protection Clause.

45 Chapter 12 provides citations and fuller discussion of this argument.

46 Charles Tilly, ed. "Western State-Making and Theories of Political Transformation," in *The Formation of National States in Western Europe* (Princeton: Princeton University Press, 1975), p. 638.

47 John L. Austin, *The Province of Jurisprudence Determined* (New York: Noonday Press, 1954).

48 H. L. A. Hart, *The Concept of Law* (London: Oxford University Press, 1961).

49 Ronald Dworkin, *Law's Empire* (Cambridge, MA: Harvard University Press, 1986). The task of this work is to justify the coercive power of the state through an account of authoritative interpretation which disposes of disagreements on the meaning of laws. The proposed solution is "law as integrity," which is "about principle" (p. 221).

50 This is how Bobbio describes Marx's particular originality; "Is There a Marxist Theory of the State?" p. 15.

8

The Market and the Forum: Three Varieties of Political Theory

Jon Elster

I want to compare three views of politics generally, and of the democratic system more specifically. I shall first look at social choice theory, as an instance of a wider class of theories with certain common features. In particular, they share the conception that the political process is instrumental rather than an end in itself, and the view that the decisive political act is a private rather than a public action, viz. the individual and secret vote. With these usually goes the idea that the goal of politics is the optimal compromise between given, and irreducibly opposed, private interests. The other two views arise when one denies, first, the private character of political behaviour and then, secondly, goes on also to deny the instrumental nature of politics. According to the theory of Jürgen Habermas, the goal of politics should be rational agreement rather than compromise, and the decisive political act is that of engaging in public debate with a view to the emergence of a consensus. According to the theorists of participatory democracy, from John Stuart Mill to Carole Pateman, the goal of politics is the transformation and education of the participants. Politics, on this view, is an end in itself – indeed many have argued that it represents the good life for man. I shall discuss these views in the order indicated. I shall present them in a somewhat stylized form, but my critical comments will not I hope, be directed to strawmen.

I

Politics, it is usually agreed, is concerned with the common good, and notably with the cases in which it cannot be realized as the aggregate outcome of individuals pursuing their private interests. In particular, uncoordinated private choices may lead to outcomes that are worse for all than some other outcome that could have been attained by coordination. Political institutions are set up to remedy such *market failures*, a phrase that can be taken either in the static sense of an inability to provide public goods or in the more dynamic sense of a breakdown of the self-regulating properties usually ascribed to the market mechanism.[1] In addition there is the redistributive task of politics – moving along the Pareto-optimal frontier once it has been reached.[2] According to the first view of politics, this task is inherently one of interest struggle and compromise. The obstacle to agreement is

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not only that most individuals want redistribution to be in their favour, or at least not in their disfavour.[3] More basically consensus is blocked because there is no reason to expect that individuals will converge in their views on what constitutes a just redistribution.

I shall consider social choice theory as representative of the private-instrumental view of politics, because it brings out supremely well the logic as well as the limits of that approach. Other varieties, such as the Schumpeterian or neo-Schumpeterian theories, are closer to the actual political process, but for that reason also less suited to my purpose. For instance, Schumpeter's insistence that voter preferences are shaped and manipulated by politicians[4] tends to blur the distinction, central to my analysis, between politics as the aggregation of given preferences and politics as the transformation of preferences through rational discussion. And although the neo-Schumpeterians are right in emphasizing the role of the political parties in the preference-aggregation process,[5] I am not here concerned with such mediating mechanisms. In any case, political problems also arise within the political parties, and so my discussion may be taken to apply to such lower-level political processes. In fact, much of what I shall say makes better sense for politics on a rather small scale – within the firm, the organization or the local community – than for nationwide political systems.

In very broad outline, the structure of social choice theory is as follows.[6] (1) We begin with a *given* set of agents, so that the issue of a normative justification of political boundaries does not arise. (2) We assume that the agents confront a *given* set of alternatives, so that for instance the issue of agenda manipulation does not arise. (3) The agents are supposed to be endowed with preferences that are similarly *given* and not subject to change in the course of the political process. They are, moreover, assumed to be causally independent of the set of alternatives. (4) In the standard version, which is so far the only operational version of the theory, preferences are assumed to be purely ordinal, so that it is not possible for an individual to express the intensity of his preferences, nor for an outside observer to compare preference intensities across individuals. (5) The individual preferences are assumed to be defined over all pairs of individuals, i.e. to be complete, and to have the formal property of transitivity, so that preference for A over B and for B over C implies preference for A over C.

Given this setting, the task of social choice theory is to arrive at a social preference ordering of the alternatives. This might appear to require more than is needed: why not define the goal as one of arriving at the choice of one alternative? There is, however, usually some uncertainty as to which alternatives are really feasible, and so it is useful to have an ordering if the top-ranked alternative proves unavailable. The ordering should satisfy the following criteria. (6) Like the individual preferences, it should be complete and transitive. (7) It should be Pareto-optimal, in the sense of never having one option socially preferred to another which is individually preferred by everybody. (8) The social choice between two given options should depend only on how the individuals rank these two options, and thus not be sensitive to changes in their preferences concerning other options. (9) The social preference ordering should respect and reflect individual preferences, over and above the condition of Pareto-optimality. This idea covers a variety of notions, the most important of which are *anonymity* (all individuals should count equally), *non-dictatorship* (*a fortiori* no single individual should dictate the social choice), *liberalism* (all individuals should have some private domain within which their preferences are decisive), and *strategy-proofness* (it should not pay to express false preferences).

The substance of social choice theory is given in a series of impossibility and uniqueness theorems, stating either that a given subset of these conditions is incapable of simultaneous satisfaction or that they uniquely describe a specific method for aggregating preferences. Much attention has been given to the impossibility theorems, yet from the present point of view these are not of decisive importance. They stem largely from the paucity of allowable information about the preferences, i.e. the exclusive focus on ordinal preferences.[7] True, at present we do not quite know how to go beyond ordinality. Log-rolling and vote-trading may capture some of the cardinal aspects of the preferences, but at some cost.[8] Yet even should the conceptual and technical obstacles to intra- and inter-individual comparison of preference intensity be overcome,[9] many objections to the social choice approach would remain. I shall discuss two sets of objections, both related to the assumption of given preferences. I shall argue, first, that the preferences people choose to express may not be a good guide to what they really prefer; and secondly that what they really prefer may in any case be a fragile foundation for social choice.

In actual fact, preferences are never 'given', in the sense of being directly observable. If they are to serve as inputs to the social choice process, they must somehow be *expressed* by the individuals. The expression of preferences is an action, which presumably is guided by these very same preferences.[10] It is then far from obvious that the individually rational action is to express these

preferences as they are. Some methods for aggregating preferences are such that it may pay the individual to express false preferences, i.e. the outcome may in some cases be better according to his real preferences if he chooses not to express them truthfully. The condition for strategy-proofness for social choice mechanisms was designed expressly to exclude this possibility. It turns out, however, that the systems in which honesty always pays are rather unattractive in other respects.[11] We then have to face the possibility that even if we require that the social preferences be Pareto-optimal with respect to the expressed preferences, they might not be so with respect to the real ones. Strategy-proofness and collective rationality, therefore, stand and fall together. Since it appears that the first must fall, so must the second. It then becomes very difficult indeed to defend the idea that the outcome of the social choice mechanism represents the common good, since there is a chance that everybody might prefer some other outcome.

Amos Tversky has pointed to another reason why choices – or expressed preferences – cannot be assumed to represent the real preferences in all cases.[12] According to his 'concealed preference hypothesis', choices often conceal rather than reveal underlying preferences. This is especially so in two sorts of cases. First, there are the cases of anticipated regret associated with a risky decision. Consider the following example (from Tversky):

> On her twelfth birthday, Judy was offered a choice between spending the weekend with her aunt in the city (*C*), or having a party for all her friends. The party could take place either in the garden (*GP*) or inside the house (*HP*). A garden party would be much more enjoyable, but there is always the possibility of rain, in which case an inside party would be more sensible. In evaluating the consequences of the three options, Judy notes that the weather condition does not have a significant effect on *C*. If she chooses the party, however, the situation is different. A garden party will be a lot of fun if the weather is good, but quite disastrous if it rains, in which case an inside party will be acceptable. The trouble is that Judy expects to have a lot of regret if the party is to be held inside and the weather is very nice.
>
> Now, let us suppose that for some reason it is no longer possible to have an outside party. In this situation, there is no longer any regret associated with holding an inside party in good weather because (in this case) Judy has no other place for holding the party. Hence, the elimination of an available course of action (holding the party outside) removes the regret associated with an inside party, and increases its overall utility. It stands to reason, in this case, that if Judy was indifferent between *C* and *HP*, in the presence of *GP*, she will prefer *HP* to *C* when *GP* is eliminated.

What we observe here is the violation of condition (8) above, the so-called 'independence of irrelevant alternatives'. The expressed preferences depend causally on the set of alternatives. We may assume that the real preferences, defined over the set of possible outcomes, remain constant, contrary to the case to be discussed below. Yet the preferences over the *pairs* (choice, outcome) depend on the set of available choices, because the 'costs of responsibility' differentially associated with various such pairs depend on what else one 'could have done'. Although Judy could not have escaped her predicament by deliberately making it physically impossible to have an outside party,[13] she might well have welcomed an event outside her control with the same consequence.

The second class of cases in which Tversky would want to distinguish the expressed preferences from the real preferences concerns decisions that are unpleasant rather than risky. For instance, 'society may prefer to save the life of one person rather than another, and yet be unable to make this choice'. In fact, losing both lives through inaction may be preferred to losing only one life by deliberate action. Such examples are closely related to the problems involved in act utilitarianism versus outcome utilitarianism.[14] One may well judge that it would be a good thing if state *A* came about, and yet not want to be the person by whose agency it comes about. The reasons for not wanting to be that person may be quite respectable, or they may not. The latter would be the case if one were afraid of being blamed by the relatives of the person who was deliberately allowed to die, or if one simply confused the causal and the moral notions of responsibility. In such cases the expressed preferences might lead to a choice that in a clear sense goes against the real preferences of the people concerned.

A second, perhaps more basic, difficulty is that the real preferences themselves might well depend causally on the feasible set. One instance is graphically provided by the fable of the fox and the sour grapes.[15] For the 'ordinal utilitarian', as Arrow for instance calls himself,[16] there would be no welfare loss if the fox were excluded from consumption of the grapes, since he thought them sour anyway. But of course the cause of his holding them to be sour was his conviction that he would in any case be

excluded from consuming them, and then it is difficult to justify the allocation by invoking his preferences. Conversely, the phenomenon of 'counter-adaptive preferences' – the grass is always greener on the other side of the fence, and the forbidden fruit always sweeter – is also baffling for the social choice theorist, since it implies that such preferences, if respected, would not be satisfied – and yet the whole point of respecting them would be to give them a chance of satisfaction.

Adaptive and counter-adaptive preferences are only special cases of a more general class of desires, those which fail to satisfy some substantive criterion for acceptable preferences, as opposed to the purely formal criterion of transitivity. I shall discuss these under two headings: autonomy and morality.

Autonomy characterizes the way in which preferences are shaped rather than their actual content. Unfortunately I find myself unable to give a positive characterization of autonomous preferences, so I shall have to rely on two indirect approaches. First, autonomy is for desires what judgment is for belief. The notion of judgment is also difficult to define formally, but at least we know that there are persons who have this quality to a higher degree than others: people who are able to take account of vast and diffuse evidence that more or less clearly bears on the problem at hand, in such a way that no element is given undue importance. In such people the process of belief formation is not disturbed by defective cognitive processing, nor distorted by wishful thinking and the like. Similarly, autonomous preferences are those that have not been shaped by irrelevant causal processes – a singularly unhelpful explanation. To improve somewhat on it, consider, secondly, a short list of such irrelevant causal processes. They include adaptive and counter-adaptive preferences, conformity and anti-conformity, the obsession with novelty and the equally unreasonable resistance to novelty. In other words, preferences may be shaped by adaptation to what is possible, to what other people do or to what one has been doing in the past – or they may be shaped by the desire to differ as much as possible from these. In all of these cases the source of preference change is not in the person, but outside him – detracting from his autonomy.

Morality, it goes without saying, is if anything even more controversial. (Within the Kantian tradition it would also be questioned whether it can be distinguished at all from autonomy.) Preferences are moral or immoral by virtue of their content, not by virtue of the way in which they have been shaped. Fairly uncontroversial examples of unethical preferences are spiteful and sadistic desires, and arguably also the desire for positional goods, i.e. goods such that it is logically impossible for more than a few to possess them.[17] The desire for an income twice the average can lead to less welfare for everybody, so that such preferences fail to pass the Kantian generalization test.[18] Also they are closely linked to spite, since one way of getting more than others is to take care that they get less – indeed this may often be a more efficient method than trying to excel.[19]

To see how the lack of autonomy may be distinguished from the lack of moral worth, let me use *conformity* as a technical term for a desire caused by a drive to be like other people, and *conformism* for a desire to be like other people, with anti-conformity and anti-conformism similarly defined. Conformity implies that other people's desires enter into the causation of my own, conformism that they enter irreducibly into the description of the object of my desires. Conformity may bring about conformism, but it may also lead to anti-conformism, as in Theodore Zeldin's comment that among the French peasantry 'prestige is to a great extent obtained from conformity with traditions, so that the son of a nonconformist might be expected to be one too'.[20] Clearly, conformity may bring about desires that are morally laudable, yet lacking in autonomy. Conversely, I do not see how one could rule out on *a priori* grounds the possibility of autonomous spite, although I would welcome a proof that autonomy is incompatible not only with anti-conformity, but also with anti-conformism.

We can now state the objection to the political view underlying social choice theory. It is, basically, that it embodies a confusion between the kind of behaviour that is appropriate in the market place and that which is appropriate in the forum. The notion of consumer sovereignty is acceptable because, and to the extent that, the consumer chooses between courses of action that differ only in the way they affect him. In political choice situations, however, the citizen is asked to express his preference over states that also differ in the way in which they affect other people. This means that there is no similar justification for the corresponding notion of the citizen's sovereignty, since other people may legitimately object to social choice governed by preferences that are defective in some of the ways I have mentioned. A social choice mechanism is capable of resolving the market failures that would result from unbridled consumer sovereignty, but as a way of redistributing welfare it is hopelessly inadequate. If people affected each other only by tripping over each other's feet, or by dumping their garbage into one another's backyards, a social choice

mechanism might cope. But the task of politics is not only to eliminate inefficiency, but also to create justice – a goal to which the aggregation of pre-political preferences is a quite incongruous means.

This suggests that the principles of the forum must differ from those of the market. A long-standing tradition from the Greek *polis* onwards suggests that politics must be an open and public activity, as distinct from the isolated and private expression of preferences that occurs in buying and selling. In the following sections I look at two different conceptions of public politics, increasingly removed from the market theory of politics. Before I go on to this, however, I should briefly consider an objection that the social choice theorist might well make to what has just been said. He could argue that the only alternative to the aggregation of given preferences is some kind of censorship or paternalism. He might agree that spiteful and adaptive preferences are undesirable, but he would add that any institutional mechanism for eliminating them would be misused and harnessed to the private purposes of power-seeking individuals. Any remedy, in fact, would be worse than the disease. This objection assumes (i) that the only alternative to aggregation of given preferences is censorship, and (ii) that censorship is always objectionable. Robert Goodin, in his paper 'Laundering preferences', challenges the second assumption, by arguing that laundering or filtering of preferences by self-censorship is an acceptable alternative to aggregation. I shall now discuss a challenge to the first assumption, viz. the idea of a *transformation* of preferences through public and rational discussion.

II

Today this view is especially associated with the writings of Jürgen Habermas on 'the ethics of discourse' and 'the ideal speech situation'. As mentioned above, I shall present a somewhat stylized version of his views, although I hope they bear some resemblance to the original.[21] The core of the theory, then, is that rather than aggregating or filtering preferences, the political system should be set up with a view to changing them by public debate and confrontation. The input to the social choice mechanism would then not be the raw, quite possibly selfish or irrational, preferences that operate in the market, but informed and other-regarding preferences. Or rather, there would not be any need for an aggregating mechanism, since a rational discussion would tend to produce unanimous preferences. When the private and idiosyncratic wants have been shaped and purged in public discussion about the public good, uniquely determined rational desires would emerge. Not optimal compromise, but unanimous agreement is the goal of politics on this view.

There appear to be two main premises underlying this theory. The first is that there are certain arguments that simply cannot be stated publicly. In a political debate it is pragmatically impossible to argue that a given solution should be chosen just because it is good for oneself. By the very act of engaging in a public debate – by arguing rather than bargaining – one has ruled out the possibility of invoking such reasons.[22] To engage in discussion can in fact be seen as one kind of self-censorship, a precommitment to the idea of rational decision. Now, it might well be thought that this conclusion is too strong. The first argument only shows that in public debate one has to pay some lip-service to the common good. An additional premise states that over time one will in fact come to be swayed by considerations about the common good. One cannot indefinitely praise the common good 'du bout des lèvres', for – as argued by Pascal in the context of the wager – one will end up having the preferences that initially one was faking.[23] This is a psychological, not a conceptual premise. To explain why going through the motions of rational discussion should tend to bring about the real thing, one might argue that people tend to bring what they mean into line with what they say in order to reduce dissonance, but this is a dangerous argument to employ in the present context. Dissonance reduction does not tend to generate autonomous preferences. Rather one would have to invoke the power of reason to break down prejudice and selfishness. By speaking with the voice of reason, one is also exposing oneself to reason.

To sum up, the conceptual impossibility of expressing selfish arguments in a debate about the public good, and the psychological difficulty of expressing other-regarding preferences without ultimately coming to acquire them, jointly bring it about that public discussion tends to promote the common good. The *volonté générale*, then, will not simply be the Pareto-optimal realization of given (or expressed) preferences,[24] but the outcome of preferences that are themselves shaped by a concern for the common good. For instance, by mere aggregation of given preferences one would be able to take account of some negative externalities, but not of those affecting future generations. A social choice mechanism might prevent persons now living from dumping their garbage into one another's backyards, but not from dumping it in the future. Moreover, considerations of distributive

justice within the Pareto constraint would now have a more solid foundation, especially as one would also be able to avoid the problem of strategy-proofness. By one stroke one would achieve more rational preferences, as well as the guarantee that they will in fact be expressed.

I now want to set out a series of objections – seven altogether – to the view stated above. I should explain that the goal of this criticism is not to demolish the theory, but to locate some points that need to be fortified. I am, in fact, largely in sympathy with the fundamental tenets of the view, yet fear that it might be dismissed as Utopian, both in the sense of ignoring the problem of getting from here to there, and in the sense of neglecting some elementary facts of human psychology.

The *first objection* involves a reconsideration of the issues of paternalism. Would it not, in fact, be unwarranted interference to impose on the citizens the obligation to participate in political discussion? One might answer that there is a link between the right to vote and the obligation to participate in discussion, just as rights and duties are correlative in other cases. To acquire the right to vote, one has to perform certain civic duties that go beyond pushing the voting button on the television set. There would appear to be two different ideas underlying this answer. First, only those should have the right to vote who are sufficiently *concerned* about politics to be willing to devote some of their resources – time in particular – to it. Secondly, one should try to favour *informed* preferences as inputs to the voting process. The first argument favours participation and discussion as a sign of interest, but does not give it an instrumental value in itself. It would do just as well, for the purpose of this argument, to demand that people should pay for the right to vote. The second argument favours discussion as a means to improvement – it will not only select the right people, but actually make them more qualified to participate.

These arguments might have some validity in a near-ideal world, in which the concern for politics was evenly distributed across all relevant dimensions, but in the context of contemporary politics they miss the point. The people who survive a high threshold for participation are disproportionately found in a privileged part of the population. At best this could lead to paternalism, at worst the high ideals of rational discussion could create a self-elected elite whose members spend time on politics because they want power, not out of concern for the issues. As in other cases, to be discussed later, the best can be the enemy of the good. I am not saying that it is impossible to modify the ideal in a way that allows both for rational discussion and for low-profile participation, only that any institutional design must respect the trade-off between the two.

My *second objection* is that even assuming unlimited time for discussion, unanimous and rational agreement might not necessarily ensue. Could there not be legitimate and unresolvable differences of opinions over the nature of the common good? Could there not even be a plurality of ultimate values?

I am not going to discuss this objection, since it is in any case preempted by the *third objection*. Since there are in fact always time constraints on discussions – often the stronger the more important the issues – unanimity will rarely emerge. For any constellation of preferences short of unanimity, however, one would need a social choice mechanism to aggregate them. One can discuss only for so long, and then one has to make a decision, even if strong differences of opinion should remain. This objection, then, goes to show that the transformation of preferences can never do more than supplement the aggregation of preferences, never replace it altogether.

This much would no doubt be granted by most proponents of the theory. True, they would say, even if the ideal speech situation can never be fully realized, it will nevertheless improve the outcome of the political process if one goes some way towards it. The *fourth objection* questions the validity of this reply. In some cases a little discussion can be a dangerous thing, worse in fact than no discussion at all, viz. if it makes some but not all persons align themselves on the common good. The following story provides an illustration:

> Once upon a time two boys found a cake. One of them said, 'Splendid! I will eat the cake.' The other one said, 'No, that is not fair! We found the cake together, and we should share and share alike, half for you and half for me.' The first boy said, 'No, I should have the whole cake!' Along came an adult who said, 'Gentlemen, you shouldn't fight about this: you should *compromise*. Give him three quarters of the cake.'[25]

What creates the difficulty here is that the first boy's preferences are allowed to count twice in the social choice mechanism suggested by the adult: once in his expression of them and then again in the other boy's internalized ethic of sharing. And one can argue that the outcome is socially inferior to that which would have emerged had they both stuck to their selfish preferences. When Adam Smith wrote that he had never known much good done by those who affected to trade for the public good, he may only have had in mind the harm that

can be done by *unilateral* attempts to act morally. The categorical imperative itself may be badly served by people acting unilaterally on it.[26] Also, an inferior outcome may result if discussion brings about partial adherence to morality in all participants rather than full adherence in some and none in others, as in the story of the two boys. Thus Serge Kolm argues that economies with moderately altruistic agents tend to work less well than economies where either everybody is selfish or everybody is altruistic.[27]

A *fifth objection* is to question the implicit assumption that the body politic as a whole is better or wiser than the sum of its parts. Could it not rather be the case that people are made more, not less, selfish and irrational by interacting politically? The cognitive analogy suggests that the rationality of beliefs may be positively as well as negatively affected by interaction. On the one hand there is what Irving Janis has called 'group-think', i.e. mutually reinforcing bias.[28] On the other hand there certainly are many ways in which people can, and do, pool their opinions and supplement each other to arrive at a better estimate.[29] Similarly autonomy and morality could be enhanced as well as undermined by interaction. Against the pessimistic view of Reinhold Niebuhr that individuals in a group show more unrestrained egoism than in their personal relationships,[30] we may set Hannah Arendt's optimistic view:

> American faith was not all based on a semireligious faith in human nature, but on the contrary, on the possibility of checking human nature in its singularity, by virtue of human bonds and mutual promises. The hope for man in his singularity lay in the fact that not man but men inhabit the earth and form a world between them. It is human worldliness that will save men from the pitfalls of human nature.[31]

Niebuhr's argument suggests an aristocratic disdain of the *mass*, which transforms individually decent people – to use a characteristically condescending phrase – into an unthinking horde. While rejecting this as a general view, one should equally avoid the other extreme, suggested by Arendt. Neither the Greek nor the American assemblies were the paradigms of discursive reason that she makes them out to be. The Greeks were well aware that they might be tempted by demagogues, and in fact took extensive precautions against this tendency.[32] The American town surely has not always been the incarnation of collective freedom, since on occasion it could also serve as the springboard for witch hunts. The mere decision to engage in rational discussion does not ensure that the transactions will in fact be conducted rationally, since much depends on the structure and the framework of the proceedings. The random errors of selfish and private preferences may to some extent cancel each other out and thus be less to be feared than the massive and coordinated errors that may arise through group-think. On the other hand, it would be excessively stupid to rely on mutually compensating vices to bring about public benefits as a general rule. I am not arguing against the need for public discussion, only for the need to take the question of institutional and constitutional design very seriously.

A *sixth objection* is that unanimity, were it to be realized, might easily be due to conformity rather than to rational agreement. I would in fact tend to have more confidence in the outcome of a democratic decision if there was a minority that voted against it, than if it was unanimous. I am not here referring to people expressing the majority preferences against their real ones, since I am assuming that something like the secret ballot would prevent this. I have in mind that people may come to change their real preferences, as a result of seeing which way the majority goes. Social psychology has amply shown the strength of this bandwagon effect,[33] which in political theory is also known as the 'chameleon' problem.[34] It will not do to argue that the majority to which the conformist adapts his view is likely to pass the test of rationality even if his adherence to it does not, since the majority could well be made up of conformists each of whom would have broken out had there been a minority he could have espoused.

To bring the point home, consider a parallel case of non-autonomous preference formation. We are tempted to say that a man is free if he can get or do whatever it is that he wants to get or do. But then we are immediately faced with the objection that perhaps he only wants what he can get, as the result of some such mechanism as 'sour grapes'.[35] We may then add that, other things being equal, the person is freer the more things he wants to do which he is not free to do, since these show that his wants are not in general shaped by adaptation to his possibilities. Clearly, there is an air of paradox over the statement that a man's freedom is greater the more of his desires he is not free to realize, but on reflection the paradox embodies a valid argument. Similarly, it is possible to dissolve the air of paradox attached to the view that a collective decision is more trust-worthy if it is less than unanimous.

My *seventh objection* amounts to a denial of the view that the need to couch one's argument in terms of the

common good will purge the desires of all selfish arguments. There are in general many ways of realizing the common good, if by that phrase we now only mean some arrangement that is Pareto-superior to uncoordinated individual decisions. Each such arrangement will, in addition to promoting the general interest, bring an extra premium to some specific group, which will then have a strong interest in that particular arrangement.[36] The group may then come to prefer the arrangement because of that premium, although it will argue for it in terms of the common good. Typically the arrangement will be justified by a causal theory – an account, say, of how the economy works – that shows it to be not only *a* way, but the only way of promoting the common good. The economic theories underlying the early Reagan administration provide an example. I am not imputing insincerity to the proponents of these views, but there may well be an element of wishful thinking. Since social scientists disagree so strongly among themselves as to how societies work, what could be more human than to pick on a theory that uniquely justifies the arrangement from which one stands to profit? The opposition between general interest and special interests is too simplistic, since the private benefits may causally determine the way in which one conceives of the common good.

These objections have been concerned to bring out two main ideas. First, one cannot assume that one will in fact approach the good society by acting as if one had already arrived there. The fallacy inherent in this 'approximation assumption'[37] was exposed a long time ago in the economic 'theory of the second best':

> It is *not* true that a situation in which more, but not all, of the optimum conditions are fulfilled is necessarily, or is even likely to be, superior to a situation in which fewer are fulfilled. It follows, therefore, that in a situation in which there exist many constraints which prevent the fulfilment of the Paretian optimum conditions, the removal of any one constraint may affect welfare or efficiency either by raising it, by lowering it or by leaving it unchanged.[38]

The ethical analogue is not the familiar idea that some moral obligations may be suspended when other people act non-morally.[39] Rather it is that the nature of the moral obligation is changed in a non-moral environment. When others act non-morally, there may be an obligation to deviate not only from what they do, but also from the behaviour that would have been optimal if adopted by everybody.[40] In particular, a little discussion, like a little rationality or a little socialism, may be a dangerous thing.[41] If, as suggested by Habermas, free and rational discussion will only be possible in a society that has abolished political and economic domination, it is by no means obvious that abolition can be brought about by rational argumentation. I do not want to suggest that it could occur by force – since the use of force to end the use of force is open to obvious objections. Yet something like irony, eloquence or propaganda might be needed, involving less respect for the interlocutor than what would prevail in the ideal speech situation.

As will be clear from these remarks, there is a strong tension between two ways of looking at the relation between political ends and means. On the one hand, the means should partake of the nature of the ends, since otherwise the use of unsuitable means might tend to corrupt the end. On the other hand, there are dangers involved in choosing means immediately derived from the goal to be realized, since in a non-ideal situation these might take us away from the end rather than towards it. A delicate balance will have to be struck between these two, opposing considerations. It is in fact an open question whether there exists a ridge along which we can move to the good society, and if so whether it is like a knife-edge or more like a plateau.

The second general idea that emerges from the discussion is that even in the good society, should we hit upon it, the process of rational discussion could be fragile, and vulnerable to adaptive preferences, conformity, wishful thinking and the like. To ensure stability and robustness there is a need for structures – political institutions or constitutions – that could easily reintroduce an element of domination. We would in fact be confronted, at the political level, with a perennial dilemma of individual behaviour. How is it possible to ensure at the same time that one is bound by rules that protect one from irrational or unethical behaviour – and that these rules do not turn into prisons from which it is not possible to break out even when it would be rational to do so?[42]

III

It is clear from Habermas's theory, I believe, that rational political discussion has an *object* in terms of which it makes sense.[43] Politics is concerned with substantive decision-making, and is to that extent instrumental. True, the idea of instrumental politics might also be taken in a more narrow sense, as implying that the political process is one in which individuals pursue their

selfish interests, but more broadly understood it implies only that political action is primarily a means to a nonpolitical end, only secondarily, if at all, an end in itself. In this section I shall consider theories that suggest a reversal of this priority, and that find the main point of politics in the educative or otherwise beneficial effects on the participants. And I shall try to show that this view tends to be internally incoherent, or self-defeating. The benefits of participation are by-products of political activity. Moreover, they are *essentially* by-products, in the sense that any attempt to turn them into the main purpose of such activity would make them evaporate.[44] It can indeed be highly satisfactory to engage in political work, but only on the condition that the work is defined by a serious purpose which goes beyond that of achieving this satisfaction. If that condition is not fulfilled, we get a narcissistic view of politics – corresponding to various consciousness-raising activities familiar from the last decade or so.

My concern, however, is with political theory rather than with political activism. I shall argue that certain types of arguments for political institutions and constitutions are self-defeating, since they justify the arrangement in question by effects that are essentially by-products. Here an initial and important distinction must be drawn between the task of justifying a constitution *ex ante* and that of evaluating it *ex post* and at a distance. I argue below that Tocqueville, when assessing the American democracy, praised it for consequences that are indeed by-products. In his case, this made perfectly good sense as an analytical attitude adopted after the fact and at some distance from the system he was examining. The incoherence arises when one invokes the same arguments before the fact, in public discussion. Although the constitution-makers may secretly have such side effects in mind, they cannot coherently invoke them in public.

Kant proposed a *transcendental formula of public right*: 'All actions affecting the rights of other human beings are wrong if their maxim is not compatible with their being made public.'[45] Since Kant's illustrations of the principle are obscure, let me turn instead to John Rawls, who imposes a similar condition of publicity as a constraint on what the parties can choose in the original position.[46] He argues, moreover, that this condition tends to favour his own conception of justice, as compared to that of the utilitarians.[47] If utilitarian principles of justice were openly adopted, they would entail some loss of self-esteem, since people would feel that they were not fully being treated as ends in themselves. Other things being equal, this would also lead to a loss in average utility. It is then conceivable that public adoption of Rawls's two principles of justice would bring about a higher average utility than public adoption of utilitarianism, although a lower average than under a secret utilitarian constitution introduced from above. The latter possibility, however, is ruled out by the publicity constraint. A utilitarian could not then advocate Rawls's two principles on utilitarian grounds, although he might well applaud them on such grounds. The fact that the two principles maximize utility would essentially be a by-product, and if chosen on the grounds that they are utility-maximizing they would no longer be so. Utilitarianism, therefore, is self-defeating in Kant's sense: 'it essentially lacks openness'.[48]

Derek Parfit has raised a similar objection to act consequentialism (AC) and suggested how it could be met:

> This gives to all one common aim: the best possible outcome. If we try to achieve this, we may often fail. Even when we succeed, the fact that we are disposed to try might make the outcome worse. AC might thus be indirectly self-defeating. What does this show? A consequentialist might say: 'It shows that AC should be only one part of our moral theory. It should be the part that covers successful acts. When we are certain to succeed, we should aim for the best possible outcome. Our wider theory should be this: we should have the aim and dispositions having which would make the outcome best. This wider theory would not be self-defeating. So the objection has been met.'[49]

Yet there is an ambiguity in the word 'should' in the penultimate sentence, since it is not clear whether we are told that it is good to have certain aims and dispositions, or that we should aim at having them. The latter answer immediately raises the problem that having certain aims and dispositions – i.e. being a certain kind of person – is essentially a by-product. When instrumental rationality is self-defeating, we cannot decide on instrumentalist grounds to take leave of it – no more than we can fall asleep by deciding not to try to fall asleep. Although spontaneity may be highly valuable on utilitarian grounds, 'you cannot both genuinely possess this kind of quality and also reassure yourself that while it is free and creative and uncalculative, it is also acting for the best'.[50]

Tocqueville, in a seeming paradox, suggested that democracies are less suited than aristocracies to deal with long-term planning, and yet are superior in the long-run to the latter. The paradox dissolves once it is seen that the first statement involves time at the level of the actors, the

second at the level of the observer. On the one hand, 'a democracy finds it difficult to coordinate the details of a great undertaking and to fix on some plan and carry it through with determination in spite of obstacles. It has little capacity for combining measures in secret and waiting patiently for the result'.[51] On the other hand, 'in the long run government by democracy should increase the real forces of society, but it cannot immediately assemble at one point and at a given time, forces as great as those at the disposal of an aristocratic government'.[52] The latter view is further elaborated in a passage from the chapter on 'The Real Advantages Derived by American Society from Democratic Government':

> That constantly renewed agitation introduced by democratic government into political life passes, then, into civil society. Perhaps, taking everything into consideration, that is the greatest advantage of democratic government, and I praise it much more on account of what it causes to be done than for what it does. It is incontestable that the people often manage public affairs very badly, but their concern therewith is bound to extend their mental horizon and to shake them out of the rut of ordinary routine … Democracy does not provide a people with the most skillful of governments, but it does that which the most skillful government often cannot do: it spreads throughout the body social a restless activity, superabundant force, and energy never found elsewhere, which, however little favoured by circumstances, can do wonders. Those are its true advantages.[53]

The advantages of democracies, in other words, are mainly and essentially by-products. The avowed aim of democracy is to be a good system of government, but Tocqueville argues that it is inferior in this respect to aristocracy, viewed purely as a decision-making apparatus. Yet the very activity of governing democratically has as a by-product a certain energy and restlessness that benefits industry and generates prosperity. Assuming the soundness of this observation, could it ever serve as a public justification for introducing democracy in a nation that had not yet acquired it? The question is somewhat more complex than one might be led to think from what I have said so far, since the quality of the decisions is not the only consideration that is relevant for the choice of a political system. The argument from *justice* could also be decisive. Yet the following conclusion seems inescapable: if the system has no inherent advantage in terms of justice or efficiency, one cannot coherently and publicly advocate its introduction because of the side effects that would follow in its wake. There must be a *point* in democracy as such. If people are motivated by such inherent advantages to throw themselves into the system, other benefits may ensue – but the latter cannot by themselves be the motivating force. If the democratic method is introduced in a society solely because of the side effects on economic prosperity, and no one believes in it on any other ground, it will not produce them.

Tocqueville, however, did not argue that political activity is an end in itself. The justification for democracy is found in its effects, although not in the intended ones, as the strictly instrumental view would have it. More to the point is Tocqueville's argument for the jury system: 'I do not know whether a jury is useful to the litigants, but I am sure that it is very good for those who have to decide the case. I regard it as one of the most effective means of popular education at society's disposal.'[54] This is still an instrumental view, but the gap between the means and the end is smaller. Tocqueville never argued that the effect of democracy was to make politicians prosperous, only that it was conducive to general prosperity. By contrast, the justification of the jury system is found in the effect on the jurors themselves. And, as above, that effect would be spoilt if they believed that the impact on their own civic spirit was the main point of the proceedings.

John Stuart Mill not only applauded but advocated democracy on the ground of such educative effects on the participants. In current discussion he stands out both as an opponent of the purely instrumental view of politics, that of his father James Mill,[55] and as a forerunner of the theory of participatory democracy.[56] In his theory the gap between means and ends in politics is even narrower, since he saw political activity not only as a means to self-improvement, but also as a source of satisfaction and thus a good in itself. As noted by Albert Hirschman, this implies that 'the benefit of collective action for an individual is not the difference between the hoped-for result and the effort furnished by him or her, but the *sum* of these two magnitudes'.[57] Yet this very way of paraphrasing Mill's view also points to a difficulty. Could it really be the case that participation would yield a benefit even when the hoped-for results are nil, as suggested by Hirschman's formula? Is it not rather true that the effort is itself a function of the hoped-for result, so that in the end the latter is the only independent variable? When Mill refers, critically, to the limitations of Bentham, whose philosophy 'can teach the means of

organising and regulating the merely *business* part of the social arrangement',[58] he seems to be putting the cart before the horse. The non-business part of politics may be the more valuable, but the value is contingent on the importance of the business part.

For a fully developed version of the non-instrumental theory of politics, we may go to the work of Hannah Arendt. Writing about the distinction between the private and the public realm in ancient Greece, she argues that:

> Without mastering the necessities of life in the household, neither life nor the 'good life' is possible, but politics is never for the sake of life. As far as the members of the *polis* are concerned, household life exists for the sake of the 'good life' in the *polis*.[59]
>
> The public realm … was reserved for individuality; it was the only place where men could show who they really and inexchangeably were. It was for the sake of this chance, and out of love for a body politic that it made it possible to them all, that each was more or less willing to share in the burden of jurisdiction, defence and administration of public affairs.[60]

Against this we may set the view of Greek politics found in the work of M.I. Finley. Asking why the Athenian people claimed the right of every citizen to speak and make proposals in the Assembly, yet left its exercise to a few, he finds that 'one part of the answer is that the *demos* recognised the instrumental role of political rights and were more concerned in the end with the substantive decisions, were content with their power to select, dismiss and punish their political leaders'.[61] Elsewhere he writes, even more explicitly: 'Then, as now, politics was instrumental for most people, not an interest or an end in itself.'[62] Contrary to what Arendt suggests, the possession or the possibility of exercising a political right may be more important than the actual exercise. Moreover, even the exercise derives its value from the decisions to be taken. Writing about the American town assemblies, Arendt argues that the citizens participated 'neither exclusively because of duty nor, and even less, to serve their own interests but most of all because they enjoyed the discussions, the deliberations, and the making of decisions'.[63] This, while not putting the cart before the horse, at least places them alongside each other. Although discussion and deliberation in other contexts may be independent sources of enjoyment, the satisfaction one derives from *political* discussion is parasitic on decision-making. Political debate is about what to *do* – not about what ought to be the case. It is defined by this practical purpose, not by its subject-matter.

Politics in this respect is on a par with other activities such as art, science, athletics or chess. To engage in them may be deeply satisfactory, if you have an independently defined goal such as 'getting it right' or 'beating the opposition'. A chess player who asserted that he played not to win, but for the sheer elegance of the game, would be in narcissistic bad faith – since there is no such thing as an elegant way of losing, only elegant and inelegant ways of winning. When the artist comes to believe that the process and not the end result is his real purpose, and that defects and irregularities are valuable as reminders of the struggle of creation, he similarly forfeits any claim to our interest. The same holds for E.P. Thompson, who, when asked whether he really believed that a certain rally in Trafalgar Square would have any impact at all, answered: 'That's not really the point, is it? The point is, it shows that democracy's alive … A rally like that gives us self-respect. Chartism was terribly good for the Chartists, although they never got the Charter.'[64] Surely, the Chartists, if asked whether they thought they would ever get the Charter, would not have answered: 'That's not really the point, is it?' It was because they believed they might get the Charter that they engaged in the struggle for it with the seriousness of purpose that also brought them self-respect as a side effect.[65]

IV

I have been discussing three views concerning the relation between economics and politics, between the market and the forum. One extreme is 'the economic theory of democracy', most outrageously stated by Schumpeter, but in essence also underlying social choice theory. It is a market theory of politics, in the sense that the act of voting is a private act similar to that of buying and selling. I cannot accept, therefore, Alan Ryan's argument that 'On any possible view of the distinction between private and public life, voting is an element in one's public life.'[66] The very distinction between the secret and the open ballot shows that there is room for a private-public distinction within politics. The economic theory of democracy, therefore, rests on the idea that the forum should be like the market, in its purpose as well as in its mode of functioning. The purpose is defined in economic terms, and the mode of functioning is that of aggregating individual decisions.

At the other extreme there is the view that the forum should be completely divorced from the market, in purpose as well as in institutional arrangement. The forum should be more than the distributive totality of individuals queuing up for the election booth. Citizenship is a quality that can only be realized in public, i.e. in a collective joined for a common purpose. This purpose, moreover, is not to facilitate life in the material sense. The political process is an end in itself, a good or even the supreme good for those who participate in it. It may be applauded because of the educative effects on the participants, but the benefits do not cease once the education has been completed. On the contrary, the education of the citizen leads to a preference for public life as an end in itself. Politics on this view is not *about* anything. It is the agonistic display of excellence,[67] or the collective display of solidarity, divorced from decision-making and the exercise of influence on events.

In between these extremes is the view I find most attractive. One can argue that the forum should differ from the market in its mode of functioning, yet be concerned with decisions that ultimately deal with economic matters. Even higher-order political decisions concern lower-level rules that are directly related to economic matters. Hence constitutional arguments about how laws can be made and changed, constantly invoke the impact of legal stability and change on economic affairs. It is the concern with substantive decisions that lends the urgency to political debates. The ever-present constraint of *time* creates a need for focus and concentration that cannot be assimilated to the leisurely style of philosophical argument in which it may be better to travel hopefully than to arrive. Yet within these constraints arguments form the core of the political process. If thus defined as public in nature, and instrumental in purpose, politics assumes what I believe to be its proper place in society.

Notes

1 Elster (1978, ch. 5) refers to these two varieties of market failure as *suboptimality* and *counterfinality* respectively, linking them both to collective action.

2 This is a simplification. First, as argued in Samuelson (1950), there may be political constraints that prevent one from attaining the Pareto-efficient frontier. Secondly, the very existence of several points that are Pareto-superior to the *status quo*, yet involve differential benefits to the participants, may block the realization of any of them.

3 Hammond (1976) offers a useful analysis of the consequences of selfish preferences over income distributions, showing that 'without interpersonal comparisons of some kind, any social preference ordering over the space of possible income distributions must be dictatorial'.

4 Schumpeter (1961, p. 263): 'the will of the people is the product and not the motive power of the political process'. One should not, however, conclude (as does Lively 1975, p. 38) that Schumpeter thereby abandons the market analogy, since on his view (Schumpeter 1939, p. 73) consumer preferences are no less manipulable (with some qualifications stated in Elster 1983a, ch. 5).

5 See in particular Downs (1957).

6 For fuller statements, see Arrow (1963), Sen (1970), and Kelly (1978), as well as the contribution of Aanund Hylland to Elster and Hylland (1986).

7 Cf. d'Aspremont and Gevers (1977).

8 Riker and Ordeshook (1973, pp. 112–13).

9 Cf. the contributions of Donald Davidson and Allan Gibbard to Elster and Hylland (1986).

10 Presumably, but not obviously, since the agent might have several preference orderings and rely on higher-order preferences to determine which of the first-order preferences to express, as suggested for instance by Sen (1976).

11 Pattanaik (1978) offers a survey of the known results. The only strategy-proof mechanisms for social choice turn out to be the dictatorial one (the dictator has no incentive to misrepresent his preferences) and the randomizing one of getting the probability that a given option will be chosen equal to the proportion of voters that have it as their first choice.

12 Tversky (1981).

13 Cf. Elster (1979, ch. II) or Schelling (1980) for the idea of deliberately restricting one's feasible set to make certain undesirable behaviour impossible at a later time. The reason this does not work here is that the regret would not be eliminated.

14 Cf. for instance Williams (1973) or Sen (1979).

15 Cf. Elster (1983b, ch. III) for a discussion of this notion.

16 Arrow (1973).

17 Hirsch (1976)

18 Haavelmo (1970) offers a model in which everybody may suffer a loss of welfare by trying to keep up with the neighbours.

19 One may take the achievements of others as a parameter and one's own as the control variable, or conversely try to manipulate the achievements of others so that they fall short of one's own. The first of these ways of realizing positional goods is clearly less objectionable than the second, but still less pure than the non-comparative desire for a certain standard of excellence.

20 Zeldin (1973, p. 134).

21 I rely mainly on Habermas (1982). I also thank Helge Høibraaten, Rune Slagstad, and Gunnar Skirbekk for

having patiently explained to me various aspects of Habermas's work.
22 Midgaard (1980).
23 For Pascal's argument, cf. Elster (1979, ch. II. 3).
24 As suggested by Runciman and Sen (1965).
25 Smullyan (1980, p. 56).
26 Sobel (1967).
27 Kolm (1981a, b).
28 Janis (1972).
29 Cf. Hogarth (1977) and Lehrer (1978).
30 Niebuhr (1932, p. 11).
31 Arendt (1973, p. 174).
32 Finley (1973); see also Elster (1979, ch. II.8).
33 Asch (1956) is a classic study.
34 See Goldman (1972) for discussion and further references.
35 Berlin (1969, p. xxxviii); cf. also Elster (1983b, ch. III.3).
36 Schotter (1981, pp. 26ff., pp. 43ff.) has a good discussion of this predicament.
37 Margalit (1983).
38 Lipsey and Lancaster (1956–7, p. 12).
39 This is the point emphasized in Lyons (1965).
40 Cf. Hansson (1970) as well as Føllesdal and Hilpinen (1971) for discussions of 'conditional obligations' within the framework of deontic logic. It does not appear, however, that the framework can easily accommodate the kind of dilemma I am concerned with here.
41 Cf. for instance Kolm (1977) concerning the dangers of a piecemeal introduction of socialism – also mentioned by Margalit (1983) as an objection to Popper's strategy for piecemeal social engineering.
42 Cf. Ainslie (1982) and Elster (1979, ch. II.9).
43 Indeed, Habermas (1982) is largely concerned with maxims for *action*, not with the evaluation of states of affairs.
44 Cf. Elster (1983b, ch. III) for a discussion of the notion that some psychological or social states are essentially by-products of actions undertaken for some other purpose.
45 Kant (1795, p. 126).
46 Rawls (1971, p. 133).
47 Rawls (1971, pp. 177ff., esp. p. 181).
48 Williams (1973, p. 123).
49 Parfit (1981, p. 554).
50 Williams (1973, p. 131); also Elster (1983b, ch. II. 3).
51 Tocqueville (1969, p. 229).
52 Tocqueville (1969, p. 224).
53 Tocqueville (1969, pp. 243–4).
54 Tocqueville (1969, p. 275).
55 Cf. Ryan (1972). His contrast between 'two concepts of democracy' corresponds in part to the distinction between the first and the second of the theories discussed here, in part to the distinction between the first and the third, as he does not clearly separate the public conception of politics from the non-instrumental one.
56 Pateman (1970, p. 29).
57 Hirschman (1982, p. 82).
58 Mill (1859, p. 105).
59 Arendt (1958, p. 37).
60 Arendt (1958, p. 41).
61 Finley (1976, p. 83).
62 Finley (1981, p. 31).
63 Arendt (1973, p. 119).
64 *Sunday Times*, 2 November 1980.
65 Cf. also Barry (1978, p. 47).
66 Ryan (1972, p. 105).
67 Veyne (1976) makes a brilliant statement of this non-instrumental attitude among the elite of the Ancient World.

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9

Invoking Civil Society

Charles Taylor

In recent years the notion of civil society has come back into circulation. The intention is to invoke something like the concept that developed at the turn of the nineteenth century, which stands in contrast to "the state." But in fact those who introduced it were trying to articulate features of the development of western civilization which go back much further.

One of the first fields of application of the revived term was to the polities of Eastern Europe. "Civil society" defined what they had been deprived of and were struggling to recreate: a web of autonomous associations, independent of the state, which bound citizens together in matters of common concern, and by their mere existence or action could have an effect on public policy. In this sense, western liberal democracies were thought to have functioning civil societies.

"Civil society" in this sense refers to what the Leninist model of rule had essentially negated. That model arose first in the Soviet Union, then was reproduced in other "Marxist–Leninist" regimes, finally was imitated more or less completely, and sometimes caricaturally, by a number of newly independent third-world countries. The essential virtue of the model for its protagonists was that it offered a kind of total mobilization of society toward what were seen as revolutionary goals. The central instrument was a vanguard party dominated by a revolutionary elite. And a crucial feature of this system was the satellitization of all aspects of social life to this party. Trade unions, leisure clubs, even churches, all had to be permeated and made into "transmission belts" of the party's purposes. Leninism in its heyday was one of the principal sources of modern totalitarianism.

This system has been in decay for a number of decades – since the death of Stalin in its original homeland, and somewhat later in countries that followed the Russian example with an indigenous revolutionary elite, such as China and Cuba. In fact there was a long period of retreat, where the drive to total mobilization flagged more and more visibly, but without any of the fundamental principles of the system being renounced. Future generations will probably describe this period of slow inner decay as the Age of Brezhnev. With Gorbachev, we entered a new phase, in which some of the tenets of total mobilization were themselves challenged. Unanimity was no longer an unambiguously good thing. They began to have real, if restricted, elections in Moscow. But under Brezhnev the goal was to keep the facade of unanimity unbroken. In principle no dissident opinions should be expressed, everyone should turn out for Leninist holidays, people should pass spontaneous resolutions on critical occasions

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denouncing US imperialism; at the same time, the demands of the regime on private life were lessening. Governments like Czechoslovakia's even encouraged a kind of privatization of life. Let everyone cultivate their gardens, provided they turned out for May Day parades and otherwise kept their mouths shut. It was a Leninism of fatigue.

In these circumstances, as the furious terror of Stalinism receded, the pressure rose in certain East European societies for reform. A total change of regime seemed, for obvious geopolitical reasons, utopian. The goal was rather to undo Leninism partially from below, to open a margin of free association out of party control but enjoying legal recognition. It is understandable that an aspiration of this kind should find expression in a distinction between civil society and the state. For on this model, the state – understood in flatly Weberian terms as the agency with the monopoly of physical force – would have an entirely different basis than society would. Its ultimate foundation would be external, in the threat of Soviet intervention, whereas the different components of the newly freed "civil society" would express indigenous social forces.

But in using this term, thinkers in both East and West wanted to express something more than the mutual independence of state and society. They wanted also to invoke something of the history and practice of the western democracies as a model. The notion was, first, that in the West there already is a civil society and, second, that this contemporary reality is heir to a centuries-long development of the distinction between society and state. There is truth in both claims, but to get at it we have to modulate the meaning of "civil society." This turns out to be a more complex and many-faceted idea than one might have thought at first. The nuances are worth exploring because they color the models of the political process we want to steer our lives by in coming decades.

To take the first claim: civil society already exists in the West. Yes, there is in western societies a web of autonomous associations, independent of the state, and these have an effect on public policy. But there has also been a tendency for these to become integrated into the state, the tendency toward what has been called (often in a slightly sneering tone, because of the origins of the term in fascist Italy) "corporatism." States like Sweden, Holland, and Germany, but also many others, have gone some way to integrating trade unions, employers' associations, and the like into government planning. To speak of integration "into the state" may be tendentious here; some people see it as a loss of government independence to special interests. But in fact what occurs is an interweaving of society and government to the point where the distinction no longer expresses an important difference in the basis of power or the dynamics of policymaking. Both government and associations draw on and are responsive to the same public. For instance, issues of national income policy, debated between management and labor unions in tripartite negotiations with the government as third party, can also be debated in parliament, where the same social forces are represented in the form of the social-democratic and conservative parties. In fact, these two loci of negotiation and debate are generally complementary; the issue about corporatism could be phrased as a question – how much of the crucial negotiation takes place outside parliament?

Of course, there are many associations in western societies which are not involved in corporatist negotiations. Some of these are capable of having an impact on policy through lobbying or public campaigns, while others are marginal and easy to ignore. But the drift toward corporatism in modern industrial democracies consists in the first category, with strong associations being more and more integrated into the process of decision-making. It makes sense for a democratic government to consult before deciding, not only to determine the most popular policy, but also to soften the edges of confrontation with the losers, who will at least have the sense that they have been listened to and will be listened to again.

This style of government is roundly condemned, on the right and the left. But it is not clear that either has come up with a viable alternative. The attack from the right is mainly in evidence in the English-speaking countries. Margaret Thatcher was its best-known protagonist. She certainly upset the rules of the game as they were understood under her predecessors of both parties. She introduced a politics of conflict into what formerly had been negotiation. It has been argued by her supporters that this was necessary in order to challenge the position that the labor unions had won in British society. She had to fight a war, ending in the bruising battle of a miners' strike. But the outcome of war is generally peace restored on a new basis. Confrontation as a style of government is not sustainable in the long run in democratic countries.

Of course, right-wing politicians like Thatcher don't subscribe theoretically to endless conflict. They envisage a new dispensation after the special interests have been dealt with, and various enterprises and functions privatized. Many things that the government now orchestrates will run themselves without state interference. State and society will do their own thing without getting in each other's way. This is especially espoused by the right because of their belief in the efficacy of unadulterated market forces.

Now I believe that this hope is utopian – or dystopian, if you don't share the moral outlook of the right. Too much is at stake to allow government and society to coexist without coordination. The really successful economies in the late twentieth century were resolutely corporatist, for instance, Germany and Japan. The idea that there is another path to competitive success on world markets seems to be a nostalgic illusion of the English-speaking countries, remembering an earlier, braver era of economic purity. But those days are gone forever. The obvious failure of the Marxist policy of suppressing the market altogether can be taken only by the simple-minded as proof that total reliance on the market is the best policy. Obviously we are all going to have to live with some mix of market and state orchestration. The difficult question is what mix suits each society. In fact, right-wing governments go on orchestrating far more than they admit. And to the extent that they refrain from doing so – that, say, Britain and the United States turn their backs on industrial policy – they will probably live to rue the day.

What is the relevance of all this to the idea of civil society? It is that the anti-corporatist aspiration can very well be, and often is, expressed in this society/state distinction. So the idea that civil society is something we *have* in the West needs to be nuanced. In one sense we do; in another sense it is a goal that has to be striven for against the grain of modern democratic government.

Let's look more closely at these different senses. (1) In a minimal sense, civil society exists where there are free associations that are not under tutelage of state power. (2) In a stronger sense, civil society exists where society as a whole can structure itself and coordinate its actions through such free associations. (3) As an alternative or supplement to the second sense, we can speak of civil society wherever the ensemble of associations can significantly determine or inflect the course of state policy.

No one can deny that civil society exists in sense (1) in the West; or that it was lacking under Leninism and was a crucial aspiration of those living under Leninist regimes. But civil society as contrasted with the state in western political theory incorporated more than this; it involved (2) and sometimes (3). It was in virtue of this that it could be referred to in the singular as civil *society*. We might say that (2) and (3) introduce a public dimension that has been crucial to the concept in the western tradition.

One aspect of the right-wing indictment of corporatism could be formulated in the charge that it has suppressed civil society in sense (2). Sense (3) might be thought to be integrally fulfilled by corporatist mechanisms of negotiation. But this will not be easily accepted by one who suspects that the associations are in fact being integrated into the state apparatus, rather than bringing to bear their independent weight on it.

This brings us to the left-wing criticism of corporatism, which also can be and sometimes is expressed in terms of civil society. Here too it is the enriched concept involving senses (2) and (3) which is in play. I'm thinking of the criticism that comes from what are sometimes called the "new social movements," and which has found expression, for instance, in Germany's green party.

On this outlook, the state and the large powerful associations it consults form a unity. They tend equally toward elite control and growing distance from the constituencies they claim to speak for. In addition, they are equally committed to increasing bureaucratic control in the name of technological efficacy over more and more aspects of human life. Even such seemingly benign features of modern society as the welfare state, originally introduced on the initiative of the left, become suspect as mechanisms of control and "normalization." To be a beneficiary of the welfare state is to submit to bureaucratic regulation, to have your life shaped by categories that may cut across those in which you want to live your life.

One response to this has been to try to open a sphere of independent self-regulation by spontaneously associating groups. Another has been to try to win for the new social movements themselves greater impact on the formation of policy. These correspond to senses (2) and (3) respectively, and so it is not surprising that this New Left has also been tempted to bring the term "civil society" into play. The sense, justified or not, of an analogy between their situation and that of dissidents in the eastern European bloc has strengthened this temptation.[1]

So the first claim mentioned above, that civil society already exists in the West, is more problematic than it appeared. But the second claim is also not simply true, and it would be worth exploring at even greater length.

The relative freedom we enjoy is seen as having sources deep in the history of the West, and in particular in conceptions of society going back to medieval Christendom. These sources can be articulated with something like the conception of civil society. In the context of contemporary Eastern Europe, the obvious pole of comparison is Russia. At successive stages, Russia took a different political path from western polities. The development of an independent noble class, of free cities, and hence of a regime of "estates" was cut short at crucial

moments by the state building of Ivan the Terrible and later by Peter the Great. Subsequent initiatives aimed at joining the West were repressed by Nicholas I and then by Lenin. A mainstay of western development, that is, a church independent of political authority, never existed in the Russian Orthodox tradition.

So runs the story, and it obviously has a great deal of truth to it, and particular relevance to the situation of Eastern Europe; at least to Hungary, Poland, Czechoslovakia, East Germany. These societies developed in close cultural contact and symbiosis with western Europe. They share analogous institutional developments and some of the same ideals. For instance, republican ideals of self-rule were present in Poland and enshrined even in the name of the pre-partition state, Rzeczpospolita Polska (the Commonwealth of Poland). The poignant fate of these societies was to have been forced to accept an alien political system, in fact of Russian origin, which ran against the grain of those societies and was the cause of endless conflict. The aspiration to greater freedom is in effect synonymous with an aspiration to rejoin Europe. That is why it finds natural expression in a view of the European political tradition and in the notion of civil society.[2]

Perhaps this contrast between Russia and the West has been overdrawn. Sometimes it is put in such a way as to imply that the tragic political plight of Russia has been virtually inevitable from the Mongol conquest on. And western freedom is described in a symmetrically self-congratulatory way as flowing inevitably out of a more remote past. In fact, there were moments when things could have been reversed. Arguably, the Bolshevik takeover was a contingent political disaster for Russia, which interrupted the slow development of civil society that had been gathering pace in the last decades of tsarism. Arguably, Peter's was not the only road to modernization open to Russia. At the same time, when Peter did try to imitate Europe, he took what was seen as the latest, most effective model, the so-called absolute monarchies. Those were in fact constrained by a context of law and independent associations. But no one would then have predicted confidently that they wouldn't grow stronger, that they would give way before a totally different governing formula, then effective only in England and Holland. Western democracy was never written in the genes. At the same time, the chauvinistic idea that representative institutions can't take root outside their home culture is refuted by the existence of such societies as India and Japan (and, dare we hope, post-Gorbachev Russia and post-Deng China).

But when all this is said, it remains true that western liberal democracy has deep roots in its past, that certain socially entrenched self-conceptions greatly facilitated its rise, and that many of these were absent in Russia or were ruthlessly rooted out by earlier rulers. What were these roots, and how do they relate to the term "civil society"?

There are a number of factors worth talking about in this connection; some of them are ideas, some are institutions, but most often they are both at once: institutions and practices that incorporate their own self-interpretation. In one form or another, they seem to be part of the background of western democratic society. But the relation is sometimes more complex and ambiguous than at first appears, mainly because modern democracy itself is a more complex and tension-ridden reality than is generally acknowledged. Some of these tensions will emerge from looking at how the society/state distinction arose.

(A) The medieval notion of society is one of those which has turned out to be important in the development of the West. What is important is in a sense a negative fact: that society is not defined in terms of its political organization. The underlying issue is this: what gives a society its identity? What are the features without which it would cease to be a society, or would become a wholly different one? In many civilizations and eras, these questions are answered in terms of political structure. For both the Greeks and the Romans, the identity of society was defined by its *politeia*, its political constitution. Under the Empire unity came from a common subjection to authority, although a fiction was maintained that this authority came from an act of the people. Now to the extent that a society is defined by its political organization, to that degree it is permeable by political power. It lacks a principle of resistance to the invasive force of sovereign political authority. Just being politically defined is hardly a sufficient condition for this kind of takeover by despotic power, as the Greek polis attests. It is rather that the basis for a certain kind of limitation on this power is lacking, whenever the conditions ripen for its advance.

Now unlike the ancient conceptions, the notion that developed in the early Middle Ages was of a society where political authority was one organ among others. Royal authority, for instance, was *singulis major* but *universis minor*. This idea, that society is not identical with its political organization, can be seen as a crucial differentiation, one of the origins of the later notion of civil society and one of the roots of western liberalism.

(B) This differentiation was carried further by one of the most important features of Latin Christendom: the

development of an idea of the church as an independent society. In principle, the inhabitants of Christendom were Christian. But these same people were organized in two societies, one temporal and one spiritual, of which neither could be simply subordinated to the other. This was, of course, a formula for perpetual struggle, and extravagant claims were made for one side or the other, including an arrogation of *plenitudo potestatis* by Pope Innocent III. But the underlying common understanding remained within the Gelasian definition of "two swords." There were two sources of authority, both granted for different purposes by God. Each was subordinate to the other for some purposes and supreme for others. Western Christendom was in its essence bifocal.

Alongside these two pervasive features, there were particular facets of medieval political arrangements which with hindsight appear important. (C) One is the development of a legal notion of subjective rights. This was linked to the peculiar nature of feudal relations of authority. The relations of vassalage were seen in a quasi-contractual light. The superior had obligations as well as the inferior. To repudiate these obligations was a felony, as much as for the vassal. So inferiors were seen as the beneficiaries of obligations, privileges enjoyed as a kind of property. This is the origin of the western notion of subjective rights. It starts off as a notion of purely positive law, before being transposed by the natural-rights doctrines of the seventeenth and eighteenth centuries. But it meant that medieval sovereigns faced a society that was partly defined as a skein of rights and duties, which imposed on them the necessity of winning consent for important changes. This, along with the existence of relatively independent, self-governing cities (D), brought about the standard political structures of medieval polities (E), in which a monarch ruled with the intermittent and uncertain support of a body of estates, which had to be called together from time to time to raise the resources he needed to govern and wage war. This dyarchy constituted another, purely secular dualism, linking the political structure to society at large.

We can recognize our roots in all of this. But it didn't ensure trouble-free progress for modern liberal democracy. Between us and that time lies the great early-modern attempt over most of Europe to set up absolute monarchies. Kings won the power to raise taxes without calling the estates, built standing armies on these resources, which in turn made their power harder to challenge. Around 1680 this looked like the wave of the future; it must have seemed to many that only this kind of state could be militarily effective. Moreover, influential theories justified the new model of political society. On one hand, the concepts of Roman law, favoring monarchical power, become dominant. On the other hand, Bodin and later Hobbes develop a notion of sovereignty which quite undermines or supersedes the medieval understanding of society. The notion comes to be accredited that a society, in order to exist at all, must be held together by sovereign power, that is, by a power unlimited by any other. In other words, the identification of society with its political organization returns, and in a form that is unambiguously favorable to despotism. Important vestiges of feature A emerge in social-contract doctrines, where society is accorded existence prior to government, as it is with the jurists Grotius and Pufendorf. This is the feature of contract theory that Hobbes wanted to suppress. But even with Grotius and Pufendorf in the seventeenth century, the "contract of subjection" is seen as setting up absolute power, against which society henceforth has no legal recourse.

Meanwhile, throughout this period, a satellitization of the church is taking place in a number of Protestant countries, and the very division of Christendom undermines the idea at the heart of B, that everyone belongs to a single alternative society.

As I said above, absolute monarchies were really rather limited exercises in despotism, seen in the light of twentieth-century dictatorships. They did away with D and E, but remained limited by C, the entrenched traditions of rights. Of course, nothing assured that C in turn would not be eroded if absolutism pursued its course. The important stream of reform thinking in the eighteenth century that looked to "enlightened despotism" to reorder society on rational lines was hostile to traditional rights, wanted them swept aside in the name of reason. But absolutism couldn't run its course. What undermined it was the military, and behind that the economic success of the at-first relatively minor powers who operated on another, more consensual model, especially England and the Low Countries. In that sense, the end of the eighteenth century may have parallels with the end of the twentieth.

Around this alternative model, there crystallized a number of anti-absolutist doctrines. The most celebrated and influential was that of Locke. In a sense he transposed and renewed both A and B and brought them back into political theory. Feature A returns in the unprecedentedly strong form that defines government as a trust.[3] Society exists before government; it issues from a first contract that takes individuals out of the state of nature. The newly formed body then sets up government.

This may be defined as supreme, but it is in fact in a fiduciary relation to society. Should it violate its trust, society recovers its freedom of action.

But Locke also reintroduces a version of B. Prior to all political society, mankind forms a kind of community. We are constituted as such by being under natural law, which is enjoined on us by God.[4] We are made a community, in other words, by our enjoyment of natural rights. This community is in fact defined as a transform of C, now written into the order of things rather than simply inscribed in positive law. Any particular political society has to respect this higher law, since those who set it up were bound by it, and they couldn't pass on powers they didn't have.

Locke is, of course, still using the term "civil society" in its traditional sense, where it is synonymous with "political society." But he is preparing the ground for the emergence of the new, contrastive sense a century later. This contrast arises out of the anti-absolutist doctrines of the eighteenth century, but in two rather different ways. One develops out of Locke's embryonic notion of mankind as a prepolitical community. Locke's state of nature is not the scene of devastation portrayed by Hobbes. It lacks security, which is why humans are driven to set up governments. But otherwise it is the possible scene of great progress in what was later called civilization, of economic development, the division of labor, the development of money, and the accumulation of property. This idea was developed in the eighteenth century into a picture of human social life in which much that is valuable is seen as coming about in a pre- or nonpolitical realm, at best under the protection of political authority, but by no means under its direction.

There was another source of the contrast, which we can perhaps most handily identify with Montesquieu. His portrait of monarchy in *De l'esprit des lois* offers an alternative anti-absolutist doctrine to Locke's. Unlike Locke, he assumes a strong monarchical government that is unremovable. The important issue turns on whether this government is unchecked, and veering toward despotism, or whether it is limited by law. But limitation by law is ineffective unless independent bodies exist which have a standing in this law and are there to defend it. The rule of law and the *corps inter-médiares* stand and fall together. Without law, bodies like parliament and estates like the nobility have no standing; without such bodies and estates, the law has no effective defenders. The free monarchy (a pleonasm for Montesquieu, since the unfree one is despotism) is in equilibrium between a powerful central authority and an interlocking mass of agencies and associations it has to work with.

Montesquieu's theory draws on different elements of the tradition from Locke's. It is based on elements C, D, and E of the medieval constitution. Indeed, the long debate in France over the rise of absolutism was seen as one that pitted the ancient constitution, inherited originally from the Frankish conquerors, against models drawn from Roman law. Montesquieu saw himself as reformulating the "German" case. Speaking of the English constitution, which he admired, Montesquieu says that it was derived from the ancient Germans. "Ce beau système a été trouvé dans les bois."[5] What he doesn't need to draw on at all is A and B. Society is not defined independently of its political constitution. On the contrary, the free society is identified with a certain such constitution.

For all the importance of the medieval constitution to him, in this respect Montesquieu thinks more like an ancient. The polis too was defined politically. The very terms we use show this to be a tautology. This vision of things allowed no place for a distinction between civil society and the state. This would have been incomprehensible to a Greek or Roman. Montesquieu, along with many anti-absolutists of his era, was an admirer of ancient freedom. But he didn't make it an alternative model to absolute rule. His genius was rather to articulate a third standard, in some ways antithetical to the polis, which was nevertheless one of freedom and dignity for the participant. Monarchy was antithetical to the republic because the latter supposed "vertu," a dedication to the public good as well as austere mores and equality; but monarchy required a lively sense of one's own rights and privileges, and thrived on differences of status and displays of wealth and power, which were bound up with honor. Patriotic virtue was what kept society free in the ancient republic, because it led people to defend laws to the death against internal and external threats. The lively sense of one's own rights and status protected freedom in the modern monarchy, because it made the privileged resist royal encroachment and feel shame in obeying any order that derogated their code.

So while retaining a thoroughly political definition of society, like the ancients, Montesquieu laid the ground for a society/state distinction that was alien to the ancients. He did this with a view of society as poised between central power and a skein of entrenched rights.

Both anti-absolutist doctrines are reflected in the distinction eventually drawn around the turn of the century, which found its most celebrated statement in

Hegel's *Philosophy of Right*. But in fact they sit uneasily together in this new concept of civil society. There is a tension between them, and between the different models for a free society which can be articulated with this new concept.

Thus two streams come together into "civil society." Let's call them the L-stream and the M-stream, after the figures I have somewhat arbitrarily chosen to represent them. What I want to do here is map the convergence and highlight some of the tensions.

The central feature of the L-stream is the elaboration of a richer view of society as an extrapolitical reality. One facet of this elaboration has dominated the discussion of civil society until quite recently: the development of a picture of society as an "economy," that is, as an entity of interrelated acts of production, exchange, and consumption which has its own internal dynamic, its own autonomous laws. This crystallizes in the eighteenth century with the work of the physiocrats and, more definitively, with Adam Smith. Just how great an intellectual revolution is involved here can be measured in the transformation of the word's meaning. "Economics" is etymologically the art of household management; it designated a particular field of prudent administration. The *nomos* was that imposed by the manager, the head of household or *oikos*. It already involved one revolution in thinking to begin to consider whole kingdoms as like households, needing to have their production and consumption "managed" in this way. This gives us the jump to "political economy." But the important change is to a view of this domain as in a sense organizing itself, following its own laws of equilibrium and change. The *nomos* in the word now comes to resemble its use in a term like "astronomy," referring us to an "autonomous" domain of causal laws. The modern "economy" is born, as a domain with its own organization.

This gives a new twist and a new force to the idea of society as enjoying an extrapolitical identity. The "economy" now defines a dimension of social life in which we function as a society potentially outside the ambit of politics. Of course, there are differences among the practitioners of the new science as to how autonomous it should be. Even Adam Smith was in favor of much more state regulation than his popular reputation allows. But this intellectual revolution allows us to raise the issue of economic autonomy; without the notion of the economic as governed by its own laws, the issue couldn't even be framed. Now everyone thinks in these terms, interventionist and free-enterpriser alike. They differ only in their assessment of the likely outcome of unregulated flow, and hence of the need or lack of it for remedial action of a more or less radical kind. Even Marx, especially Marx, has a theory of unimpeded flow. It is the disaster scenario laid out in *Capital*.

This provided an important part of the content of the new concept of civil society, at least of its L-facet. It figures in Hegel's formulation, where the self-regulating, entrepreneurial economy is given a central place on this level of society. Marx took over Hegel's concept and reduced it almost exclusively to this, and it is partly due to Marx's influence that "civil society" was for so long defined in economic terms. But this represents an impoverishment of Hegel's concept. It also owed something to the M-stream, so that his civil society incorporated bodies engaged in conscious self-management – the corporations – which were also integrated in their own way into the state.

But I want to return to this later, when we look at the tension between the two streams. Right now it is important to see that, even in what I call the L-stream, the economy is not the only component. What is also of great importance is the development in the eighteenth century of an autonomous public with its own "opinion."

This involves a quite new use of the notion of "public." The term designates what is of common concern, and not just objectively or from an outsider's perspective, but what is commonly recognized as of common concern. So public is what matters to the whole society, or belongs to this whole society, or pertains to the instruments, institutions, or loci by which the society comes together as a body and acts. So plainly the political structure of a society is public – its executive organs, the loci of its legislative power, and whatever spaces of assembly these require – from the agora in which the citizen assembly meets to the court where a king exercises his rule. These are loci of what one might call public space.

The new notion of opinion in the eighteenth century defines a quite different model of public space. Through the circulation of newspapers, reviews, and books among the educated classes, and scattered, small-scale personal exchanges in salons, coffeehouses, and (in some cases) political assemblies, there emerges a sense of nation, or its literate segment, an opinion that deserves to be called "public." Public opinion, as originally conceived, is not just the sum of our private individual opinions, even where we spontaneously agree. It is something that has been elaborated in debate and discussion, and is recognized by everyone as something held in common. This element of common recognition is what makes it public, in the strong sense.

This is also what gives it its force, a new force in history. The novel aspect is that public opinion is elaborated entirely outside the channels and public spaces of the political structure. More radically, it is developed outside the channels and public spaces of any authority whatever, since it is also independent of that second focus of European societies, the church. Governments were used to facing the independent power of religious opinion, articulated by churches. What was new was opinion, presented as that of society, which was elaborated through no official, established, hierarchical organs of definition.[6]

Like the economy, public opinion was here to stay. And though some thinkers envisaged a kind of absolute rule which would align itself on enlightened opinion, in fact free opinion and absolute power don't consort too well. But it can't be simply forgotten, and so contemporary despotisms are forced not only to suppress public opinion, but also to counterfeit it. Official newspapers write editorials and report meetings and resolutions, all of which purportedly come spontaneously from individual authors and initiators. The orchestrated character of all this has to be hidden from view. Such is the prestige of public opinion.

The self-regulating economy and public opinion – these are two ways in which society can come to some unity or coordination outside the political structures. They give body to the Lockean idea, which in turn has medieval roots, that society has its own identity beyond the political dimension. It seems to follow from this that political authority ought to respect the autonomy of society in the spheres where it is manifest. This involves a new kind of limitation of authority. It was always understood as limited in Christendom by the church, to some degree or other; and also by rights ascribed to individuals or corporations. But the political used to be the only domain in which secular social purpose could be articulated and carried out. To the extent that these new spheres of nonpolitical social identity become recognized, this is no longer the case.

Indeed, the new space of public opinion, mediated by printed materials, can be the source of a more radical challenge, questioning the primacy of political structures on their own ground. Previously it was axiomatic that societies found their political identities and defined their political direction through the traditionally established political structures, and only there – whether these were royal courts or parliaments or some combination of the two. Unofficial pressure might be exercised through agitation and pamphleteering, but this didn't challenge the principle that the authoritative locus for defining political ends lay in the established bodies. With the development of the new space of public opinion, more far-reaching claims had to be made. It has been argued, for instance, that in early eighteenth-century America a new form of discourse emerges in newspapers and pamphlets.[7] It is a discourse that implicitly arrogates to this print-sustained space the power and duty to define the goals of the people and to call the established bodies to book for their deviations from these goals. The discourse is cast in the traditional rhetoric of republicanism, but under this familiar cover a radically new formula is being advanced. In republican societies, the people did indeed criticize and control their officers, but assembled in the *ekklesia* or general meeting. This was itself a governing body, the foundational one. Now the powers of the assembled people are being arrogated to a new print-mediated public space, unembodied in any traditional structure or, indeed, in face-to-face meetings of any kind. The political identity of society shifts to an unprecedented locus. Whether or not this analysis holds for the eighteenth-century British colonies, something like this shift plainly became central to modern democratic self-understanding.

This congeries of ideas about the economy and public space constituted one of the strands in the new notion of "civil society" as distinguished from the state. It comprised a public, but not a politically structured domain. The first feature was essential: civil society was not the private sphere. Where Aristotle distinguishes *polis* from *oikos*, and only the first is a public domain, Hegel distinguishes three terms in *Sittlichkeit*: family, civil society, and the state. Civil society is not identical with the third term, the polis, and not with the first term either. That is why I argue that any definition of civil society in sense (1), which identifies it simply with the existence of autonomous associations free from state tutelage, fails to do justice to the historical concept. This defines a pattern of public social life, and not just a collection of private enclaves.

This notion of civil society, the L-variant, can inspire radical political hopes, sometimes of an anti-political kind. Even Locke saw the political structure as an emanation of a society that in one sense was already political, because people had put in common their power to enforce the Law of Nature, but had as yet no political structure. With the enriching of the concept, we can formulate the idea that society has its own prepolitical life and unity which the political structure must serve. Society has the right and power to make and unmake political authority, according as it does so serve or fail to serve.

This is the radical doctrine of Thomas Paine. In a somewhat less radical variant, something like this was acted on by the American colonists in their war of independence. It was less radical because the decision to rebel was taken by political authorities in the thirteen colonies. The early-modern idea, that a rebellion against a supreme authority in violation of its trust could be carried out by duly constituted subordinate authority (the central notion of *vindiciae contra tyrannos*), would also have served to justify the rebellion. Americans saw themselves as fighting for established right as against usurpation. But in fact the language they adopted, that of "We, the People," had a more radical impact. It seemed to draw the revolutionary conclusion from the L-variant: the people have an identity, they have purposes, even a will, outside any political structure. In the name of this identity, following this will, they have the right to make and unmake these structures. The duality of focus in the western concept of society, which goes back in different forms to the Middle Ages, finally takes on its most revolutionary formulation.

This has become a commonplace of modern thought. Between 1776 and now, the notion of a people's prepolitical identity has taken a new and much more powerful form, that of the nation. We now speak of this right to make and unmake structures as the right of self-determination. No one today dares deny this in principle, however suppressed it may be in practice.

But radical hopes can also take an antipolitical form. One could dream of the nonpolitical spheres of society becoming more and more autonomous, more and more self-sufficient. Taken to the extreme, this offers a vision of a society without politics, where the government of men gives way to the administration of things, as Saint-Simon articulated it, followed by Engels. In less extreme fashion, one could hope for a society in which the development of industry and commerce would serve to tie people together in peace, and thus drastically reduce the role of government, lessening its policing function and doing away with war altogether.

The eighteenth-century developments described above, which gave us the notions of economy and public opinion, also provided a notion of "civilization." A civilized society was partly so in virtue of its political constitution – indeed, the term in some respects replaces the earlier French expression *état policé*. But "civilization" included a lot more – pacification, enlightenment, technical development, arts and sciences, polished mores. Within the self-definition of modern Europe as civilized, in contrast to other societies and to its own past, the virtues of peaceful production bulked large, and the older warrior virtues were seen in an unfavorable light. European society gained in polish as it turned its back on these and on the honor ethic behind them. But it was also the honor ethic that gave the political life intrinsic value. For the new social ethic of peaceful productivity, as we see for instance with the utilitarians, political structures had purely instrumental significance. The less we needed them, the better.

So two rather different kinds of political hopes arise from this notion of society as having a pre- or nonpolitical identity. The one moves toward the norm of self-determination; the other toward the goal of marginalizing the political. So we can see why the L-stream was not the only one to feed the new concept of civil society. It was not just that these hopes each in their own way undermine the very distinction between society and state. This they did, of course. Radical self-determination swallows up the state in society, in a supposed common will; while the goal of marginalization tries to approach as closely as possible to anarchy.

But also, much more importantly, both hopes pose a threat to freedom, and the distinction was introduced in the first place in the context of counter-absolutist thought. One recurring threat to freedom has come from the politics of what would later be called the general will. This *idée force*, as elaborated by Rousseau, fuses the idea of a people's will independent of all political structure with the ethic of ancient republicanism, drawing its power from both. Rousseau invokes the prepolitical in the very unancient idea of a social contract, of society as constituted by will, as well as in his understanding of nature as inner voice. He invokes the ancient ethic of virtue in the ideal of a transparent face-to-face political society. The latter, of course, drops out of the picture as unrealizable in the modern world. What remains is the notion of popular will as the ultimate justification for all political structures and authority.

The most thoroughgoing destruction of civil society has been carried out in the name of some variants and successors of this idea in the twentieth century, notably the nation and the proletariat. A strange and horrifying reversal has taken place, whereby an idea whose roots lie in a prepolitical concept of society can now justify the total subjection of life to an enterprise of political transformation. And in less spectacular form, the power of the state has often been enhanced by its self-definition as an instrument of the national will.

But in a more subtle way, the politics of marginalizing politics has also been seen as posing a threat to freedom.

This is particularly so when the sphere of society in the name of which the political is being marginalized is that of the self-regulating economy. For in this domain the disposition of things in society as a whole is seen as arising not out of any collective will or common decision, but by way of an "invisible hand." To leave our collective fate to blind economic forces can be portrayed as a kind of alienation. On top of this, all those whose allegiance is to an ideal of the political life as good in itself will see the marginalization of politics as an abandonment of what is most valuable in life, a flight from the public into the narrower and less significant sphere of private satisfactions, the "petty and paltry pleasures" of which Tocqueville speaks in *Democracy in America*.

Marx, who developed a theory of alienation, himself subscribed to his own version of a world without politics. But Tocqueville spelled out the dangers implicit in the kinds of hopes generated by the L-theory. The modern democracy of the general will can degenerate, he argues, into a kind of mild despotism (*despotisme doux*) in which citizens fall prey to a tutelary power that dwarfs them; and this is both cause and effect of a turn away from the public to the private which, although tempting, represents a diminution of their human stature.

Those who are thus dissatisfied with the L-variant of the notion of civil society are induced to turn to Montesquieu. Tocqueville can be seen as the greatest disciple of Montesquieu in the nineteenth century. But Hegel, in his dissatisfaction with the L-variant, had already drawn on Montesquieu. Like Marx after him, Hegel couldn't believe in the benign effects of an autonomous, unregulated economic sphere. And he produced his own variant of the civic-humanist doctrine that the life of the citizen had value in itself. At the same time, his theory of modern life, in distinction from the ancients, turned on the differentiated development of this nonpolitical public sphere, which related individuals in their separate identities. The result was the Hegelian concept of civil society – a separate sphere, but not self-sufficient. Not only did its constituent economic processes need regulation, which was undertaken partly within civil society, but this society could only escape destruction by being incorporated in the higher unity of the state, that is, society as politically organized.

Hegel combines both the L- and the M-streams in his concept of civil society. If the L-concept, to repeat, turns on the idea of a nonpolitical dimension to society, Montesquieu's contribution is the picture of a society defined by its political organization, but where this is constitutionally diverse, distributing power among many independent agencies. It is important here too that there be independent associations for nonpolitical purposes. But their significance is not that they form a nonpolitical social sphere, but rather that they form the basis for the fragmentation and diversity of power *within* the political system. What is relevant is not their life outside, but the way they are integrated into the political system and the weight they have in it.

Thus the different elements of Hegel's political society take up their role in the state, make up the different estates, and form the basis for a differentiated constitution, whose formula was partly inspired by Montesquieu. In this way, we avoid both the undifferentiated homogeneity of the general-will state, which Hegel thought must lead inevitably to tyranny and terror, and also the unregulated and ultimately self-destructive play of blind economic forces, which then seemed to be menacing England.

With Tocqueville, the heritage of Montesquieu is even clearer. The only bulwark against mild despotism is free associations. Voluntary associations for all purposes are valuable. But their significance is that they give us the taste and habit of self-rule, and so they are essential for political purposes. But if they are to be real loci of self-rule, they have to be nongigantic and numerous, and exist at many levels of the polity. This itself should be decentralized, so that self-government can be practiced also at the local and not just the national level. If it dies out at the former, it is in danger at the latter. "In democratic countries the science of association is the mother of science," according to Tocqueville.

So our notion of civil society is complex. It is an amalgam of two rather different influences, which I have called the L-stream and the M-stream. It clearly goes beyond the minimal definition (1) above. But it hovers between the other two because of its dual origin. For the purposes of deconstructing a Leninist dictatorship, any one of these definitions will do. But when we come to ask how the concept of civil society relates to the freedom of western liberal democracies, we find a more complex story.

We can see now why the question discussed at the outset, whether we in fact have a functioning independent civil society in the West, was not so easy to answer. Among the other reasons is the fact that there are different definitions of what this independence involves, which have equally strong warrant in our two-streamed tradition. No easier to answer is the question of what role a concept of civil society has to play in the future defense of freedom.

It is tempting to think that it is almost guaranteed a role, just because of its place in the complex intellectual and institutional background of western liberty. The distinction between civil society and the state is indeed important to the western tradition, not just because of all the roots of the idea in earlier epochs, but more especially because it has been central to the different forms of counter-absolutist thinking. Indeed, it owes its existence and relevance to the development in the West of reforming absolutism, of "the well-ordered police state" in the seventeenth and eighteenth centuries.[8] It made no sense in the context of the polis, or in the medieval polity, no more than it did in a host of traditional nonwestern polities. It arose, one might say, as a necessary instrument of defense in face of the specific *threats* to freedom implicit in the western tradition. But precisely to the extent that the modern state is still drawn to a vocation of mobilizing and reorganizing its subjects' lives, the distinction would seem to be guaranteed a continuing relevance.

So one can argue that the distinction is essential to our conception of what it is to preserve freedom. But it has also been shouldered aside by supposedly simpler and more arresting definitions of a free society, which turn on the idea of a general will or a politics-free sphere. To make the notion of civil society central to our political discourse ought to involve a rejection of these seductively limpid formulas.

But those who find these simpler definitions unsatisfactory (as I do), and want to recur to "civil society," will find that it is not a unified idea. Both its sources are deeply woven into our political traditions and way of life. Which definition we accept of civil society will have important consequences for our picture of the free society and hence our political practice.

In fact, our choice today lies not simply between the two variants. The force of the L-idea is too great and too obtrusive to be altogether denied. The choice seems to lie between a view of civil society almost exclusively concerned with the L-stream and one that tries to balance both. In the first category fall those critics of corporatist politics on the right who aim to roll back the power of the state. In the second are found the contemporary followers of Tocqueville, some of whom along with a bewilderingly diverse variety of utopians end up on the ecological left, but who are also found near the center of many western societies. I hope an impression has emerged that the second view, which balances both streams, is greatly superior to the first; more, that the first is in constant danger of falling victim to the simpler formulas of a prepolitical freedom that end up subverting the distinction or neutralizing its force as a counterthrust to bureaucratic power. In any case, this is what I propose.

Notes

1 For a work in which both predicaments are discussed together in a very illuminating way, see John Keane, ed., *Civil Society and the State* (London: University of Westminster, 1988). The civil-society tradition has been mediated to thinkers on the left partly through the work of Antonio Gramsci, who had a much richer concept than Marx, one more indebted to Hegel. It should also be said that the concern on the left with the "colonization of the life-world" by bureaucracies dedicated to technological efficacy is not confined to ecological green parties. A well-known theorist who has addressed this issue, and who is in no sense a "green," is Jürgen Habermas. See his *Theorie des kommunikativen Handelns* (Frankfurt: Suhrkamp, 1981); *The Theory of Communicative Action*, 2 vols. (Boston: Beacon, 1985, 1989).

2 For a discussion of Eastern Europe in this context, see Jenö Szücs, "Three Historical Regions of Europe," and Mihaly Vajda, "East-Central European Perspectives," in Keane, *Civil Society*.

3 See "*Second Treatise of Civil Government*," paras. 221–2, in Peter Laslett, ed., *Locke's Two Treatises of Government*, 2nd edn (Cambridge, 1967), p. 430.

4 Ibid., para. 172. Locke speaks of "the common bond whereby humane kind is united into one fellowship and societie" (Laslett, p. 401).

5 Montesquieu, *De l'esprit des lois*, 11.6, in *Oeuvres complètes* (Paris, 1964), p. 590.

6 This whole development has been interestingly discussed by Jürgen Habermas in his *Strukturwandel der Öffentlichkeit* (Berlin, 1962); *Structural Transformation* (Cambridge, MA, 1989).

7 I have drawn here on the interesting discussion in Michael Warner, *The Letters of the Republic* (Cambridge, MA, 1989).

8 See Marc Raeff, *The Well-Ordered Police State* (New Haven, 1983). Of course the term is used not in its present-day sense. "Police" translates the eighteenth-century German "Polizei," which covered the state's action in ordering the lives of its subjects rather than in suppressing violence.

PART III

Democracy

10

The Public Sphere

Jürgen Habermas

Concept

By "public sphere" we mean first of all a domain of our social life in which such a thing as public opinion can be formed. Access to the public sphere is open in principle to all citizens. A portion of the public sphere is constituted in every conversation in which private persons come together to form a public. They are then acting neither as business nor professional people conducting their private affairs, nor as legal consociates subject to the legal regulations of a state bureaucracy and obligated to obedience. Citizens act as a public when they deal with matters of general interest without being subject to coercion; thus with the guarantee that they may assemble and unite freely, and express and publicize their opinions freely. When the public is large, this kind of communication requires certain means of dissemination and influence: today, newspapers and periodicals, radio and television are the media of the public sphere. We speak of a political public sphere (as distinguished from a literary one, for instance) when the public discussions concern objects connected with the practice of the state. The coercive power of the state is the counterpart, as it were, of the political public sphere, but it is not a part of it. State power is, to be sure, considered "public" power, but it owes the attribute of publicness to its task of caring for the public, that is, providing for the common good of all legal consociates. Only when the exercise of public authority has actually been subordinated to the requirement of democratic publicness does the political public sphere acquire an institutionalized influence on the government, by way of the legislative body. The term "public opinion" refers to the functions of criticism and control of organized state authority that the public exercises informally, as well as formally during periodic elections. Regulations concerning the publicness (or publicity [*Publizität*] in its original meaning) of state-related activities, as, for instance, the public accessibility required of legal proceedings, are also connected with this function of public opinion. To the public sphere as a sphere mediating between state and society, a sphere in which the public as the vehicle of public opinion is formed, there corresponds the principle of publicness – the publicness that once had to win out against the secret politics of monarchs and that since then has permitted democratic control of state activity.

It is no accident that these concepts of the public sphere and public opinion were not formed until the eighteenth century. They derive their specific meaning from a concrete historical situation. It was then that one learned to distinguish between opinion and public opinion, or

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opinion publique. Whereas mere opinions (things taken for granted as part of a culture, normative convictions, collective prejudices and judgments) seem to persist unchanged in their quasi-natural structure as a kind of sediment of history, public opinion, in terms of its very idea, can be formed only if a public that engages in rational discussion exists. Public discussions that are institutionally protected and that take, with critical intent, the exercise of political authority as their theme have not existed since time immemorial – they developed only in a specific phase of bourgeois society, and only by virtue of a specific constellation of interests could they be incorporated into the order of the bourgeois constitutional state.

History

It is not possible to demonstrate the existence of a public sphere in its own right, separate from the private sphere, in the European society of the High Middle Ages. At the same time, however, it is not a coincidence that the attributes of authority at that time were called "public." For a public representation of authority existed at that time. At all levels of the pyramid established by feudal law, the status of the feudal lord is neutral with respect to the categories "public" and "private"; but the person possessing that status represents it publicly; he displays himself, represents himself as the embodiment of a "higher" power, in whatever degree. This concept of representation has survived into recent constitutional history. Even today the power of political authority on its highest level, however much it has become detached from its former basis, requires representation through the head of state. But such elements derive from a pre-bourgeois social structure. Representation in the sense of the bourgeois public sphere, as in "representing" the nation or specific clients, has nothing to do with *representative publicness*, which inheres in the concrete existence of a lord. As long as the prince and the estates of his realm "are" the land, rather than merely "representing" it, they are capable of this kind of representation; they represent their authority "before" the people rather than for the people.

The feudal powers (the church, the prince, and the nobility) to which this representative publicness adheres disintegrated in the course of a long process of polarization; by the end of the eighteenth century they had decomposed into private elements on the one side and public on the other. The position of the church changed in connection with the Reformation; the tie to divine authority that the church represented, that is, religion, became a private matter. Historically, what is called the freedom of religion safeguarded the first domain of private autonomy; the church itself continued its existence as one corporate body under public law among others. The corresponding polarization of princely power acquired visible form in the separation of the public budget from the private household property of the feudal lord. In the bureaucracy and the military (and in part also in the administration of justice), institutions of public power became autonomous vis-à-vis the privatized sphere of the princely court. In terms of the estates, finally, elements from the ruling groups developed into organs of public power, into parliament (and in part also into judicial organs); elements from the occupational status groups, insofar as they had become established in urban corporations and in certain differentiations within the estates of the land, developed into the sphere of bourgeois society, which would confront the state as a genuine domain of private autonomy.

Representative publicness gave way to the new sphere of "public power" that came into being with the national and territorial states. Ongoing state activity (permanent administration, a standing army) had its counterpart in the permanence of relationships that had developed in the meantime with the stock market and the press, through traffic in goods and news. Public power became consolidated as something tangible confronting those who were subject to it and who at first found themselves only negatively defined by it. These are the "private persons" who are excluded from public power because they hold no office. "Public" no longer refers to the representative court of a person vested with authority; instead, it now refers to the competence-regulated activity of an apparatus furnished with a monopoly on the legitimate use of force. As those to whom this public power is addressed, private persons subsumed under the state form the public.

As a private domain, society, which has come to confront the state, as it were, is on the one hand clearly differentiated from public power; on the other hand, society becomes a matter of public interest insofar as with the rise of a market economy the reproduction of life extends beyond the confines of private domestic power. The *bourgeois public sphere* can be understood as the sphere of private persons assembled to form a public. They soon began to make use of the public sphere of informational newspapers, which was officially regulated, against the public power itself, using those papers, along with the morally and critically oriented weeklies, to engage in debate about the general rules governing relations in their own essentially privatized but publicly relevant sphere of commodity exchange and labor.

The Liberal Model of the Public Sphere

The medium in which this debate takes place – public discussion – is unique and without historical prototype. Previously the estates had negotiated contracts with their princes in which claims to power were defined on a case-by-case basis. As we know, this development followed a different course in England, where princely power was relativized through parliament, than on the Continent, where the estates were mediatized by the monarch. The "third estate" then broke with this mode of equalizing power, for it could no longer establish itself as a ruling estate. Given a commercial economy, a division of authority accomplished through differentiation of the rights of those possessing feudal authority (liberties belonging to the estates) was no longer possible – the power under private law of disposition of capitalist property is nonpolitical. The bourgeois are private persons; as such, they do not "rule." Thus their claims to power in opposition to public power are directed not against a concentration of authority that should be "divided" but rather against the principle of established authority. The principle of control, namely publicness, that the bourgeois public opposes to the principle of established authority aims at a transformation of authority as such, not merely the exchange of one basis of legitimation for another.

In the first modern constitutions the sections listing basic rights provide an image of the liberal model of the public sphere: they guarantee society as a sphere of private autonomy; opposite it stands a public power limited to a few functions; between the two spheres, as it were, stands the domain of private persons who have come together to form a public and who, as citizens of the state, mediate the state with the needs of bourgeois society, in order, as the idea goes, to thus convert political authority to "rational" authority in the medium of this public sphere. Under the presuppositions of a society based on the free exchange of commodities, it seemed that the general interest, which served as the criterion by which this kind of rationality was to be evaluated, would be assured if the dealings of private persons in the marketplace were emancipated from social forces and their dealings in the public sphere were emancipated from political coercion.

The political daily press came to have an important role during this same period. In the second half of the eighteenth century, serious competition to the older form of news writing as the compiling of items of information arose in the form of literary journalism. Karl Bücher describes the main outlines of this development: "From mere institutions for the publication of news, newspapers became the vehicles and guides of public opinion as well, weapons of party politics. The consequence of this for the internal organization of the newspaper enterprise was the insertion of a new function between the gathering of news and its publication: the editorial function. For the newspaper publisher, however, the significance of this development was that from a seller of new information he became a dealer in public opinion." Publishers provided the commercial basis for the newspaper without, however, commercializing it as such. The press remained an institution of the public itself, operating to provide and intensify public discussion, no longer a mere organ for the conveyance of information, but not yet a medium of consumer culture.

This type of press can be observed especially in revolutionary periods, when papers associated with the tiniest political coalitions and groups spring up, as in Paris in 1789. In the Paris of 1848 every halfway prominent politician still formed his own club, and every other one founded his own *journal*: over 450 clubs and more than 200 papers came into being there between February and May alone. Until the permanent legalization of a public sphere that functioned politically, the appearance of a political newspaper was equivalent to engagement in the struggle for a zone of freedom for public opinion, for publicness as a principle. Not until the establishment of the bourgeois constitutional state was a press engaged in the public use of reason relieved of the pressure of ideological viewpoints. Since then it has been able to abandon its polemical stance and take advantage of the earning potential of commercial activity. The ground was cleared for this development from a press of viewpoints to a commercial press at about the same time in England, France, and the United States, during the 1830s. In the course of this transformation from the journalism of writers who were private persons to the consumer services of the mass media, the sphere of publicness was changed by an influx of private interests that achieved privileged representation within it.

The Public Sphere in Mass Welfare-State Democracies

The liberal model of the public sphere remains instructive in regard to the normative claim embodied in institutionalized requirements of publicness; but it is not applicable to actual relationships within a mass democracy that is industrially advanced and constituted as a

social-welfare state. In part, the liberal model had always contained ideological aspects; in part, the social presuppositions to which those aspects were linked have undergone fundamental changes. Even the forms in which the public sphere was manifested, forms which made its idea seem to a certain extent obvious, began to change with the Chartist movement in England and the February Revolution in France. With the spread of the press and propaganda, the public expanded beyond the confines of the bourgeoisie. Along with its social exclusivity the public lost the cohesion given it by institutions of convivial social intercourse and by a relatively high standard of education. Accordingly, conflicts which in the past were pushed off into the private sphere now enter the public sphere. Group needs, which cannot expect satisfaction from a self-regulating market, tend toward state regulation. The public sphere, which must now mediate these demands, becomes a field for competition among interests in the cruder form of forcible confrontation. Laws that have obviously originated under the "pressure of the streets" can scarcely continue to be understood in terms of a consensus achieved by private persons in public discussion; they correspond, in more or less undisguised form, to compromises between conflicting private interests. Today it is social organizations that act in relation to the state in the political public sphere, whether through the mediation of political parties or directly, in interplay with public administration. With the interlocking of the public and private domains, not only do political agencies take over certain functions in the sphere of commodity exchange and social labor; societal powers also take over political functions. This leads to a kind of "refeudalization" of the public sphere. Large-scale organizations strive for political compromises with the state and with one another, behind closed doors if possible; but at the same time they have to secure at least plebiscitarian approval from the mass of the population through the deployment of a staged form of publicity.

The political public sphere in the welfare state is characterized by a singular weakening of its critical functions. Whereas at one time publicness was intended to subject persons or things to the public use of reason and to make political decisions susceptible to revision before the tribunal of public opinion, today it has often enough already been enlisted in the aid of the secret policies of interest groups; in the form of "publicity" it now acquires public prestige for persons or things and renders them capable of acclamation in a climate of non-public opinion. The term "public relations" itself indicates how a public sphere that formerly emerged from the structure of society must now be produced circumstantially on a case-by-case basis. The central relationship of the public, political parties, and parliament is also affected by this change in function.

This existing trend towards the weakening of the public sphere, as a principle, is opposed, however, by a welfare-state transformation of the functioning of basic rights: the requirement of publicness is extended by state organs to all organizations acting in relation to the state. To the extent to which this becomes a reality, a no longer intact public of private persons acting as individuals would be replaced by a public of organized private persons. Under current circumstances, only the latter could participate effectively in a process of public communication using the channels of intra-party and intra-organizational public spheres, on the basis of a publicness enforced for the dealings of organizations with the state. It is in this process of public communication that the formation of political compromises would have to achieve legitimation. The idea of the public sphere itself, which signified a rationalization of authority in the medium of public discussions among private persons, and which has been preserved in mass welfare-state democracy, threatens to disintegrate with the structural transformation of the public sphere. Today it could be realized only on a different basis, as a rationalization of the exercise of social and political power under the mutual control of rival organizations committed to publicness in their internal structure as well as in their dealings with the state and with one another.

11

Procedural Democracy

Robert A. Dahl

If one makes certain minimal assumptions about a human association, I shall argue here, then one must also accept the reasonableness of certain criteria for evaluating how that association governs itself. These criteria specify democratic procedures, and an association that satisfied all of the criteria would be fully democratic in its procedures.

However, since their origins in classical Greece, democratic ideas have been plagued by the problem of inclusion: what persons have a rightful claim to be included as citizens with full and equal rights to participate in governing the association? My strategy will be to leave this problem initially unsolved in order to set out the assumptions and the criteria of procedural democracy. I shall then examine several well-known solutions to the problem – those advanced by Schumpeter, Locke, Rousseau and Mill – and show that they are defective. I shall conclude by offering what seems to me a more satisfactory solution to the problem of inclusion.

I Assumptions

Let me start by assuming that each of a number of persons has in mind the idea of forming an association for certain purposes, or changing an already existing association in order to adapt to conditions as they now understand them. Among other things, the association will have rules, or will make decisions about rules, that are to be binding on the members. Anyone to whom the rules apply is defined as a member. Thus being subject to the rules and decisions of the association is an essential characteristic of membership; it is sufficient to distinguish members from non-members.

Suppose one believes that the following assumptions are valid:

> (A1) There is a need among the members or putative members[1] for *binding decisions* on at least some matters, and so for a process that will eventuate in binding decisions on these matters.

This condition has two aspects. First, at least some of the purposes the members have in mind can be satisfactorily attained if and only if at least some members are influenced to act, or not to act, in certain ways.[2] Second, the actions necessary to these purposes can be brought about if, and only if, there exists a procedure by means of which the members, or some of them, can decide on a rule, policy, purpose, principle, act, or pattern of conduct with which members will be obliged to act

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consistently. The obligation to act consistently with the rule is imposed on *all* members in the sense that even when acts by particular members or offices are specified, all members are required not to act in such a way as to impede or prevent that particular act.

In order to bring about the acts they seek, rule makers might create an expectation that violators of the rule will be punished by officials. Conceivably, however, decisions might be binding without punishments by officials or other members. It might be enough to evoke an expectation of divine or magical sanctions. Or the mere process of enacting and announcing a rule might cause enough members to adopt it as a principle of conduct so as to produce a quite satisfactory level of compliance. In short, the need for binding decisions, and for procedures to bring them about, does not imply that the association is necessarily coercive, employs the threat of violent sanctions to bring about compliance, or possesses other characteristics that are often used to distinguish a state from other sorts of associations.

(A2) A process for making binding decisions ought to include at least two stages: setting the agenda and deciding the outcome.

Setting the agenda is the part of the process during which the matters are selected on which decisions are to be made (including a decision not to decide the matter). Deciding the outcome, or the *decisive stage*, is the time during which the process culminates in an outcome, signifying that a rule has definitely been adopted or rejected. If setting the agenda is, so to speak, the first say, the decisive stage is the last say, the final word, the controlling decision, the moment of sovereignty with respect to the matter at hand. Until the decisive stage is completed, the process of decision-making is tentative; it may lead to discussion, agreements, even outcomes of votes; but these are all preliminary, may be over-ruled at the decisive stage and are not binding on the members. Decisions are binding only at the conclusion of the decisive stage.

(A3) Binding decisions should be made only by members.

That is, no person who is not a member is properly qualified, in the broadest sense, to make, or participate in making, decisions that will be binding on members. I say nothing about the possible grounds for such a belief, which are many. It may be, for example, that the founders of the association have managed to include among the members everyone who is considered to be fully qualified, or everyone who must be included if the rule is to be useful, or everyone whose interests are affected. But other reasons would also suffice.

(A4) Equally valid claims justify equal shares.

That is, if the claims made on behalf of A,B,C… to an object of value, X, are judged to be equally valid, then any procedure for allocating X to A,B,C … must give equal regard to the claims of each.

Because this principle seems to have well-nigh universal acceptability, one might suspect that it is tautological. I think it falls just short of a tautology, but it is close enough to being so as to make its contradiction seem quite fundamentally arbitrary. Thus suppose that Christopher, Ann and Jane each claims the last piece of pie; they agree (or I hold) that their claims are equally valid; that is, there are no grounds for asserting that, say, Christopher's claims are superior to Ann's or Jane's; or that either Ann's or Jane's are better. Then they must also agree (or I must insist) that any procedure for allocating the piece of pie must give equal regard to the claims of each. The principle does not specify a particular procedure. Several procedures might therefore be thought to satisfy the principle equally well: The piece of pie might be divided equally among them, or awarded according to a random process, etc.

Even with the addition of this elementary principle of fairness, the conditions set out so far do not constitute grounds for asserting that an association ought to be governed by democratic procedures. If a single member were judged by all the others to be definitely more qualified than they to make decisions on all the matters which the association is to deal with, or if there were a graded hierarchy of competencies, then to say that the association ought to be governed by the one person, or by a graded hierarchy, would not be inconsistent with the judgement that all the preceding conditions also hold.

In order for democratic procedures to be required, it is sufficient to add one additional and highly crucial assumption:

(A5) The claims of a significant number of members as to the rules, policies, etc., to be adopted by binding decisions are valid and equally valid, taken all around, and no member's claims are, taken all around, superior or overriding in relation to the claims of this set of members.

This set of members I am going to call the demos. Members of the demos are citizens, though this usage is not meant to imply that they are necessarily citizens of a state.

A 'significant number' must, of course, be more than one member; otherwise democratic procedures would not be required nor could the procedures be democratic. What constitutes a sufficiently large number or proportion, however, has been an issue of great theoretical and practical importance. It is directly bound up with the question of whose claims are valid and equally valid. These issues are central to the problem of inclusion: what persons have a rightful claim to be included in the demos? Since this question is too important to be closed off merely by stipulation, I want to defer it for the time being. Meanwhile, the grounds that would properly justify having one's claims accepted as equally valid are not at issue here. I shall simply assume that one arrives at such a judgement somehow; whether the grounds are reasonable or unreasonable is not at this point a matter of concern. In this way a controversial issue in the history of democratic ideas and practices can be set aside for consideration later on.

II Criteria

Suppose, then, some collection of persons wish to form an association, and one believes that the five assumptions described above are valid with respect to this group. Then it is reasonable to hold that the procedures by which the demos is to arrive at its decisions ought to meet certain criteria, which I am going to call the criteria of procedural democracy.

When I say that the procedures ought to meet certain criteria, I mean that if one believes in the assumptions, then one must reasonably affirm the desirability of the criteria; conversely, to reject the criteria is in effect to deny that the assumptions apply.

One additional point. The criteria do not specify any *particular* procedure, such as majority rule. Specific procedures cannot be extracted from the criteria. The criteria are standards against which proposed procedures are to be evaluated. They do not eliminate all elements of judgement in evaluation. I think it should not be surprising that democratic theory, like most other normative theories, cannot furnish completely unambiguous answers in all concrete situations in which a choice has to be made between alternative proposals.

Political Equality

First, all proposed procedures for making binding decisions must be evaluated according to *the criterion of political equality*. That is, the decision rule for determining outcomes at the decisive stage must take into account, and take equally into account, the expressed preferences of each member of the demos as to the outcome. The expression of preferences as to the outcome at the decisive stage is, of course, what we usually mean by 'voting' and 'a vote'; thus the criterion of political equality specifies that at the decisive stage each citizen has an equal vote.

To reject this criterion would be to deny at least one of two premises discussed earlier. Either equally valid claims do not justify equal shares, or it is not true that the claims of a significant number of members are valid and equally valid.

However, the criterion does not explicitly embody a particular method of voting or elections. It is not reducible solely to the principle of one man one vote, or to the principle that each citizen should have an equal vote in districts of equal numbers of voters, potential voters, or residents, or to a system of proportional representation based on equal votes. To adopt the criterion implies that specific procedures like these ought to be evaluated according to the extent to which they satisfy the conclusions. How preferences may best be expressed and what the specific rules should be for taking preferences into account, and equally into account, are questions requiring additional judgements; but procedures judged to meet the criterion better ought to be preferred over those that meet it worse. Obviously the requirement that the better be preferred to the worse holds even if all the procedures proposed are in some respects defective.

Nor does the criterion explicitly specify the majority principle. It requires only that the majority principle and alternatives to it be evaluated according to the criterion, and the solution that best meets the criterion of political equality be adopted. Whether majority voting is the best, or always the best, is thus left open.

Effective Participation

The second criterion according to which all proposed procedures must be evaluated is the criterion of *effective participation*. According to this criterion, throughout the process of making binding decisions, one must have an adequate opportunity, and an equal opportunity, for expressing his or her preferences as to the final outcome.

Thus citizens must have adequate and equal opportunities for placing questions on the agenda, and for expressing reasons for endorsing one outcome rather than another. For to deny any citizen adequate opportunities for effective participation means that their preferences cannot be known, or cannot be correctly known, and hence cannot be taken into account. And if some citizens have less opportunity than others, then their preferences as to the final outcome are less likely to be taken equally into account. But not to take their preferences as to the final outcome equally into account is to reject the criterion of political equality, and thus to deny the condition of roughly equal qualification, taken all around.

Any specific procedures, then, must be evaluated according to the adequacy of the opportunities they provide for, and the relative costs they impose on, expression and participation by the demos in making binding decisions. Other things being equal, procedures that meet the criteria better are to be preferred over those that meet it less well. Once again, the requirement that the better be chosen over the worse clearly applies even if all the options are thought to be imperfect in some respect. Thus having the agenda for the assembly determined by a council of 500, chosen by lot, as in classical Athens, would meet the criterion better than having the agenda set single-handedly by Pericles or Creon, even if the system of selection by lot involved some minor departures from a strictly random selection in which every citizen had an exactly equal chance of being selected.

I think it is consistent with historic usage to say that any association satisfying these two criteria is, at least to that extent, *procedurally democratic*. To put it somewhat formally, in order to leave room for some important distinctions to come, I want to call such an association *procedurally democratic* (or a *procedural democracy*) in a *narrow sense*. The criteria enable one to evaluate a large number of possible procedures. They are not decisive in cases where a procedure is better according to one criterion and worse by the other. Moreover, any evaluation would ordinarily require additional judgements about the facts of the particular situation, or about general tendencies and regularities of human behaviour and action. Nonetheless, the criteria are far from vacuous. Although I will not introduce a rigorous argument here, it would be hard to deny that procedures providing for decisions by a randomly selected sample of citizens would satisfy the criteria better than a procedure by which one citizen makes binding decisions for all the rest, or that a voting scheme allocating one vote to each citizen would be better than a scheme in which some citizens had ten votes and others none. I do not mean to imply that judgements about alternatives like these could invariably result from a perfectly rigorous argument ending in a completely unassailable conclusion.

Enlightened Understanding

As I have already suggested, judgements about the existence, composition, and boundaries of a demos are highly contestable. Thus one might simply challenge such judgements outright by asserting that some citizens are more qualified than the rest to make the decisions required. This objection of course raises a fundamental challenge to procedural democracy and is generally a premise in a counter-argument for aristocracy, meritocracy, or rule by a qualified elite. It is not this fundamental objection that I wish to consider at the moment, but rather a second kind of objection which might run rather like this:

> I agree – the objector might say – that the citizens are equally well qualified, taken all around. I agree also that none among them, or among the other members, or among nonmembers are so definitely better qualified as to warrant their making the decisions instead of the demos. Yet for all that, I think the citizens are not as well qualified as they might be. They make mistakes about the means to the ends they want; they also choose ends they would reject if they were more enlightened. I agree then that they ought to govern themselves by procedures that are satisfactory according to the criteria of procedural democracy, narrowly defined. Yet a number of different procedures will satisfy the criteria about equally well; among these, however, some are more likely to lead to a more enlightened demos – and thus to better decisions – than others. Surely these are better procedures, and ought to be chosen over the others.

One might object, I suppose, that enlightenment has nothing to do with democracy. But I think this would be a foolish and historically false assertion. It is foolish because democracy has usually been conceived as a system in which 'rule by the people' makes it more likely that 'the people' will get what it wants, or what it believes is best, than alternative systems, like aristocracy, in which an elite determines what is best. But to know what it wants, or what is best, the people must be enlightened, at least to some degree. And because advocates of

democracy have invariably recognized this, and placed great stress on the means to an informed and enlightened demos, such as education and public discussion, the objection is also historically false.

I propose therefore to amplify the doctrine of procedural democracy by adding a third criterion. Unfortunately, I do not know how to formulate the criterion except in words that are rich in meaning and correspondingly ambiguous. Let me, however, offer this formulation for *the criterion of enlightened understanding*:

> In order to express his or her preferences accurately, each citizen ought to have adequate and equal opportunities for discovering and validating, in the time permitted by the need for a decision, what his or her preferences are on the matter to be decided.

This criterion implies, then, that alternative procedures for making decisions ought to be evaluated according to the opportunities they furnish citizens for acquiring an understanding of means and ends, and of oneself and other relevant selves. Yet if the criterion is accepted, ambiguous as it may be, I think it would be hard to justify procedures that cut off or suppressed information which, were it available, might well cause citizens to arrive at a different decision; or gave some citizens much easier access than others to information of crucial importance; or presented citizens with an agenda of decisions that had to be decided without discussion, though time was available; and so on. To be sure, these may look like easy cases; but a great many political systems – perhaps most – operate according to the worse not the better procedures.

Control of the Agenda

If an association were to satisfy all three criteria, it could properly be regarded as a *full procedural democracy with respect to its agenda* and *in relation to its demos*. The criteria are to be understood as aspects of the best possible political system, from a democratic point of view; while no actual system could be expected to satisfy the criteria perfectly, systems could be judged more democratic or less, and to that extent better or worse, according to how nearly they meet the criteria.

Yet to say that a system is governed by fully democratic procedures 'with respect to an agenda' and 'in relation to a demos' suggests the possibility that the three criteria are incomplete. The two qualifying clauses imply the possibility of restrictions – of democratic decision-making processes limited to a narrow agenda, or responsive to a highly exclusive demos, or both. To judge whether a demos is appropriately inclusive and exercises control over an appropriate agenda evidently requires additional standards. The catch is that the condition of equal qualification is of indefinite range: it need apply only to certain matters or to some members of an association. Obviously, to say that some persons are sufficiently well qualified to govern themselves on some matters is not to say that all persons are sufficiently competent to govern themselves on all matters.

Thus the conditions set out earlier are no longer sufficient for generating the additional criteria we need. To remedy this defect in the conditions, I now propose a change of strategy. I shall propose a fourth criterion, and show what sort of judgement as to equality would impose this criterion.

In order to see more clearly why a fourth criterion is needed, let us suppose that Philip of Macedon, having defeated the Athenians at Chaeronea, deprives the Athenian assembly of the authority to make any decisions on matters of foreign and military policy. The citizens continue to assemble some forty times a year and decide on many matters; but on some of the most important questions they must remain silent. With respect to 'local' matters, the Athenian polis is no less democratic than before; but with respect to foreign and military affairs, the Athenians are now governed hierarchically by Philip or his minions.

Again: let us imagine that during the Nazi occupation of Norway, Hitler had allowed the Norwegians to use their democratic political institutions for one or two matters – driving speeds for civilian traffic, let us say – but nothing else. If the Norwegians had gone along with this arrangement, we might conclude that while they had retained some nominal degree of 'democracy', in a broad sense they had lost it. Save for one subject of minor importance, Norwegians would be denied the opportunity to make binding decisions on the matters they felt important and fully qualified to decide for themselves. If we were to take as valid their own judgement as to their competence, then we must also hold that the criteria of procedural democracy ought to apply to all the questions they feel are important and not merely to trivial matters. For to say that some persons outside the demos should be able to prevent the demos from deciding for itself which questions it wishes to put on the agenda of things to be decided according to the criteria of procedural democracy is to deny at least one of the original premises: binding

decisions ought to be made only by members, equally valid claims justify equal shares, and no member's claims are, taken all around, superior or overriding in relation to the claims of the demos.

These considerations suggest an additional criterion, *final control of the agenda by the demos*:

> The demos must have the exclusive opportunity to make decisions that determine what matters are and are not to be decided by means of procedural democracy.

The criterion of final control is perhaps what is also meant when we say that in a democracy the people must have the final say, or must be sovereign. A system that satisfies this criterion as well as the other three could be regarded as *a full procedural democracy in relation to its demos*.

According to this criterion, a political system would be procedurally democratic even if the demos decided that it would not make every decision on every matter, but instead chose to have some decisions on some matters made, say, in a hierarchical fashion by judges or administrators. As long as the demos could effectively retrieve any matter for decision by itself, the criterion would be met. In this respect, then, the doctrine of procedural democracy allows more latitude for delegation of decision-making than would be permissible by Rousseau's eccentric definition of democracy in the *Social Contract*. By defining democracy so as to make delegation impermissible, Rousseau could hardly avoid concluding, as he did, that democracy (in his sense) would be impossible among human beings, though perhaps satisfactory for gods.

Thus the criterion of final control does not presuppose a judgement that the demos is qualified to decide *every* question requiring a binding decision. It does presuppose a judgement that the demos is qualified to decide (1) which matters do or do not require binding decisions, (2) of those that do, which matters the demos is qualified to decide for itself, and (3) the terms on which the demos delegates authority. To accept the criterion as appropriate is therefore to imply that the demos is the best judge of its own competence and limits. Consequently, to say that certain matters ought to be placed beyond the final reach of the demos – in the sense that the demos ought to be prohibited from dealing with them at all – is to say that on these matters the demos is not qualified to judge its own competence and limits.

Let me now phrase our revised assumption as follows:

> (A5.1) *The Full Condition of Equal Qualification*. With respect to all matters, citizens are qualified, and equally well qualified, taken all around, to decide which matters do or do not require binding decisions; of those that do, which matters the demos is qualified to decide for itself; and the terms on which the demos delegates authority.

By *delegation* I mean a revocable grant of authority, subject to recovery by the demos. Empirically, of course, the boundaries between delegation and alienation are not always sharp, and what begins as delegation might end as alienation. But the theoretical distinction is nonetheless crucial.

In a system of full procedural democracy decisions about delegation would be made according to democratic procedures. But alienation would clearly violate the criterion of final control, and would be inconsistent with the judgement that the full condition of equal qualification existed among a demos.[3]

The criterion of final control completes the requirements for full procedural democracy in relation to a demos. If all the members of some set of persons are judged equally qualified, in the full sense, and if the other conditions set out earlier are held to exist among them, then the procedures according to which these persons, the demos, make binding decisions ought to be evaluated according to the four criteria. If citizens were reasonable, they would select the procedures that best meet the criteria.

III The Problem of Inclusion

The criteria of procedural democracy assume the existence of a demos of qualified citizens. However, neither the existence of a demos nor the scope of its competence can be settled satisfactorily merely by assumption. Any specific claim of either kind would surely be highly contestable. Thus the assumptions have allowed me to bypass two interrelated problems:

1. The problem of inclusion: What persons have a rightful claim to be included in the demos?
2. The scope of its authority. What rightful limits are there on the control of a demos? Is alienation ever permissible?

Finding solutions is particularly difficult for two reasons. First, not only is it hard to find much direct confrontation with these problems by democratic theorists, but political and moral theory is typically expressed in universalistic terms – 'all men', 'all persons' – that belie the need for boundaries even as the theory prescribes limits on conduct. Second, the two problems are interdependent; a solution to one seems to depend on a solution to the other.

Thus the extent to which a particular demos ought to have final control over the agenda evidently depends on a prior judgement as to the scope of matters which the demos is qualified to decide. In this sense, judgements as to the scope of the agenda and the composition of the demos are interdependent. A judgement as to the competence of the demos bears on the scope of its agenda; and the nature of an agenda bears on a judgement as to the composition of the demos. The demos being given, the scope of its agenda can be determined. The scope of an agenda being given, the composition of an appropriate demos to make decisions on those matters can be determined. But in principle the one cannot be determined independently of the other.

In this essay, however, I intend to explore only the first problem. I shall argue that we cannot successfully deal with it without directly meeting the question of competence and openly confronting the view that a meritorious elite of exceptional knowledge and virtue ought to govern. This rival idea, which the Greeks called aristocracy and I shall call meritocracy, seems to me to constitute the greatest challenge to democracy, both historically and in the present world. I shall show that insofar as democratic theorists like Locke and Rousseau evaded taking direct and explicit issue with the challenge of meritocracy, they allowed a lethal defect to remain in the foundations of democratic ideas.

What properly constitutes a demos? Who must be included in a properly constituted demos, and who may or must be excluded from it?

The question of inclusion in (or exclusion from) the demos would scarcely present a serious challenge if a demos could enact rules that were binding only on itself. In that case, an outsider might still argue that a demos was acting unwisely or unjustly toward itself; but this would hardly give the outsider a justifiable claim to be included. Some associations do escape the problem in this way. The rules of an association might be binding only on its demos, either because all members of the association are also citizens, in which case the association is fully inclusive, or because every member is free to leave the association at any time with no great difficulty, in which case a member who objects to a rule can simply escape the application of the rule by withdrawing from the association.

It is by no means true of every association, however, that its demos can enact rules that are binding only on itself. A trade union might enforce a rule preventing non-members from working at a particular trade or workplace. An even more obvious and certainly more important exception is of course the state. Even if a state met all four of the criteria for procedural democracy and thus were a full procedural democracy in relation to its citizens, it could enact laws that were enforceable against persons who were not citizens, did not have the right to participate in making the laws, and had not given their consent either explicitly or implicitly to the laws they were forced to obey. Indeed every state has done so in the past, and there are grounds for thinking that all states will continue to do so in the future.

If some persons are excluded from the demos of a state, and yet are compelled to obey its laws, do they have a justifiable claim to be included in the demos or else to be excluded from the domain of enforcement? How inclusive should the demos be? Are there criteria for judging when, if ever, exclusion is rightful or inclusion is obligatory?

Citizenship as Wholly Contingent

One response is that the grounds for deciding who ought to be included in a demos are inherently particularistic and historical, often indeed primordial, and cannot be set forth as general principles. Thus citizenship is wholly contingent on circumstances that cannot be specified in advance. This is Schumpeter's solution.

Although democratic ideas often yield rather ambiguous answers to the question of inclusion, Schumpeter was an exception. It is an 'inescapable conclusion', he asserted, that we must 'leave it to every populus to define himself' [*sic*]. He rested his argument on an incontestable historical fact: what had been thought and legally held to constitute a 'people' has varied enormously, even among 'democratic' countries. What is more, there are no grounds for rejecting any exclusion whatsoever as improper: 'it is not relevant whether we, the observers, admit the validity of those reasons or of the practical rules by which they are made to exclude portions of the population; all that matters is that the society in question admits it.' He pressed his argument relentlessly. The exclusion of Blacks in the American South does not

allow us to say that the South was undemocratic. The rule of the 'Bolshevik party' in the Soviet Union 'would not *per se* entitle us to call the Soviet Republic undemocratic. We are entitled to call it so only if the Bolshevik party itself is managed in an undemocratic manner – as obviously it is.'[4]

The last two examples beautifully illustrate the absurdities to which we may be led by the absence of any criterion for defining the *demos*. It is undeniable that in the United States, southern Blacks were excluded from the *demos*. But surely *to that extent* the South was undemocratic: *undemocratic in relation to its Black population*. Suppose that in the South, as in Rhodesia or South Africa, Blacks had been a preponderant majority of the population. Would Schumpeter still have said that the Southern states were 'democratic'? Is there not some number or proportion of a population below which a 'people' is not a demos but rather an aristocracy, oligarchy, or despotism? If the rulers numbered 100 in a population of 100 million, would we call the rulers a demos and the system a democracy? On Schumpeter's argument, Britain was already a 'democracy' by the end of the eighteenth century – even though only one adult in twenty could vote.

Consider the monumental implications of the second example, in which Schumpeter asserts that 'the Soviet Republic' would be a democracy if only the ruling party itself were internally democratic. Schumpeter imposes no minimum limits on the relative size of the party. Suppose it were one per cent of the population? Or suppose that the Politburo were internally democratic, and ruled the party, which ruled over the State, which ruled over the people. Then the members of the Politburo would constitute the Soviet *populus*, and the Soviet State would be, on Schumpeter's interpretation, a democracy.

His definition thus leaves us with no particular reason for wanting to know whether a system is 'democratic' or not. Indeed, if a demos can be a tiny group that exercises a brutal despotism over a vast subject population, then 'democracy' is conceptually, morally, and empirically indistinguishable from autocracy. Thus Schumpeter's solution is truly no solution at all, for its upshot is that there are simply no principles for judging whether anyone is unjustly excluded from citizenship. But the argument leads, as we have seen, to absurdities.

These consequences follow because Schumpeter failed to distinguish, indeed insisted on conflating, two different kinds of propositions:

System X is democratic in relation to its own demos.
System Y is democratic in relation to everyone subject to its rules.

Perhaps because he was convinced by historical experience that no state like Y had ever existed or was likely to, he felt that any 'realistic' theory of democracy, such as he proposed, could scarcely require that a 'democracy' be a system like Y. For if this requirement were imposed, then no democratic state would, or probably ever could, exist. But by carrying historicism and moral relativism to their limits, he obliterated the possibility of any useful distinction between democracy, aristocracy, oligarchy and one-party dictatorship.

Citizenship as a Categorical Right

Schumpeter's solution, or rather non-solution, was to allow a demos to draw any line it chooses between itself and other members. Suppose instead that one were to insist that no one subject to the rules of the demos should be excluded from the demos. Then the demos and the members (in the language used here) would be identical.

It is possible to interpret Locke, Rousseau, and a long succession of writers they influenced as advancing a solution along these lines.[5] The argument is grounded on the moral axiom that no person ought to be governed without his consent, or, with Rousseau, required to obey laws that are not of his own making in some genuine sense. In developing the argument, writers have found it useful to distinguish between the initial act of forming the polity (society, association, community, city, or state) and the subsequent process of making and enforcing the rules of the polity. Thus both Locke and Rousseau held that the initial formation required the agreement of everyone who has to be subject to it; thereafter, however, laws could be enacted and enforced if they were endorsed by a majority. Both sought to explain why, even though unanimity is required in the first instance, thereafter a majority is sufficient. I wish to ignore this question, for my concern here is a different one: in speaking of agreement by 'all' or a 'majority', what is the collection of persons to which they refer? Does 'the consent of every individual' and 'the determination of the *majority*' of such individuals[6] literally refer to *every* member, in the sense that a majority must be *a majority of every person subject to the laws?*

Clearly, neither Locke nor Rousseau meant to imply this conclusion. To begin with, children are of course to be excluded from the demos. The exclusion of children

from the demos is so often taken as unproblematical that one hardly notices how much the claim to citizenship based on categorical right is embarrassed by this simple exclusion: for it is made on the grounds that children are not competent to govern themselves or the community. Yet if we permit the exclusion of children from the demos (and who seriously does not?) then we allow a contingent element, based on qualifications for governing, to limit the universality of the claim based on categorical right. Never mind; let us momentarily ignore this embarrassment, though I intend to return to it.

Suppose, then, that the claim based on a categorical right is revised to read: all *adults* subject to the laws of a state should be members of the demos of that state. Citizenship is no longer fully coextensive with membership; but all adult members are citizens by categorical right. Did Rousseau and Locke mean to justify such a claim?

Certainly Rousseau did not, though it is easy to see why the *Social Contract* is sometimes understood as saying so. There Rousseau occasionally appears to be asserting an unqualified right to membership in the demos.[7] But Rousseau makes it clear that he means no such thing. Thus he lauds Geneva, even though its demos consisted of only a small minority of the population. Children were, of course, excluded. But so too were women. What is more, a majority of adult males were also excluded from the Genevan demos. Rousseau was well aware of these exclusions. Yet he neither condemned them as inconsistent with his principles, nor provided grounds on which they might be justified. Rather, he seems simply to have taken them for granted.

Rousseau may, in fact, have anticipated Schumpeter's solution. In arguing that it is wrong to take the government of Venice as an instance of true aristocracy, he remarks that although the ordinary people in Venice have no part in the government, there the nobility takes the place of the people. This is Schumpeter's *populus* defining itself. Rousseau then goes on to show that Venice and Geneva are truly alike. Thus the government of Venice is actually no more aristocratic than that of Geneva! (Book IV, chapter 3).

What Rousseau does not feel it important to say is that in both cities the great bulk of the people subject to the laws were not only excluded from the execution and administration of the laws (the *government*, in Rousseau's terminology) but also from any participation in *making* the laws. In neither republic were the people – that is, most people – entitled to assemble in order to vote on the laws, or even to vote for representatives who would make the laws. In both cities, most people were thus subject to laws which they had no part in making.[8] One might conclude that neither republic could be legitimate in Rousseau's eyes. But this was not his conclusion, nor did he even hint at such an inference.

What Rousseau seems to have assumed, as other advocates of democracy had done since the Greek city states of antiquity, is that a large number of persons in any republic – children, women, foreigners and many male adult residents – will be subjects but are not qualified to be citizens. In this way, Rousseau himself undermined the categorical principle of inclusion that he appeared to set forth in the *Social Contract*.

Locke's language in *The Second Treatise* is as categorical and universalistic as Rousseau's, if not more so.[9] Yet his apparent assertion of an unqualified and categorical claim was limited both explicitly and implicitly by a requirement as to competence. Naturally, children were excluded; I shall return later to Locke's argument on 'paternal power'. It is highly doubtful that he meant women to be included as a matter of right.[10] As to adult males, he explicitly excluded 'lunatics and idiots [who] are never set free from the government of their parents'.[11] In addition, 'slaves, … being captives taken in a just war, are by the right of nature subjected to the absolute dominion and arbitrary power of their masters'. He probably intended to exclude servants as well.[12] Thus a claim to citizenship was not categorical but, as it turns out, contingent on a judgement as to the relative qualifications of a person for participating in the government of the commonwealth. Like Rousseau, Locke torpedoed his own view (if indeed it was his view) that every person subject to the laws made by the demos possesses a categorical and unqualified right to membership in the demos.

Citizenship as Contingent on Competence

Locke and Rousseau appear to have advanced two different principles on which a claim to citizenship might be grounded. One is explicit, categorical and universal; the other is implicit, contingent and limiting:

- *Categorical Principle*: Every person subject to a government and its laws has an unqualified right to be a member of the demos (i.e., a citizen).
- *Contingent Principle*: Only persons who are qualified to govern, but all such persons, should be members of the demos (i.e., citizens).

If some persons subject to the laws are not qualified to govern, then obviously the two principles lead to contradictory conclusions. Which principle should take precedence? As we have seen, Locke and Rousseau held, at least implicitly, that the second principle takes precedence over the first.

What was only or mainly implicit in the arguments of Locke and Rousseau was made explicit by John Stuart Mill. Mill openly confronted the conflict he believed to exist between the two principles. Like his predecessors he also insisted that in case of conflict the first must give way to the second.

To be sure, on a careless reading Mill could be interpreted as favouring the categorical principle.[13] Yet although on casual inspection his language has a universalistic tone, in fact Mill does not endorse a categorical principle of general inclusion. It is hardly surprising that he argues, not from principles of right, but rather from considerations of social utility. His judgements are meant to reflect a balancing of social utilities and disutilities. And while his argument is powerful, it does not lead him to a categorical principle but to a contingent and contestable judgement about social utility. If the question is one of social utility, however, then relative competence is also a factor to be weighed.

As every reader of *Representative Government* soon discovers, it was Mill himself who undermined his own argument for universal inclusion by posing a counter-argument based on considerations of competence. In the course of his discussion, he gave explicit and careful recognition that the criterion of competence must take priority over any principle, whether categorical or utilitarian, that makes inclusion in the demos a matter of general right among all adults subject to the laws. At a minimum, he argued, to demonstrate that persons are qualified to engage in governing requires a showing that they have 'acquired the commonest and most essential requisites for taking care of themselves, for pursuing intelligently their own interests and those of the persons most nearly allied to them'. It was Mill's judgement that in the England of his day, many categories of adults could not meet this standard and ought therefore to be denied the suffrage until they acquired the competence they at that time lacked.[14]

By giving priority to the criterion of competence, recognizing the contingent and socially specific nature of judgements about competence, and accepting a restricted demos as the consequence of his own judgement as to the qualifications of fellow Englishmen, Mill brought into the open a problem that has been glossed over by some of his most illustrious predecessors. Yet in justifying an exclusionary demos Mill did no more than to make explicit what had generally been implicit in all previous democratic theory and practice.

The formal opportunities for participation available to citizens in the democratic city-states of Greece, the universalistic language in which democratic beliefs are often presented, and the emphasis on participation by Rousseau and Mill have induced some writers to interpret 'classical' democratic ideas as much less 'elitist' than they actually were.[15]

In classical Athens itself, the demos could hardly have consisted of more than a third of the free adults, a sixth of all free persons, and a seventh – or less – of the total population. In relation to its own demos, the Athenians may have come about as close as any people to procedural democracy, and possibly a good deal closer than any modern state. But the fact is that the Athenian demos, as a modern admirer rather nonchalantly admits, was 'a minority elite'.[16]

One might choose to dismiss these limits as transitory deficiencies in a revolutionary new political idea which transcended the historical limits of actual practice. But as we have seen, Locke and Rousseau accepted, and Mill defended, the principle that a demos might properly exclude large numbers of adults who are subject to laws made by the demos. Thus the attempt to ground 'participatory democracy' on Mill and his predecessors is fatally flawed. Participation indeed. But only for the qualified! And in principle the qualified might be a tiny minority. Thus it is not only Schumpeter's solution that would permit the demos to shrink into a ruling elite. Rousseau himself, as we saw, regarded Geneva and Venice both as true republics, governed 'by the people', even though in both cities the demos constituted a minority of the adults: in Venice about one-tenth of one per cent of the population!

Modern admirers of 'classical' democratic ideas seem to have reversed the relation between citizenship and competence as it was generally understood from the Greeks to Mill. In the 'classical' perspective not every adult, much less every person, was necessarily qualified to govern and thus to enter into the demos. Rather, the demos consisted of all those who *were* qualified to govern. It was precisely because citizens were a qualified minority of the whole people that they were entitled to govern and could on the whole be counted on to govern well.

As a consequence, 'classical' ideas leave the intellectual defence of procedural democracy lethally vulnerable.

Consider the standing of the case for procedural democracy if the criterion of competence is given priority over a categorical and universal principle of right.

If everyone subject to law has a categorical right to participate in the process of making laws, if the requirement of consent is universal and uncontestable, then the case for democracy is very powerful and the case against exclusionary alternatives – aristocracy, meritocracy, rule by a qualified elite, monarchy, dictatorship, and so on – is correspondingly weakened. If the claim to citizenship is a categorical and universal right of all human beings, then among any human group a demos always exists and that demos must always be inclusive. To put it in another way, among any body of persons who wish to establish or maintain an association having a government capable of making binding decisions, the conditions of equal qualification, the most crucial of the conditions for procedural democracy set forth earlier, must necessarily exist.

But if the criterion of competence overrides a claim based on rights, then the argument for democracy rests on mushy grounds. Citizenship depends on contingent judgements, not categorical rights. And the contingent judgements need not lead to universal inclusion. Indeed, as we have seen, the boundaries between democracy on the one side and meritocracy on the other become fuzzy and indeterminate. The arguments for the one or the other become indistinguishable except for a crucial judgement as to the relative magnitude of the competent members, the citizenry or ruling group.

IV Towards a Criterion of Inclusiveness

Three questions arise: First, is it possible to get around the principle of competence in deciding on the inclusiveness of the demos? Second, if not, is it possible to avoid the contingent and contestable nature of a judgement as to competence? Third, if again not, can we develop strong criteria that such a judgement ought to satisfy?

That we cannot get round the principle of competence in deciding on the inclusiveness of the demos is decisively demonstrated by the exclusion of children. It is virtually never argued, no doubt because it would be so obviously untenable to do so, that children either must be members of the state's demos, or else ought not to be subject to laws made by the demos. So far as I am aware, no one seriously contends that children should be full members of the state's demos. An eight-year-old child can hardly be enlightened enough to participate equally with adults in deciding on laws to be enforced by the government of the state. Yet these laws are enforced on children – without their explicit or implied consent. It is often held – and legal systems tend to reflect the force of the argument – that because of their limited competence children should not be subject to exactly the same laws as adults; they cannot, for example, enter into legally enforceable contracts. Yet they are not wholly exempt from the enforcement of all laws.

Children therefore furnish us with a clear instance of violation of the principle that a government must rest on the consent of the governed, or that no one should be subject to a law not of one's own choosing, or subject to a law made by an association not of one's own choosing. Yet this violation is nearly always taken for granted; or else it is interpreted as not actually a violation. One way of interpreting it is to say that the principle of consent applies only to adults. But this is to admit that some persons who are subject to the rules of a state can nevertheless be properly excluded from the demos of the state.

On what grounds? The only defensible ground on which to exclude children from the demos is that they are not yet fully capable of the 'exercise of reason', to use the common phrase. The need to exclude children on this ground was of course perfectly obvious to early democratic theorists. Locke devotes a whole chapter to Paternal Power. After reminding us of 'that equal right that every man hath to his natural freedom, without being subject to the will or authority of any other man', he immediately turns to the exceptions, of which children are the most numerous, obvious and important.[17]

The example of children is sufficient to show that the criterion of competence cannot reasonably be evaded, that any reasonable bounding of a demos must, by excluding children, necessarily exclude a large body of persons subject to the laws, and that any assertion of a universal right of *all* persons to membership in a demos cannot be sustained. It might be argued, however, that children constitute a comparatively well-defined and unique exception.[18] Thus once a distinction is allowed between children and adults, all *adults* subject to the laws must be included. The categorical principle might then be restated as follows:

> *Modified Categorical Principle*: Every adult subject to a government and its laws must be presumed to be qualified as, and has an unqualified right to be, a member of the demos.

There are, however, at least two sources of difficulty with the modified categorical principle. First, the

boundary between childhood and adulthood is itself something of a difficulty. There is the well-known arbitrariness of imposing a dichotomy – child/adult – on what is clearly a continuous process of development; we may reasonably disagree about whether one becomes qualified at 21, or 18, or whatever. There are also the troublesome cases for which experience, even when joined with compassion, points to no clear solution. As Locke put it:

> … if, through defects that may happen out of ordinary course of nature, any one comes not to such a degree of Reason wherein he might be supposed capable of knowing the Law, and so living within the rules of it, he is never capable of being a Free Man, … but is continued under the Tuition and Government of others all the time his own understanding is incapable of that charge. And so Lunatics and Idiots are never set free from the government of their Parents …[19]

Thus the modified categorical principle runs the risk of circularity by defining 'adult' as persons who are presumed to be qualified to govern.

A second source of difficulty with the modified principle is caused by the presence in a country of foreigners who might be adult by any reasonable standards, who are subject to the laws of the country in which they temporarily reside, but who are not thereby qualified to participate in governing.

Suppose that France is holding an election on Sunday and I, an American, arrive in Paris on Saturday as a tourist. Would anyone argue that I should be entitled to participate in the election – much less acquire all the other political rights of French citizenship? I think not. On what grounds could I properly be excluded? On the ground that I am unqualified.[20]

To sum up:

1. Schumpeter's solution to the problem of the composition of the demos is unacceptable because it effectively erases the distinction between democracy and a non-democratic order dominated by a collegial elite.
2. A categorical principle of inclusion that overrides the need for a judgement as to competence is also unacceptable, for it is rendered untenable by such cases as children, feeble-minded persons and foreigners of temporary residence. In so far as Locke and Rousseau advanced a categorical principle, their defence of it is unconvincing. However, evidence suggests that they recognized these objections and never intended their argument to be taken as a rejection of the priority of a criterion of competence.
3. Because a judgement as to competence is contingent on weighing evidence and making inferences as to the intellectual and moral qualifications of specific categories of persons, a decision based on competence is inherently open to question. To be sure, a reasonable argument may be presented on behalf of a particular judgement as to the proper boundaries of inclusion and exclusion. But the exact location of any boundary is necessarily a highly debatable judgement. Thus Mill presented persuasive reasons to justify the particular exclusions he advocated; yet probably few contemporary democrats would accept his exclusions as reasonable.

In short, if Schumpeter's solution leads to absurdities, those found in earlier democratic ideas, whether in classical antiquity or in the works of early modern theorists like Locke, Rousseau and Mill, provide all too fragile a foundation for the doctrine of procedural democracy. Even though we must accept the need for, and the contingent and contestable nature of a judgement as to competence, we are in need of further criteria that will help to reduce the arbitrariness of such a judgement.

Further Requirements

I now want to argue that a reasonable criterion of inclusion in a system of procedural democracy in relation to its demos must pass three tests. At the outset, a criterion of inclusion must satisfy the general principle of fairness that constitutes one of the conditions of procedural democracy: equally valid claims justify equal shares. Consequently if C_a is a citizen, and if another member, M, is about as well qualified as C_a, then either M must be included in the demos or C_a must be excluded from it. If C_a is excluded, then the same test must be applied in comparing the claims of C_a with any other citizen, C_i. And so on, until a fair boundary can be staked out.

Assuming that a boundary of inclusion and exclusion meets the general principle of fairness, several additional tests may reasonably be required. The reasonableness of these tests rests, however, on two additional principles, which I shall refer to as *equal consideration* and *burden of proof*. I do not propose to consider whether or how these principles might be derived from antecedent considerations. Although the burden of proof principle reflects a judgement as to human experience, I doubt whether it is

wholly verifiable, at least as a practical matter. And the principle of equal consideration is a moral orientation so fundamental that it is hard to see how one might go about the task of demonstrating its validity to an adversary. Fortunately, the principle itself is widely accepted. I want to introduce it initially as a principle of universal application and then narrow it to include only the members of the association.

> *Equal consideration (universal inclusion)*. No distribution of socially allocated entities, whether actions, forebearances, or objects, is acceptable if it violates the principle that the good or interest of each human being is entitled to equal consideration.[21]

The principle does not depend on an assumption as to whether one's good is distinguished from one's interests, or whether 'good' or 'interest' refer to want-regarding or ideal-regarding principles.[22] It simply asserts that the good or interest of each person, whatever they may be, ought to be given equal consideration in social allocations. If A and B are human beings, if some entity X is socially allocated, if X is equally beneficial to A and to B and if no benefits to others need to be taken into account, then the principle holds that there are no grounds for upholding a claim that X ought to go to A rather than B, or B rather than A. Whatever principle of distribution is adopted, it must not incorporate a bias toward either A or B. Thus if X is indivisible, the most appropriate solution might be to toss a coin. But to claim that because A is stronger than B or A has discovered X first, then A ought to have X, would not be acceptable.

To universalize the principle of equal consideration, however, poses a host of theoretical and practical problems that I do not wish to deal with here. Moreover, universality is not necessary in order to arrive at a reasonable solution to the problem of the composition of the demos. A much less inclusive version applying only to the *members* will prove satisfactory.

> *Equal Consideration for all members*: No distribution of socially allocated entities, whether actions, forbearances, or objects, is acceptable if it violates the principle that the good or interest of each member is entitled to equal consideration.

If one accepts the principle of equal consideration of all members, then of course one must also hold that a criterion of inclusion is unacceptable if it violates this principle. However, the import of the principle is further amplified by an additional assumption that also reflects a widely held though not strictly universal judgement:

> *Burden of Proof*: In the absence of a compelling showing to the contrary everyone is assumed to be the best judge of his or her own good or interests. Thus if A holds that her good consists of X, not Y, and B insists that A's good consists of Y, not X, then A's judgement is to be accepted unless the validity of B's judgement can be satisfactorily demonstrated.[23]

For any given member, M, an association that meets the criteria of procedural democracy in relation to its demos can satisfy the principle of equal consideration in one of two ways. M may be a citizen; that is, M is already included in the demos, in which case equal consideration is insured by procedural democracy. Alternatively, if M is excluded from the demos the principle of equal consideration can be satisfied if, but only if, the citizens give as much consideration to M's good or interest as to their own. However, the demos cannot reasonably be expected to give equal consideration to M unless (1) it *knows* at least as much about M's good as about its own, and (2) it will in fact *act* on this knowledge in such a way as to give equal consideration to M's good or interests. But the burden of proof principle requires a compelling showing that the demos definitely is a better judge than M as to M's own interests. The second test that M's exclusion must meet is precisely such a showing.

If the second test is met satisfactorily, M's exclusion will still violate the principle of equal consideration if the demos cannot reasonably be expected to *act* so as to give equal consideration to M. Thus, given the burden of proof, a positive showing is necessary that the demos has in fact given equal consideration to M's interests in the past and will continue to do so in the future; or, though it has neglected M's good in the past, there are nevertheless compelling reasons for believing that the demos has recently changed in this respect, or is about to change and will care equally for M's good in the future.

The arguments used in the past to justify the exclusions from full citizenship in the state of various categories of adults – the unpropertied, women, racial minorities, for example – would, I think, fail to meet these three tests. Experience has shown that any group of adults excluded from the demos will be lethally weakened in its own defence; and an exclusive demos will fail to protect the interests of those who are excluded.

> We need not suppose that when power resides in an exclusive class, that class will knowingly and deliberately sacrifice the other classes to themselves; it suffices that, in the absence of its natural defenders, the interest of the excluded is always in danger of being over-looked, and, when looked at, is seen with very different eyes from those of the persons whom it directly concerns.[24]

Mill was surely right. In rejecting the conclusion his own premises pointed to – the enfranchisement of the working classes – Mill's justification failed all three tests. 'Universal teaching must precede universal enfranchisement', he wrote. But it was not until *after* the extension of the suffrage in 1868 that Parliament passed the first act establishing public elementary schools. The historical record since then demonstrates even more fully that when a large class of adults is excluded from citizenship their interests will almost certainly not be given equal consideration. Perhaps the most convincing evidence is provided by the exclusion of Southern Blacks from political life in the United States until the late 1960s.

Though one might argue from numerous cases of child neglect that all too many children fall under III.2, there are reasonable grounds for holding that in general the exclusion of children meets the tests. The bonds between children and adults are unique in the human species. For one thing, while most citizens may not understand from their own direct experiences what it is like to be a member of an excluded class, race, or sex, every adult has once been a child. Moreover, many adults are closely tied to children by bonds of love, nurturance, pity, joy, compassion and hope. Among adults these bonds are far too weak to ensure enough mutuality of interests and understanding to ensure that members of a demos will protect the interests of other adults who are excluded. Consequently, as children approach 'the age of reason' the justification for their guardianship by parents, community, and state weakens and finally fails to meet the two tests.

What then of III.2? For example, what of the child in a community of uncaring adults? In this case, it is not possible for a procedural democracy to arrive at a satisfactory solution. Yet since the existing state of affairs violates the principle of equal consideration, an obligation arises for all who accept that principle to search for and bring about changes that will remedy the situation. There is an obligation to raise the level of M's competence or the enlightenment and compassion of the demos or both. Meanwhile III.2 ought to be viewed as a morally intolerable state of affairs.

A Criterion of Inclusion

These considerations provide reasonable grounds for adopting a criterion that approaches universality among adults. It is not only very much less arbitrary than Schumpeter's solution but far more inclusive than the restricted demos that was accepted, implicitly or explicitly, by Mill, Rousseau, Locke and the Greek *polis*.

> (C.5) *Inclusiveness*: The demos must include all adult members of the association except transients.

Admittedly the definition of adults and transients is a potential source of ambiguity. Probably no definition of the term adult can be completely watertight. In general, however, every member ought to be considered an adult who does not suffer from a severe mental disability or whose punishment for disobeying the rules is not reduced because he or she is younger than a given age. The meaning of the criterion seems to me to be clear enough: A demos that permitted the concept of adulthood to be manipulated in order to deprive certain persons of their rights – dissenters, for example – to that degree would simply fail to meet the criterion of inclusiveness. Obviously this criterion, like others, can never be self-enforcing.

Taken with the other four criteria, inclusiveness completes the requirements for procedural democracy. To the extent that a system approaches all five criteria, it is fully democratic in a procedural sense. The argument is summarized in Table 1.

V Comments

The argument for procedural democracy holds that if one believes in the half dozen assumptions in Table 1, then reason requires one to hold that an association should adopt procedures for making binding decisions that will satisfy the five criteria of procedural democracy.

I take it for granted that in the real world no system will fully meet these criteria. At best any actual polity is likely to be something of an approximation to procedural democracy. My guess is that any approximation will invariably fall pretty far short of meeting the criteria. However, I have not tried to specify thresholds of attainment above which a system may properly be called a procedural democracy, for that exercise promises to be rather sterile. Instead, the criteria serve as standards against which one may compare alternative procedures in order to judge their relative merits according to the criteria of

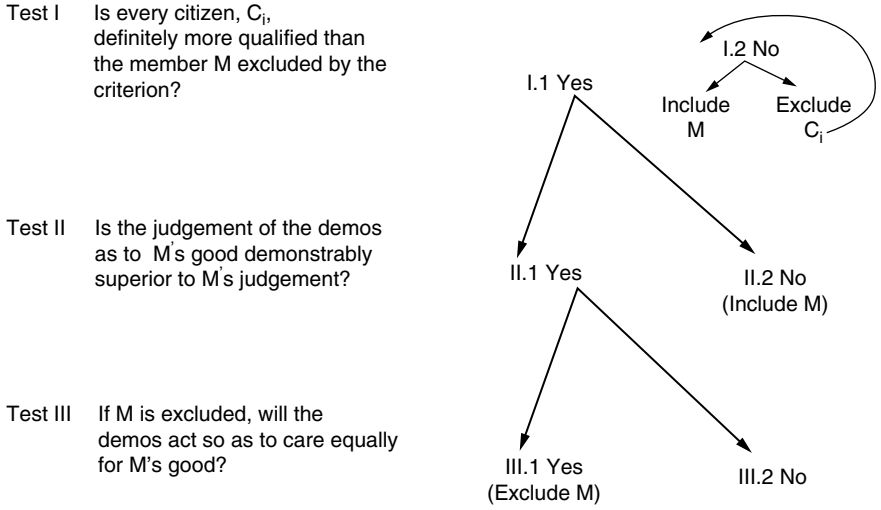


Figure 1. Three tests for a criterion of inclusion.

Table 1. The argument for procedural democracy in schematic outline.

If one believes that:	Then procedures for making binding decisions must satisfy the following criteria:	To the extent that procedures satisfy the criteria, then the system approaches:
A.1. A specific collection of people has a need for binding decisions.	C.1. Political equality C.2. Effective participation C.3. Enlightened understanding	Procedural democracy in a narrow sense Full procedural democracy with respect to an agenda and in relation to a demos
A.2. Binding decisions involve two stages: Setting the agenda The decisive stage		
A.3. Binding decisions ought to be made only by persons who are subject to the decisions (i.e., by *members*)		
A.4. Equally valid claims justify equal shares.		
A.5. The preferences of a significant number of members as to the decision are equally valid and no member's preferences are of overriding validity.		
A.5.1. The full condition of equal qualification exists.	C.4. Final control of the agenda	Full procedural democracy in relation to its demos
A.6. The good of each member is entitled to equal consideration, *and* each member is assumed to be the best judge of his or her own interasts in the absence of a compelling showing to the contrary.	C.5. Inclusiveness	Full procedural democracy

procedural democracy: to compare different systems in order to judge their relative approximations to procedural democracy; and to compare a given system over time in order to judge whether its trend, if any, is toward or away from procedural democracy. I do not hold that the criteria of procedural democracy fully define the notion of a good polity or good society. But to the extent that procedural democracy is worthwhile, then judgements of the sort I just mentioned bear directly on the relative worth or goodness of political arrangements.

The doctrine thus serves the task of clarification and prescription, of appraising and choosing among alternatives. For an example, suppose that I am a member of an association, and I believe that the conditions of procedural democracy exist among us but that my fellow members have not understood why the criteria of procedural democracy ought to apply to our processes of decision-making. My task is clarification: if we believe these things to be true, I would say to them, then we must reasonably adopt the criteria of procedural democracy. Or clarification might go in the other direction. Since you deny the validity of the criteria, I would say, then it must be that you reject one or more of these assumptions as valid among us. Which of the assumptions do you reject, and on what grounds?

Nor need I be a member of an association in order to arrive at judgements and recommendations as to the procedures the association ought to employ. If I judge that the conditions exist, then I must also conclude that the association should be procedurally democratic, whether or not I am a member.

As I have already said, I think that objections to procedural democracy will most often come to rest on a denial of the condition of equal qualification. This is why I have dealt at such length with that assumption. Sooner or later, to advocate procedural democracy requires a direct confrontation with its main alternative, which historically, today, and doubtless far into the future, is the doctrine of meritocracy. This enduring rival to democratic ideas is the view that adults in general are not qualified to govern, that the task of governing ought properly to be lodged with a meritorious minority, an elite possessing superior knowledge and virtue.

Many defences of democracy imply that democracy is always better than meritocracy. Yet even the most committed adherents of democracy have usually shrunk from insisting that every kind of human association must always follow democratic procedures.

In setting out the doctrine of procedural democracy I have not assumed that the condition of equal qualification always holds. Yet I would have to believe the doctrine irrelevant if I did not believe that the condition exists in at least some important associations.

Whether or not the state is the most important of all human associations, it is surely highly crucial. It is crucial because of its extraordinary influence, power, and authority, and thus the capacity of those who govern the state to control the resources, structures, agendas, and decisions of all other associations within the boundaries of the state. A people that alienates its final control over the agenda and decisions of the government of the state runs a very high risk of alienating its final control over other important associations as well.

I have not tried to show here what kinds of institutional arrangements procedural democracy would require for governing the state. Partly, though not wholly, in response to democratic ideas, a set of institutions for the government of the state has evolved during the last two centuries. The common features of these institutions have been called polyarchy. The institutions of polyarchy provide a much better approximation to procedural democracy among a numerous people, I believe, than the more exclusionary and authoritarian systems they replaced or serve as existing alternatives to polyarchy in the present world. Yet it seems clear to me that the institutions of polyarchy are not sufficient for a close approximation to procedural democracy.

However, I refrain here from arguing whether they are necessary, or how polyarchies might be further democratized, or whether radically different kinds of political institutions could provide a closer fit to procedural democracy.

A people that adhered to the doctrine of procedural democracy in the government of the state would also want to employ that doctrine in determining how other associations ought to be governed. For reasons I have already indicated, the doctrine bars a universalistic and *a priori* judgement that procedural democracy is best for all associations. But every system for governing any association ought to be tested against the doctrine, to determine whether the conditions are present; and, if they are, the relative merits of existing and alternative arrangements for satisfying the criteria.

As with the state, the question of what government is best for other associations will turn most frequently on a contestable and contingent judgement as to the relative competence of the members to govern. If, as I believe, a wise and humane people that sought to govern the state according to the criteria of procedural democracy would

also employ the principles of equal consideration and burden of proof in making judgements about the relative qualifications of members to govern other associations, then it appears to me that many hierarchic or meritocratic arrangements would have to give way to procedural democracy.

Notes

1 Hereafter, in the case of an association not yet formed, member means putative member.

2 Hereafter expressions like 'acting' are meant to include not acting in certain ways.

3 In this respect the criterion comes closer to meeting Rousseau's restrictions in the *Social Contract* than might first appear. Rousseau would allow a sovereign people to grant executive power to (1) itself or a majority ('democracy'), (2) a minority ('aristocracy'), or (3) a single person ('monarchy'). What the people may not do is alienate its sovereignty, the power to make laws. Although 'democracy' in sense (1) is impractical, all three forms of delegating executive power are equally legitimate because, and as long as, the people does not alienate any of its sovereignty. Cf. particularly Book 2, chapters 1 and 6, and Book 3, chapter 6.

4 The whole discussion occurs in less than three pages (243–5) in Joseph A. Schumpeter, *Capitalism, Socialism, and Democracy* (New York: Harper and Bros., 1942, 1947).

5 I do not mean to suggest that Locke and Rousseau (or later writers) presented similar views on democracy, for they were of course very different. Thus Locke permitted the delegation and even the indefinite alienation by the demos of the power to make laws. (*Second Treatise*, ch. X and ch. XIX, par. 243.) Rousseau, as we saw above, did not. However, because their differences are not directly relevant to the argument of this section, I ignore them here.

6 The phrases are from Locke's *Second Treatise of Government*, chapter VIII, 'Of the Beginning of Political Societies', par. 95–7, and *passim*, in John Locke, *Two Treatises of Government*, ed. by Peter Laslett, 2nd edn. (Cambridge: Cambridge University Press, 1967).

7 For example, in Book I, chapters 4 and 6.

8 In Venice, the number of noblemen, who alone had rights to participate in the government, were from one to two per cent of the population of the city, and, if the mainland population is included, around one tenth of one per cent. In 1797, there were 1,090 noblemen, 137,000 residents of the city, and 2.2 million people on the mainland. The number of noblemen was never larger than about 2,000. James C. Davis, *The Decline of the Venetian Nobility as a Ruling Class* (Baltimore: The Johns Hopkins Press, 1962), Table 1, p. 58.

In Geneva the percentage, though not as tiny, was small. Of the five orders subject to the laws, only males in the top two orders participated in making laws: 'at the top, the "citizens", who had the legal right to hold office, and of whom Rousseau was one; next, the "burghers", who had the right to vote but not to hold office.' Together, the citizens and burghers were 'some 1,500 in number' in a population of 25,000. Moreover, the top offices were monopolized by a few families. R.R. Palmer, *The Age of the Democratic Revolution: A Political History of Europe and America, 1760–1800* (Princeton: Princeton University Press, 1959), p. 36. Palmer remarks that 'Rousseau himself, in all the study he made of Geneva politics at Neuchatel, showed no interest in the Natives. The Natives, however, (were) three-quarters of the population who were not Burghers' (p. 137).

9 For example, *Second Treatise*, ch. VIII, §93.

10 See his discussion on the status of women in 'conjugal society', ch. VIII, §§78–84. '… it seems highly improbable that Locke was thinking in terms of extending those rights to women.' Willmoore Kendall, *John Locke and the Doctrine of Majority Rule* (Urbana: University of Illinois Press, 1941, p. 121, fn. vi.).

11 Ch. VI, §60.

12 Ch. VII, §85.

13 For example, *Considerations on Representative Government*, 3rd edn. (1865), ed. by Currin V. Shields (New York: The Liberal Arts Press, 1958), pp. 42, 55, 131. A much fuller exposition of Mill's ideas about the conflict between 'the principle of participation' and 'the principle of competence', which draws on a wide variety of Mill's work, is Dennis F. Thompson, *John Stuart Mill and Representative Government* (Princeton: Princeton University Press, 1976).

14 Ibid., pp. 131–8.

15 For examples, see Peter Bachrach's comments on 'classical democratic theory' and its contrasts with 'elitist theory' in *The Theory of Democratic Elitism* (Boston: Little, Brown, 1967), pp. 2–9. And Carole Pateman, *Participation and Democratic Theory* (Cambridge: Cambridge University Press, 1970), who presents Rousseau and John Stuart Mill as 'two examples of "classical" democratic theorists, whose theories provide us with the basic postulates of a theory of participatory democracy' (p. 21).

16 M. I. Finley, *Democracy, Ancient and Modern* (New Brunswick: Rutgers University Press, 1973). The remark is made in the context of slavery; he does not mention that the exclusion of women and resident foreigners made the demos an even more restrictive 'minority elite'. All the conjectures about the relative size of the citizen body and the level of their participation in public affairs look very fragile to me. I have taken the estimates above from A.H.M. Jones, *Athenian Democracy* (Oxford: Basil Blackwell, 1969), pp. 78–9. As to actual participation, scholarly guess work looks even shakier. Though sympathetic to the Athenian democracy, Jones concludes that 'contrary to general belief, the average assembly was attended mainly by the

relatively well-to-do citizens …' (ibid., p. 36; see also pp. 50, 55, and the discussion 104–7). However, unlike the Assembly and the Council, the magistracies chosen by lot 'were filled by quite humble citizens' (p. 104). I cannot help suspecting that an Athenian Survey Research Centre would have turned up a good deal of evidence of citizen apathy and non-participation.

17 *The Second Treatise*, op. cit., par. 55 and 63 (pp. 28, 31). In the *Social Contract*, Rousseau also recognizes, though merely in passing, the authority of the father over children 'before they reach the age of reason'; op. cit., p. 239.

18 Douglas Rae has commented that children may be thought of as having a life-time bundle of rights, some of which they become eligible for as they mature. Locke seems to make a similar point in the paragraphs cited above. By contrast, for excluded adults 'the bonds of … subjection' never 'quite drop off, and leave a man at his own free disposal'.

19 *Second Treatise*, par. 60, op. cit., p. 30.

20 Suppose I were able to demonstrate that I had carefully studied the issues, parties, candidates, and the like. My exclusion would seem rather less justified. Still, a French citizen might say, 'you will hardly be in France long enough to justify your inclusion. Your coming here is voluntary; you acknowledge by coming your willingness to obey our laws; you will have left the country before the election will effect any changes in existing laws; consequently you will not bear any responsibility for your choices. Therefore you are, in that respect, *morally* unqualified to participate in this election.' This seems to me a powerful rebuttal to my claim. However, the force of the objection derives mainly from the fact that I may not be subject to the laws my participation might have helped to bring about. To this extent, I am not a member in the sense defined earlier, and consequently I *ought* to be excluded under the assumption (no. 3) that binding decisions should be made only by members.

21 This assumption is, I think, roughly equivalent to, though not necessarily identical with, a widespread if contestable judgement that forms a fundamental ground for a good deal of moral theory. For instance, Hugo Adam Bedau specifies a not dissimilar notion that he calls 'the doctrine of metaphysical egalitarianism' in J. Roland Pennock and John W. Chapman, *Equality* (New York: Atherton Press, 1976), p. 17. Stanley I. Benn asserts the 'principle of equal consideration of interests' (ibid., p. 67). It is probably at least a second cousin to Rawls's assumption of human equality based on the capacity for moral personality (op. cit., p. 506).

22 Brian Barry, *Political Argument* (London: Routledge & Kegan Paul, 1965), pp. 38–9 and 173 ff.

23 The principle is analogous to, though not identical with, the first of the two principles that according to Mill are, 'of as universal truth and applicability as any general propositions which can be laid down respecting human affairs. The first is that the rights and interests of every and any person are only secure from being disregarded when the person interested is himself able, and habitually disposed, to stand up for them … Human beings are only secure from evil at the hands of others in proportion as they have the power of being, and are, *self-protecting* …' (op. cit., p. 43).

24 Mill, op. cit., pp. 44–5.

12

Deliberation and Democratic Legitimacy

Joshua Cohen

In this essay I explore the ideal of a 'deliberative democracy'.[1] By a deliberative democracy I shall mean, roughly, an association whose affairs are governed by the public deliberation of its members. I propose an account of the value of such an association that treats democracy itself as a fundamental political ideal and not simply as a derivative ideal that can be explained in terms of the values of fairness or equality of respect.

The essay is in three sections. In section I, I focus on Rawls's discussion of democracy and use that discussion both to introduce certain features of a deliberative democracy, and to raise some doubts about whether their importance is naturally explained in terms of the notion of a fair system of social cooperation. In section II, I develop an account of deliberative democracy in terms of the notion of an *ideal deliberative procedure*. The characterization of that procedure provides an abstract model of deliberation which links the intuitive ideal of democratic association to a more substantive view of deliberative democracy. Three features of the ideal deliberative procedure figure prominently in the essay. First, it helps to account for some familiar judgements about collective decision-making, in particular about the ways that collective decision-making ought to be different from bargaining, contracting and other market-type interactions, both in its explicit attention to considerations of the common advantage and in the ways that attention helps to form the aims of the participants. Second, it accounts for the common view that the notion of democratic association is tied to notions of autonomy and the common good. Third, the ideal deliberative procedure provides a distinctive structure for addressing institutional questions. And in section III of the paper I rely on that distinctive structure in responding to four objections to the account of deliberative democracy.

I

The ideal of deliberative democracy is a familiar ideal. Aspects of it have been highlighted in recent discussion of the role of republican conceptions of self-government in shaping the American constitutional tradition and contemporary public law.[2] It is represented as well in radical democratic and socialist criticisms of the politics of advanced industrial societies.[3] And some of its central features are highlighted in Rawls's account of democratic politics in a just society, particularly in those parts of his account that seek to incorporate the 'liberty of the ancients' and to respond to radical democrats and socialists who argue that 'the basic liberties may prove to

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be merely formal'. In the discussion that follows I shall first say something about Rawls's remarks on three such features, and then consider his explanation of them.[4]

First, in a well-ordered democracy, political debate is organized around alternative conceptions of the public good. So an ideal pluralist scheme, in which democratic politics consists of fair bargaining among groups each of which pursues its particular or sectional interest, is unsuited to a just society (Rawls 1971, pp. 360–1).[5] Citizens and parties operating in the political arena ought not to 'take a narrow or group-interested standpoint' (p. 360). And parties should only be responsive to demands that are 'argued for openly by reference to a conception of the public good' (pp. 226, 472). Public explanations and justifications of laws and policies are to be cast in terms of conceptions of the common good (conceptions that, on Rawls's view, must be consistent with the two principles of justice), and public deliberation should aim to work out the details of such conceptions and to apply them to particular issues of public policy (p. 362).

Second, the ideal of democratic order has egalitarian implications that must be satisfied in ways that are manifest to citizens. The reason is that in a just society political opportunities and powers must be independent of economic or social position – the political liberties must have a fair value[6] – and the fact that they are independent must be more or less evident to citizens. Ensuring this manifestly fair value might, for example, require public funding of political parties and restrictions on private political spending, as well as progressive tax measures that serve to limit inequalities of wealth and to ensure that the political agenda is not controlled by the interests of economically and socially dominant groups (Rawls 1971, pp. 225–6, 277–8; 1982, pp. 42–3). In principle, these distributional requirements might be more stringently egalitarian than those fixed by the difference principle (1982, p. 43).[7] This is so in part because the main point of these measures is not simply to ensure that democratic politics proceeds under fair conditions, nor only to encourage just legislation, but also to ensure that the equality of citizens is manifest and to declare a commitment to that equality 'as the public intention' (1971, p. 233).

Third, democratic politics should be ordered in ways that provide a basis for self-respect, that encourage the development of a sense of political competence, and that contribute to the formation of a sense of justice;[8] it should fix 'the foundations for civic friendship and [shape] the ethos of political culture' (Rawls 1971, p. 234). Thus the importance of democratic order is not confined to its role in obstructing the class legislation that can be expected from systems in which groups are effectively excluded from the channels of political representation and bargaining. In addition, democratic politics should also shape the ways in which the members of the society understand themselves and their own legitimate interests.

When properly conducted, then, democratic politics involves *public deliberation focused on the common good*, requires some form of *manifest equality* among citizens, and *shapes the identity and interests* of citizens in ways that contribute to the formation of a public conception of common good. How does the ideal of a fair system of social co-operation provide a way to account for the attractiveness and importance of these three features of the deliberative democratic ideal? Rawls suggests a formal and an informal line of argument. The formal argument is that parties in the original position would choose the principle of participation[9] with the proviso that the political liberties have their fair value. The three conditions are important because they must be satisfied if constitutional arrangements are to ensure participation rights, guarantee a fair value to those rights, and plausibly produce legislation that encourages a fair distribution according to the difference principle.

Rawls also suggests an informal argument for the ordering of political institutions, and I shall focus on this informal argument here:

> Justice as fairness begins with the idea that where common principles are necessary and to everyone's advantage, they are to be worked out from the viewpoint of a suitably defined initial situation of equality in which each person is fairly represented. The principle of participation transfers this notion from the original position to the constitution … [thus] preserv[ing] the equal representation of the original position to the degree that this is feasible. (Rawls 1971, pp. 221–2)[10]

Or, as he puts it elsewhere: 'The idea [of the fair value of political liberty] is to incorporate into the basic structure of society an effective political procedure which *mirrors* in that structure the fair representation of persons achieved by the original position' (1982, p. 45; emphasis added). The suggestion is that, since we accept the intuitive ideal of a fair system of co-operation, we should want our political institutions themselves to conform, in so far as it is feasible, to the requirement that terms of association be worked out under fair conditions. And so we arrive directly at the requirement of equal liberties with fair value, rather than arriving at it indirectly, through a hypothetical choice of that requirement under fair conditions.

In this informal argument, the original position serves as an *abstract model* of what fair conditions are, and of what we should strive to mirror in our political institutions, rather than as an initial-choice situation in which regulative principles for those institutions are selected.

I think that Rawls is right in wanting to accommodate the three conditions. What I find less plausible is that the three conditions are natural consequences of the ideal of fairness. Taking the notion of fairness as fundamental, and aiming (as in the informal argument) to model political arrangements on the original position, it is not clear why, for example, political debate ought to be focused on the common good, or why the manifest equality of citizens is an important feature of a democratic association. The pluralist conception of democratic politics as a system of bargaining with fair representation for all groups seems an equally good mirror of the ideal of fairness.

The response to this objection is clear enough: the connection between the ideal of fairness and the three features of democratic politics depends on psychological and sociological assumptions. Those features do not follow directly from the ideal of a fair system of co-operation, or from that ideal as it is modelled in the original position. Rather, we arrive at them when we consider what is required to preserve fair arrangements and to achieve fair outcomes. For example, public political debate should be conducted in terms of considerations of the common good because we cannot expect outcomes that advance the common good unless people are looking for them. Even an ideal pluralist scheme, with equal bargaining power and no barriers to entry, cannot reasonably be expected to advance the common good as defined by the difference principle (1971, p. 360).

But this is, I think, too indirect and instrumental an argument for the three conditions. Like utilitarian defences of liberty, it rests on a series of highly speculative sociological and psychological judgements. I want to suggest that the reason why the three are attractive is not that an order with, for example, no explicit deliberation about the common good and no manifest equality would be unfair (though of course it might be). Instead it is that they comprise elements of an independent and expressly political ideal that is focused in the first instance[11] on the appropriate conduct of public affairs – on, that is, the appropriate ways of arriving at collective decisions. And to understand that ideal we ought not to proceed by seeking to 'mirror' ideal fairness in the fairness of political arrangements, but instead to proceed by seeking to mirror a system of ideal deliberation in social and political institutions. I want now to turn to this alternative.

II[12]

The notion of a deliberative democracy is rooted in the intuitive ideal of a democratic association in which the justification of the terms and conditions of association proceeds through public argument and reasoning among equal citizens. Citizens in such an order share a commitment to the resolution of problems of collective choice through public reasoning, and regard their basic institutions as legitimate in so far as they establish the framework for free public deliberation. To elaborate this ideal, I begin with a more explicit account of the ideal itself, presenting what I shall call the 'formal conception' of deliberative democracy. Proceeding from this formal conception, I pursue a more substantive account of deliberative democracy by presenting an account of an *ideal deliberative procedure* that captures the notion of justification through public argument and reasoning among equal citizens, and serves in turn as a model for deliberative institutions.

The formal conception of a deliberative democracy has five main features:

D1. A deliberative democracy is an ongoing and independent association, whose members expect it to continue into the indefinite future.

D2. The members of the association share (and it is common knowledge that they share) the view that the appropriate terms of association provide a framework for or are the results of their deliberation. They share, that is, a commitment to co-ordinating their activities within institutions that make deliberation possible and according to norms that they arrive at through their deliberation. For them, free deliberation among equals is the basis of legitimacy.

D3. A deliberative democracy is a pluralistic association. The members have diverse preferences, convictions and ideals concerning the conduct of their own lives. While sharing a commitment to the deliberative resolution of problems of collective choice (D2), they also have divergent aims, and do not think that some particular set of preferences, convictions or ideals is mandatory.

D4. Because the members of a democratic association regard deliberative procedures as the source of *legitimacy*, it is important to them that the terms of their association not merely *be* the results of their deliberation, but also be *manifest* to them as such.[13] They prefer institutions in which the

connections between deliberation and outcomes are evident to ones in which the connections are less clear.

D5. The members recognize one another as having deliberative capacities, i.e. the capacities required for entering into a public exchange of reasons and for acting on the result of such public reasoning.

A theory of deliberative democracy aims to give substance to this formal ideal by characterizing the conditions that should obtain if the social order is to be manifestly regulated by deliberative forms of collective choice. I propose to sketch a view of this sort by considering an ideal scheme of deliberation, which I shall call the 'ideal deliberative procedure'. The aim in sketching this procedure is to give an explicit statement of the conditions for deliberative decision-making that are suited to the formal conception, and thereby to highlight the properties that democratic institutions should embody, so far as possible. I should emphasize that the ideal deliberative procedure is meant to provide a model for institutions to mirror – in the first instance for the institutions in which collective choices are made and social outcomes publicly justified – and not to characterize an initial situation in which the terms of association themselves are chosen.[14]

Turning then to the ideal procedure, there are three general aspects of deliberation. There is a need to decide on an agenda, to propose alternative solutions to the problems on the agenda, supporting those solutions with reasons, and to conclude by settling on an alternative. A democratic conception can be represented in terms of the requirements that it sets on such a procedure. In particular, outcomes are democratically legitimate if and only if they could be the object of a free and reasoned agreement among equals. The ideal deliberative procedure is a procedure that captures this principle.[15]

I1. Ideal deliberation is *free* in that it satisfies two conditions. First, the participants regard themselves as bound only by the results of their deliberation and by the preconditions for that deliberation. Their consideration of proposals is not constrained by the authority of prior norms or requirements. Second, the participants suppose that they can act from the results, taking the fact that a certain decision is arrived at through their deliberation as a sufficient reason for complying with it.

I2. Deliberation is *reasoned* in that the parties to it are required to state their reasons for advancing proposals, supporting them or criticizing them. They give reasons with the expectation that those reasons (and not, for example, their power) will settle the fate of their proposal. In ideal deliberation, as Habermas puts it, 'no force except that of the better argument is exercised' (1975, p. 108). Reasons are offered with the aim of bringing others to accept the proposal, given their disparate ends (D3) and their commitment (D2) to settling the conditions of their association through free deliberation among equals. Proposals may be rejected because they are not defended with acceptable reasons, even if they could be so defended. The deliberative conception emphasizes that collective choices should be *made in a deliberative way*, and not only that those choices should have a desirable fit with the preferences of citizens.

I3. In ideal deliberation parties are both formally and substantively *equal*. They are formally equal in that the rules regulating the procedure do not single out individuals. Everyone with the deliberative capacities has equal standing at each stage of the deliberative process. Each can put issues on the agenda, propose solutions, and offer reasons in support of or in criticism of proposals. And each has an equal voice in the decision. The participants are substantively equal in that the existing distribution of power and resources does not shape their chances to contribute to deliberation, nor does that distribution play an authoritative role in their deliberation. The participants in the deliberative procedure do not regard themselves as bound by the existing system of rights, except in so far as that system establishes the framework of free deliberation among equals. Instead they regard that system as a potential object of their deliberative judgement.

I4. Finally, ideal deliberation aims to arrive at a rationally motivated *consensus* – to find reasons that are persuasive to all who are committed to acting on the results of a free and reasoned assessment of alternatives by equals. Even under ideal conditions there is no promise that consensual reasons will be forthcoming. If they are not, then deliberation concludes with voting, subject to some form of majority rule.[16] The fact that it may so conclude does not, however, eliminate the distinction between deliberative forms of collective choice and forms that aggregate non-deliberative preferences. The institutional consequences are likely to

> be different in the two cases, and the results of voting among those who are committed to finding reasons that are persuasive to all are likely to differ from the results of an aggregation that proceeds in the absence of this commitment.

Drawing on this characterization of ideal deliberation, can we say anything more substantive about a deliberative democracy? What are the implications of a commitment to deliberative decisions for the terms of social association? In the remarks that follow I shall indicate the ways that this commitment carries with it a commitment to advance the common good and to respect individual autonomy.

Common Good and Autonomy

Consider first the notion of the common good. Since the aim of ideal deliberation is to secure agreement among all who are committed to free deliberation among equals, and the condition of pluralism obtains (D3), the focus of deliberation is on ways of advancing the aims of each party to it. While no one is indifferent to his/her own good, everyone also seeks to arrive at decisions that are acceptable to all who share the commitment to deliberation (D2). (As we shall see just below, taking that commitment seriously is likely to require a willingness to revise one's understanding of one's own preferences and convictions.) Thus the characterization of an ideal deliberative procedure links the formal notion of deliberative democracy with the more substantive ideal of a democratic association in which public debate is focused on the common good of the members.

Of course, talk about the common good is one thing; sincere efforts to advance it are another. While public deliberation may be organized around appeals to the common good, is there any reason to think that even ideal deliberation would not consist in efforts to disguise personal or class advantage as the common advantage? There are two responses to this question. The first is that in my account of the formal idea of a deliberative democracy, I stipulated (D2) that the members of the association are committed to resolving their differences through deliberation, and thus to providing reasons that they sincerely expect to be persuasive to others who share that commitment. In short, this stipulation rules out the problem. Presumably, however, the objection is best understood as directed against the plausibility of realizing a deliberative procedure that conforms to the ideal, and thus is not answerable through stipulation.

The second response, then, rests on a claim about the effects of deliberation on the motivations of deliberators.[17] A consequence of the reasonableness of the deliberative procedure (I2) together with the condition of pluralism (D3) is that the mere fact of having a preference, conviction or ideal does not by itself provide a reason in support of a proposal. While I may take my preferences as a sufficient reason for advancing a proposal, deliberation under conditions of pluralism requires that I find reasons that make the proposal acceptable to others who cannot be expected to regard my preferences as sufficient reasons for agreeing. The motivational thesis is that the need to advance reasons that persuade others will help to shape the motivations that people bring to the deliberative procedure in two ways. First, the practice of presenting reasons will contribute to the formation of a commitment to the deliberative resolution of political questions (D2). Given that commitment, the likelihood of a sincere representation of preferences and convictions should increase, while the likelihood of their strategic misrepresentation declines. Second, it will shape the content of preferences and convictions as well. Assuming a commitment to deliberative justification, the discovery that I can offer no persuasive reasons on behalf of a proposal of mine may transform the preferences that motivate the proposal. Aims that I recognize to be inconsistent with the requirements of deliberative agreement may tend to lose their force, at least when I expect others to be proceeding in reasonable ways and expect the outcome of deliberation to regulate subsequent action.

Consider, for example, the desire to be wealthier come what may. I cannot appeal to this desire itself in defending policies. The motivational claim is the need to find an independent justification that does not appeal to this desire and will tend to shape it into, for example, a desire to have a level of wealth that is consistent with a level that others (i.e. equal citizens) find acceptable. I am of course assuming that the deliberation is known to be regulative, and that the wealth cannot be protected through wholly non-deliberative means.

Deliberation, then, focuses debate on the common good. And the relevant conceptions of the common good are not comprised simply of interests and preferences that are antecedent to deliberation. Instead, the interests, aims and ideals that comprise the common good are those that survive deliberation, interests that, on public reflection, we think it legitimate to appeal to in making claims on social resources. Thus the first and third of the features of deliberative democracy that I mentioned in

the discussion of Rawls (p. 160 above) comprise central elements in the deliberative conception.

The ideal deliberative scheme also indicates the importance of autonomy in a deliberative democracy. In particular, it is responsive to two main threats to autonomy. As a general matter, actions fail to be autonomous if the preferences on which an agent acts are, roughly; given by the circumstances, and not determined by the agent. There are two paradigm cases of 'external' determination. The first is what Elster (1982) has called 'adaptive preferences'.[18] These are preferences that shift with changes in the circumstances of the agent without any deliberate contribution by the agent to that shift. This is true, for example, of the political preferences of instinctive centrists who move to the median position in the political distribution, wherever it happens to be. The second I shall call 'accommodationist preferences'. While they are deliberately formed, accommodationist preferences represent psychological adjustments to conditions of subordination in which individuals are not recognized as having the capacity for self-government. Consider Stoic slaves, who deliberately shape their desires to match their powers, with a view to minimizing frustration. Since the existing relations of power make slavery the only possibility, they cultivate desires to be slaves, and then act on those desires. While their motives are deliberately formed, and they act on their desires, the Stoic slaves do not act autonomously when they seek to be good slaves. The absence of alternatives and consequent denial of scope for the deliberative capacities that defines the condition of slaves supports the conclusion that their desires result from their circumstances, even though those circumstances shape the desires of the Stoic slaves through their deliberation.

There are then at least two dimensions of autonomy. The phenomenon of adaptive preferences underlines the importance of conditions that permit and encourage the deliberative formation of preferences; the phenomenon of accommodationist preferences indicates the need for favourable conditions for the exercise of the deliberative capacities. Both concerns are met when institutions for collective decision-making are modelled on the ideal deliberative procedure. Relations of power and subordination are neutralized (I1, I3, I4), and each is recognized as having the deliberative capacities (D5), thus addressing the problem of accommodationist preferences. Further, the requirement of reasonableness discourages adaptive preferences (I2). While preferences are 'formed' by the deliberative procedure, this type of preference formation is consistent with autonomy since preferences that are shaped by public deliberation are not simply given by external circumstances. Instead they are the result of 'the power of reason as applied through public discussion'.[19]

Beginning, then, from the formal ideal of a deliberative democracy, we arrive at the more substantive ideal of an association that is regulated by deliberation aimed at the common good and that respects the autonomy of the members. And so, in seeking to embody the ideal deliberative procedure in institutions, we seek, *inter alia*, to design institutions that focus political debate on the common good, that shape the identity and interests of citizens in ways that contribute to an attachment to the common good, and that provide the favourable conditions for the exercise of deliberative powers that are required for autonomy.

III

I want now to shift the focus. While I shall continue to pursue the relationship between the ideal deliberative procedure and more substantive issues about deliberative democratic association, I want to do so by considering four natural objections to the conception I have been discussing, objections to that conception for being sectarian, incoherent, unjust and irrelevant. My aim is not to provide a detailed response to the objections, but to clarify the conception of deliberative democracy by sketching the lines along which a response should proceed. Before turning to the objections, I enter two remarks about what follows.

First, as I indicated earlier, a central aim in the deliberative conception is to specify the institutional preconditions for deliberative decision-making. The role of the ideal deliberative procedure is to provide an abstract characterization of the important properties of deliberative institutions. The role of the ideal deliberative procedure is thus different from the role of an ideal social contract. The ideal deliberative procedure provides a model for institutions, a model that they should mirror, so far as possible. It is not a choice situation in which institutional principles are selected. The key point about the institutional reflection is that it should *make deliberation possible*. Institutions in a deliberative democracy do not serve simply to implement the results of deliberation, as though free deliberation could proceed in the absence of appropriate institutions. Neither the commitment to nor the capacity for arriving at deliberative decisions is something that we can simply assume to obtain

independent from the proper ordering of institutions. The institutions themselves must provide the framework for the formation of the will; they determine whether there is equality, whether deliberation is free and reasoned, whether there is autonomy, and so on.

Second, I shall be focusing here on some requirements on 'public' institutions that reflect the ideal of deliberative resolution. But there is of course no reason to expect as a general matter that the preconditions for deliberation will respect familiar institutional boundaries between 'private' and 'public' and will all pertain to the public arena. For example, inequalities of wealth, or the absence of institutional measures designed to redress the consequences of those inequalities, can serve to undermine the equality required in deliberative arenas themselves. And so a more complete treatment would need to address a wider range of institutional issues (see Cohen and Rogers 1983, chs. 3, 6; Cohen 1988).

Sectarianism

The first objection is that the ideal of deliberative democracy is objectionably sectarian because it depends on a particular view of the good life – an ideal of active citizenship. What makes it sectarian is not the specific ideal on which it depends, but the (alleged) fact that it depends on some specific conception at all. I do not think that the conception of deliberative democracy suffers from the alleged difficulty. In explaining why not, I shall put to the side current controversy about the thesis that sectarianism is avoidable and objectionable, and assume that it is both.[20]

Views of the good figure in political conceptions in at least two ways. First, the *justification* of some conceptions appeals to a notion of the human good. Aristotelian views, for example, endorse the claim that the exercise of the deliberative capacities is a fundamental component of a good human life, and conclude that a political association ought to be organized to encourage the realization of those capacities by its members. A second way in which conceptions of the good enter is that the *stability* of a society may require widespread allegiance to a specific conception of the good, even though its institutions can be justified without appeal to that conception. For example, a social order that can be justified without reference to ideals of national allegiance may none the less require widespread endorsement of the ideal of patriotic devotion for its stability.

A political conception is objectionably sectarian only if its *justification* depends on a particular view of the human good, and not simply because its stability is contingent on widespread agreement on the value of certain activities and aspirations. For this reason the democratic conception is not sectarian. It is organized around a view of political justification – that justification proceeds through free deliberation among equal citizens – and not a conception of the proper conduct of life. So, while it is plausible that the stability of a deliberative democracy depends on encouraging the ideal of active citizenship, this dependence does not suffice to show that it is objectionably sectarian.

Incoherence

Consider next the putative incoherence of the ideal. We find this charge in an important tradition of argument, including Schumpeter's *Capitalism, Socialism, and Democracy* and, more recently, William Riker's work on social choice and democracy. I want here to say a word about the latter, focusing on just one reason that Riker gives for thinking that the ideal of popular self-government is incoherent.[21]

Institutionalizing a deliberative procedure requires a decision rule short of consensus – for example, majority rule. But majority rule is globally unstable: as a general matter, there exists a majority-rule path leading from any element in the set of alternatives to any other element in the set. The majority, standing in for the people, wills everything and therefore wills nothing. Of course, while anything can be the result of majority decision, it is not true that everything will be the result. But, because majority rule is so unstable, the actual decision of the majority will not be determined by preferences themselves, since they do not constrain the outcome. Instead decisions will reflect the particular institutional constraints under which they are made. But these constraints are 'exogenous to the world of tastes and values' (Riker 1982, p. 190). So the ideal of popular self-government is incoherent because we are, so to speak, governed by the institutions, and not by ourselves.

I want to suggest one difficulty with this argument that highlights the structure of the deliberative conception. According to the argument I just sketched, outcomes in majority-rule institutions reflect 'exogenous' institutional constraints, and not underlying preferences. This suggests that we can identify the preferences and convictions that are relevant to collective choices apart from the institutions through which they are formed and expressed. But that is just what the deliberative conception denies. On this conception, the relevant

preferences and convictions are those that could be expressed in free deliberation, and not those that are prior to it. For this reason, popular self-government *premises* the existence of institutions that provide a framework for deliberation; these arrangements are not 'exogenous constraints' on the aggregation of preferences, but instead help to shape their content and the way that citizens choose to advance them. And, once the deliberative institutions are in place, and preferences, convictions and political actions are shaped by them, it is not clear that instability problems remain so severe as to support the conclusion that self-government is an empty and incoherent ideal.

Injustice

The third problem concerns injustice. I have been treating the ideal of democracy as the basic ideal for a political conception. But it might be argued that the ideal of democracy is not suited to the role of fundamental political ideal because its treatment of basic liberties is manifestly unacceptable. It makes those liberties dependent on judgements of majorities and thus endorses the democratic legitimacy of decisions that restrict the basic liberties of individuals. In responding to this objection I shall focus on the liberty of expression,[22] and shall begin by filling out a version of the objection which I put in the words of an imagined critic.[23]

'You embrace the ideal of a democratic order. The aim of a democratic order is to maximize the *power of the people* to secure its wants. To defend the liberty of expression you will argue that that power is diminished if the people lack the information required for exercising their will. Since expression provides information, you will conclude that abridgements of expression ought to be barred. The problem with your argument is that preventing restrictions on expression also restricts the power of the people, since the citizens may collectively prefer such restrictions. And so it is not at all clear as a general matter that the protection of expression will maximize popular power. So while you will, of course, not want to prevent everyone from speaking all the time, you cannot defend the claim that there is even a presumption in favour of the protection of expression. And this disregard for fundamental liberties is unacceptable.'

This objection has force against some conceptions on which democracy is a fundamental ideal, particularly those in which the value of expression turns exclusively on its role as a source of information about how best to advance popular ends. But it does not have any force against the deliberative conception, since the latter does not make the case for expression turn on its role in maximizing the power of the people to secure its wants. That case rests instead on a conception of collective choice, in particular on a view about how the 'wants' that are relevant to collective choice are formed and defined in the first place. The relevant preferences and convictions are those that arise from or are confirmed through deliberation. And a framework of free expression is required for the reasoned consideration of alternatives that comprises deliberation. The deliberative conception holds that free expression is required for *determining* what advances the common good, because what is good is fixed by public deliberation, and not prior to it. It is fixed by informed and autonomous judgements, involving the exercise of the deliberative capacities. So the ideal of deliberative democracy is not hostile to free expression; it rather presupposes such freedom.

But what about expression with no direct bearing on issues of public policy? Is the conception of deliberative democracy committed to treating all 'non-political expression' as second-class, and as meriting lesser protection? I do not think so. The deliberative conception construes politics as aiming in part at the formation of preferences and convictions, not just at their articulation and aggregation. Because of this emphasis on reasoning about preferences and convictions, and the bearing of expression with no political focus on such reasoning, the deliberative view draws no bright line between political speech and other sorts of expression. Forms of expression that do not address issues of policy may well bear on the formation of the interests, aims, and ideals that citizens bring to public deliberation. For this reason the deliberative conception supports protection for the full range of expression, regardless of the content of that expression.[24] It would violate the core of the ideal of free deliberation among equals to fix preferences and convictions in advance by restricting the content of expression, or by barring access to expression, or by preventing the expression that is essential to having convictions at all. Thus the injustice objection fails because the liberties are not simply among the topics for deliberation; they help to comprise the framework that makes it possible.[25]

Irrelevance

The irrelevance objection is that the notion of public deliberation is irrelevant to modern political conditions.[26] This is the most important objection, but also the one about which it is hardest to say anything at the level

of generality required by the present context. Here again I shall confine myself to one version of the objection, though one that I take to be representative.

The version that I want to consider starts from the assumption that a direct democracy with citizens gathering in legislative assemblies is the only way to institutionalize a deliberative procedure. Premising that, and recognizing that direct democracy is impossible under modern conditions, the objection concludes that we ought to be led to reject the ideal because it is not relevant to our circumstances.

The claim about the impossibility of direct democracy is plainly correct. But I see no merit in the claim that direct democracy is the uniquely suitable way to institutionalize the ideal procedure.[27] In fact, in the absence of a theory about the operations of democratic assemblies – a theory which cannot simply stipulate that ideal conditions obtain – there is no reason to be confident that a direct democracy would subject political questions to deliberative resolution, even if a direct democracy were a genuine institutional possibility.[28] In the absence of a realistic account of the functioning of citizen assemblies, we cannot simply assume that large gatherings with open-ended agendas will yield any deliberation at all, or that they will encourage participants to regard one another as equals in a free deliberative procedure. The appropriate ordering of deliberative institutions depends on issues of political psychology and political behaviour; it is not an immediate consequence of the deliberative ideal. So, far from being the only deliberative scheme, direct democracy may not even be a particularly good arrangement for deliberation. But, once we reject the idea that a direct democracy is the natural or necessary form of expression of the deliberative ideal, the straightforward argument for irrelevance no longer works. In saying how the ideal might be relevant, however, we come up against the problem I mentioned earlier. Lacking a good understanding of the workings of institutions, we are inevitably thrown back on more or less speculative judgements. What follows is some sketchy remarks on one issue that should be taken in this spirit.

At the heart of the institutionalization of the deliberative procedure is the existence of arenas in which citizens can propose issues for the political agenda and participate in debate about those issues. The existence of such arenas is a public good, and ought to be supported with public money. This is not because public support is the only way, or even the most efficient way, of ensuring the provision of such arenas. Instead, public provision expresses the basic commitment of a democratic order to the resolution of political questions through free deliberation among equals. The problem is to figure out how arenas might be organized to encourage such deliberation.

In considering that organization, there are two key points that I want to underscore. The first is that material inequalities are an important source of political inequalities. The second point – which is more speculative – is that deliberative arenas which are organized exclusively on local, sectional or issue-specific lines are unlikely to produce the open-ended deliberation required to institutionalize a deliberative procedure. Since these arenas bring together only a narrow range of interests, deliberation in them can be expected at best to produce coherent sectional interests, but no more comprehensive conception of the common good.

These two considerations together provide support for the view that political parties supported by public funds play an important role in making a deliberative democracy possible.[29] There are two reasons for this, corresponding to the two considerations I have just mentioned. In the first place, an important feature of organizations generally, and parties in particular, is that they provide a means through which individuals and groups who lack the 'natural' advantage of wealth can overcome the political disadvantages that follow on that lack. Thus they can help to overcome the inequalities in deliberative arenas that result from material inequality. Of course, to play this role, political organizations must themselves be freed from the dominance of private resources, and that independence must be manifest. Thus the need for public funding. Here we arrive back at the second point that I mentioned in the discussion of Rawls's view – that measures are needed to ensure manifest equality – though now as a way of displaying a shared commitment to deliberative decisions, and not simply as an expression of the commitment to fairness. Second, because parties are required to address a comprehensive range of political issues, they provide arenas in which debate is not restricted in the ways that it is in local, sectional or issue-specific organizations. They can provide the more open-ended arenas needed to form and articulate the conceptions of the common good that provide the focus of political debate in a deliberative democracy.

There is certainly no guarantee that parties will operate as I have just described. But this is not especially troubling, since there are no guarantees of anything in politics. The question is how we can best approximate the deliberative conception. And it is difficult to see how that is possible in the absence of strong parties,

supported with public resources (though, of course, a wide range of other conditions are required as well).

IV

I have suggested that we take the notion of democratic association as a fundamental political ideal, and have elaborated that ideal by reference to an ideal deliberative procedure and the requirements for institutionalizing such a procedure. I have sketched a few of those requirements here. To show that the democratic ideal can play the role of fundamental organizing ideal, I should need to pursue the account of fundamental liberties and political organization in much greater detail and to address a wide range of other issues as well. Of course, the richer the requirements are for institutionalizing free public deliberation, the larger the range of issues that may need to be removed from the political agenda; that is, the larger the range of issues that form the background framework of public deliberation rather than its subject matter. And, the larger that range, the less there is to deliberate about. Whether that is good news or bad news, it is in any case a suitable place to conclude.

Notes

For joint treatment of the issues that I discuss here, see Cohen and Rogers (1983), ch. 6. The main differences between the treatment of issues here and the treatment in the book lies in the explicit account of the ideal deliberative procedure, the fuller treatment of the notions of autonomy and the common good, and the account of the connection of those notions with the ideal procedure.

1 I originally came across the term 'deliberative democracy' in Sunstein (1985). He cites (n. 26) an article by Bessette, which I have not consulted.

2 For some representative examples, see Sunstein (1984, 1985, 1986), Michelman (1986), Ackerman (1984, 1986).

3 I have in mind, in particular, criticisms which focus on the ways in which material inequalities and weak political parties restrict democracy by constraining public political debate or undermining the equality of the participants in that debate. For discussion of these criticisms, and of their connections with the ideal of democratic order, see Cohen and Rogers (1983), chs. 3, 6; Unger (1987), ch. 5.

4 In the discussion that follows, I draw on Rawls (1971, esp. sections 36, 37, 43, 54; 1982).

5 This rejection is not particularly idiosyncratic. Sunstein, for example, argues (1984, 1985) that ideal pluralism has never been embraced as a political ideal in American public law.

6 Officially, the requirement of fair value is that 'everyone has a fair opportunity to hold public office and to influence the outcome of political decisions' (Rawls 1982, p. 42).

7 Whatever their stringency, these distributional requirements take priority over the difference principle, since the requirement of fair value is part of the principle of liberty; that is, the first principle of justice (Rawls 1982, pp. 41–2).

8 The importance of democratic politics in the account of the acquisition of the sense of justice is underscored in Rawls (1971), pp. 473–4.

9 The principle of participation states that 'all citizens are to have an equal right to take part in, and to determine the outcome of, the constitutional process that establishes the laws with which they are to comply' (Rawls 1971, p. 221).

10 I assume that the principle of participation should be understood here to include the requirement of the fair value of political liberty.

11 The reasons for the phrase 'in the first instance' are clarified below at pp. 162–3.

12 Since writing the first draft of this section of the paper, I have read Elster (1986) and Manin (1987), which both present parallel conceptions. This is especially so with Elster's treatment of the psychology of public deliberation (pp. 112–13). I am indebted to Alan Hamlin for bringing the Elster article to my attention. The overlap is explained by the fact that Elster, Manin and I all draw on Habermas. See Habermas (1975, 1979, 1984). I have also found the discussion of the contractualist account of motivation in Scanlon (1982) very helpful.

13 For philosophical discussions of the importance of manifestness or publicity, see Kant (1983), pp. 135–9; Rawls (1971), p. 133 and section 29; Williams (1985), pp. 101–2, 200.

14 The distinction between the ideal procedure and an initial-choice situation will be important in the later discussion of motivation formation (see the end of Section II) and institutions (see the beginning of Section III).

15 There are of course norms and requirements on individuals that do not have deliberative justification. The conception of deliberative democracy is, in Rawls's term, a 'political conception', and not a comprehensive moral theory. On the distinction between political and comprehensive theories, see Rawls (1987), pp. 1–25.

16 For criticism of the reliance on an assumption of unanimity in deliberative views, see Manin (1987), pp. 359–61.

17 Note the parallel with Elster (1986) indicated in note 12. See also the discussion in Habermas (1975), p. 108, about 'needs that can be communicatively shared', and Habermas (1979), ch. 2.

18 For an interesting discussion of autonomous preferences and political processes, see Sunstein (1986, pp. 1145–58; 1984, pp. 1699–700).

19 Whitney *vs*. California, 274 US 357 (1927).

20 For contrasting views on sectarianism, see Rawls (1987); Dworkin (1985), pt 3; MacIntyre (1981); Sandel (1982).

21 See Riker (1982); for discussion of Riker's view see Coleman and Ferejohn (1986); Cohen (1986b).

22 For discussion of the connection between ideals of democracy and freedom of expression, see Meiklejohn (1948), Tribe (1978; 1985, ch. 2) and Ely (1980, pp. 93–4, 105–16). Freedom of expression is a special case that can perhaps be more straightforwardly accommodated by the democratic conception than liberties of conscience, or the liberties associated with privacy and personhood. I do think, however, that these other liberties can be given satisfactory treatment by the democratic conception, and would reject it if I did not think so. The general idea would be to argue that other fundamental liberties must be protected if citizens are to be able to engage in and have equal standing in political deliberation without fear that such engagement puts them at risk for their convictions or personal choices. Whether this line of argument will work out on the details is a matter for treatment elsewhere.

23 This objection is suggested in Dworkin (1985), pp. 61–3. He cites the following passage from a letter of Madison's: 'And a people who mean to be their own Governors, must arm themselves with *the power which knowledge gives*' (emphasis added).

24 On the distinction between content-based and content-neutral abridgements, the complexities of drawing the distinction in particular cases, and the special reasons for hostility to content-based abridgements, see Tribe (1978), pp. 584–682; Stone (1987), pp. 46–118.

25 I am not suggesting that the deliberative view provides the only sound justification for the liberty of expression. My concern here is rather to show that the deliberative view is capable of accommodating it.

26 For an especially sharp statement of the irrelevance objection, see Schmitt (1985).

27 This view is sometimes associated with Rousseau, who is said to have conflated the notion of democratic legitimacy with the institutional expression of that ideal in a direct democracy. For criticism of this interpretation, see Cohen (1986a).

28 Madison urges this point in the *Federalist Papers*. Objecting to a proposal advanced by Jefferson which would have regularly referred constitutional questions 'to the decision of the whole of society', Madison argues that this would increase 'the danger of disturbing the public tranquillity by interesting too strongly the public passions'. And 'it is the reason, alone, of the public that ought to control and regulate the government … [while] the passions ought to be controlled and regulated by the government'. I endorse the form of the objection, not its content (*Federalist Papers* 1961, pp. 315–17).

29 Here I draw on Cohen and Rogers (1983), pp. 154–7. The idea that parties are required to organize political choice and to provide a focus for public deliberation is one strand of arguments about 'responsible parties' in American political-science literature. My understanding of this view has been greatly aided by Perlman (1987), and, more generally, by the work of my colleague Walter Dean Burnham on the implications of party decline for democratic politics. See, for example, Burnham (1982).

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13

Dealing with Difference: A Politics of Ideas or a Politics of Presence?

Anne Phillips

In the post-communist world of the 1980s and 1990s, liberalism and liberal democracy have achieved an impressive ascendancy, and can more plausibly present themselves as the only legitimate bases for equality, justice or democracy. Critics, of course, remain, but the grounds of complaint have shifted considerably. For many years, the central arguments against liberalism fell into three broad categories: that the liberal emphasis on individual freedoms and rights reflected a self-protective and competitive egotism that refused any wider community; that the liberal focus on "merely" political equalities ignored or even encouraged gross inequalities in social and economic life; and that the liberal consolidation of representative democracy reduced the importance of more active citizen participation. None of these complaints has disappeared, but each has been reformulated in terms of diversity and difference. Feminist theorists, in particular, have identified liberalism with an abstract individualism that ignores its own gendered content, and many have criticized the homogenizing ideals of equality that require us to be or become the same.[1] Accusations of gender-blindness and race- or ethnicity-blindness have added weight to older complaints that liberalism is blind to class. At a moment when most political theorists have situated themselves more firmly in the liberal tradition, liberalism is extensively criticized for erasing diversity and difference.

From the standpoint of that much maligned visitor from Mars (whose technical brilliance in negotiating the journey always combines with an astonishing ignorance of political ideas) it might well appear that liberals never thought about difference. Left at such a level of generality, the accusation is distinctly odd, for notions of diversity and difference have been central to liberalism from its inception and to liberal democracy throughout its formation. What gave the original impetus to liberalism was the perception that neither nature nor tradition guaranteed political order, and that the very equality of what we now see as male subjects increased the potential diversity and conflict. Hence the search for a contractual basis for political authority that would bind these different individuals into a coherent whole; hence the concern with rights and autonomies that would allow them to pursue part of their lives under their own steam. In these and subsequent developments, difference remained politically significant and theoretically important: a driving force, indeed, in the separation between public and private affairs.

The defining characteristics of liberal democracy, as Robert Dahl among others has clarified,[2] are also

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grounded in the heterogeneity of the societies that gave it birth. It was the diversity of the citizenry, as much as its absolute size, that made the earlier (more consensual) practices of Athenian democracy so inappropriate to the modern world. Lacking any half-credible basis for seeing citizens as united in their goals, theorists of liberal democracy took issue with the homogenizing presumptions of a common good or common purpose, and made diversity a central organizing theme. John Stuart Mill's famous vacillations over democracy derived from a double sense of democracy as both impetus and threat to diversity: something that breaks the hold of any single notion of the good life, but can also encourage a deadening conformity. In more straightforwardly confident vein, George Kateb has presented constitutional and representative democracy as that system *par excellence* that encourages and disseminates diversity. The procedures of electoral competition do not merely chasten and circumscribe the powers of government. By promoting a more skeptical attitude towards the basis on which competing claims are resolved, they also cultivate "a general tolerance of, and even affection for diversity: diversity in itself, and diversity as the source of regulated contest and competition."[3]

Difference is not something we have only just noticed. What we can more usefully say is that difference has been perceived in an overly cerebral fashion as differences in opinions and beliefs, and that the resulting emphasis on what I will call a politics of ideas has proved inadequate to the problems of political exclusion. The diversity most liberals have in mind is a diversity of beliefs, opinions, preferences and goals, all of which may stem from the variety of experience, but are considered as in principle detachable from this. Even the notion of interests, which seems most thoroughly grounded in differential material conditions, lends itself to at least semi-detachment. The preference for higher taxes on those with higher incomes may be stronger among those with little money, especially if they believe the proceeds will finance public provision of educational or health services that would be otherwise beyond their reach. But support for higher taxation and better public provision is not restricted to those who most directly benefit: political preferences are influenced by material circumstances without being reducible to these. The interests of pensioners or the long-term unemployed can then be championed by those who are neither retired nor out of work; the interests of geographical localities can be represented by people who no longer live in the area; the interests of mothers with young children can be represented by childless men.

One consequence for democracy is that what is to be represented then takes priority over who does the representation. Issues of political presence are largely discounted, for when difference is considered in terms of intellectual diversity, it does not much matter who represents the range of ideas. One person may easily stand in for another; there is no additional requirement for the representatives to "mirror" the characteristics of the person or people represented. What concerns us in the choice of representative is a congruity of political beliefs and ideals, combined perhaps with a superior ability to articulate and register opinions. The quality of the democracy is guaranteed by the extension of suffrage to all adults, each of whom contributes his or her vote to the opinions that gain public weight. Stripped of any predemocratic authority, the role of the politician is to carry a message. The messages will vary, but it hardly matters if the messengers are the same. (Those who believe that men have a monopoly on the political skills of articulating policies and ideas will not be surprised that most messengers are men.)

The notion of representation as primarily a matter of ideas has not, of course, gone unchallenged. In 1789, a group of Frenchwomen laid claim to a place in the Estates General in the following terms:

> Just as a nobleman cannot represent a plebeian and the latter cannot represent a nobleman, so a man, no matter how honest he may be, cannot represent a woman. Between the representatives and the represented there must be an absolute identity of interests.[4]

Shared experience here takes precedence over shared ideas; more precisely, no amount of thought or sympathy, no matter how careful or honest, can jump the barriers of experience. This assertion came, however, at a very particular point in the development of democracy, when the challenge to privilege momentarily centered around questioning which "estates" were entitled to representation. Subsequent notions of citizenship seemed to make this an anachronism, the last gasp of a feudal tradition. Hard fought extensions of suffrage combined with the evolution of political parties as the basic medium of representation to encourage an alternative notion of politics as a battleground for contested ideas.

The socialist tradition is of interest here, not only because it threw up a politics of pressing for the "representation of labour" (which seems to echo the earlier idea of representing different estates) but because it has been persistently troubled by tensions between a politics

of ideas and an alternative politics of presence. Those involved in socialist parties often argued fiercely over the relationship between intellectuals and the "authentically" working class, some feeling that a socialist politics should privilege the voices and presence of workers, others that class identities should signify less than adherence to socialist ideas. In *What Is To Be Done*, Lenin offered one classic refutation of the politics of presence. Stressing the multiplicity of arenas within which the power of capital was exerted, he argued the limits of an experience confined to any one of these, and the overriding importance of strategic links between one set of struggles and another. This privileged the all-seeing intellectual (who might in principle originate from any class position or faction), the political activist who could look beyond each specific struggle or campaign to its wider connections and ramifications, and fit the various pieces of the jigsaw together. When socialist feminists challenged such views in the 1970s, one of the things they pointed out was that they denied legitimacy to women's self-understandings; another was that they presumed an objectivity on the part of these activists that raised them to a God-like level. As Sheila Rowbotham remarked in her critique of Leninist conceptions of the vanguard party, "(t)he Party is presented as soaring above all sectional concerns without providing any guarantees that this soaring will not be in fact an expression of the particular preoccupations of the group or groups with power within it."[5] Part of what was at issue in the development of an autonomous women's movement was the arrogance of those who thought that ideas could be separated from presence.

In Hannah Pitkin's influential discussion of representation, she criticizes the mirror view as beginning and ending with who is present, setting to one side the far more important question of what the representatives actually do. "Think of the legislature as a pictorial representation or a representative sample of the nation," she argues, "and you will almost inevitably concentrate on its composition rather than its activities."[6] But looking back at her discussion from a distance of twenty-five years, what is notable is how she elides the mapping of ideas with the mapping of people, not really distinguishing between a representative sample that captures the range of ideas, the range of interests, or the range of socially significant groups. Her emphasis throughout is on the distinction between being and doing, and her arguments are as much directed against versions of proportional representation that would more adequately reflect the multiplicity of parties and opinion as against later preoccupations with representing excluded or marginalized groups. Questions of power and inequality do not figure largely in Pitkin's account. Such questions have become central to democratic debate today.

It is no part of my intention to disparage politics as a battleground for ideas. Much of the radicalizing impetus to democracy has centered around initiatives to make ideas more rather than less important, as in efforts to bind representatives more closely to the opinions they profess to hold, or in measures to reduce the backstage manipulations of pressure groups that disrupt the higher politics of ideas. But when the politics of ideas is taken in isolation from the politics of presence, it does not deal adequately with the experiences of those social groups who by virtue of their race or ethnicity or religion or gender have felt themselves excluded from the democratic process. Political exclusion is increasingly – I believe rightly – viewed in terms that can only be met by political presence, and much of this development has depended on a more complex understanding of the relationship between ideas and experience. The separation between who and what is to be represented, and the subordination of one to the other, relies on an understanding of ideas and interests as relatively unproblematic. It is as if the field of politics is already clearly demarcated, containing with it various clusters of preferences or ideas or concerns that exist independently of any process of formation. This is in stark contrast with the preoccupations that ran through the early years of the contemporary women's movement, when women talked of the difficulties in finding a voice, the way that dominant definitions of politics blocked out alternatives, or hegemonic culture controlled what could or could not be said. The emphasis then shifted from an objectively defined set of interests (that just needed more vigorous pursuit) to a more exploratory notion of possibilities so far silenced and ideas one had to struggle to express. In this later understanding of the processes that generate needs and concerns and ideas, it is harder to sustain the primacy of ideas over political presence. If it is simply a question of representing a given range of ideas and interests, it may not much matter who does the work of representation. But if the range of ideas has been curtailed by orthodoxies that rendered alternatives invisible, there will be no satisfactory solution short of changing the people who represent and develop the ideas.

The renewed concern over the relationship between ideas and experience also figures in recent arguments over the limits of tolerance in dealing with difference. The classically liberal treatment of difference allows for

private spaces within which people can get on with their own chosen affairs and a public realm ordered around a set of minimum shared presumptions. But the relegation of difference to a private world of private variation has been experienced as an injunction to keep peculiarities a secret, and the shared presumptions that control the public world have proved less than even-handed in their treatment of different groups. The separation of church from state has long been considered the solution to the problems of religious difference, but it achieves this by requiring all religions to adopt a similarly self-denying ordinance that will limit the relevance of religious precepts to practices in the private sphere. This resolution is more amenable to some religions than to others; in particular, it is more acceptable to the heavily secularized forms of Christianity that became the norm in contemporary Europe. In similar vein, we might say that the relegation of homosexuality to a private affair between consenting adults helps reduce more overt forms of discrimination, but it achieves this at the expense of any more public disruption of a heterosexual norm. Private deviation is permitted, but not equal public worth.

Part of the dissatisfaction with liberalism's treatment of difference is the feeling that toleration is a poor substitute for recognition.[7] We only tolerate what we do not like or approve of (otherwise there is no need for toleration[8]), and yet where difference is bound up with identity, this is hard for the tolerated to accept. You can put up with people thinking you a harmless freak for your membership in the flat earth society. You may even revel in people thinking you a dangerous lunatic for your belief in communist revolution. It is not so easy to live with mere tolerance of your perverted sexuality or your denial of femininity or your irrationally fundamentalist religion. Tolerance is perceived as non-egalitarian, resting in some way on a distinction between majority norms and minority deviance, and incorporating some implied preference for a particular way of life.[9] It is perhaps one of the tributes to democracy that people do not find tolerance satisfactory for long, and that the imperatives of democratic equality seem to press on further towards the recognition of equal worth. One reflection of this pressure has been the emerging school of thought that looks to "democratic" rather than "liberal" ways of dealing with diversity[10]: instead of treating difference as something that can flourish in the private domain, it turns to public manifestations in which differences can be confronted and (hopefully) resolved. Here, too, presence becomes crucial, for any public domain marked by the systematic absence of significant groups cannot even approach this resolution.

Once raised, the issues of presence are unlikely to go away: these are questions that must be addressed if democracies are to deliver on political equality. My concern in the rest of this paper is with what happens next, and in particular, with the tensions that arise between ideas and political presence. In the caricatures of those most resistant to a politics of presence, it is frequently misrepresented as a kind of "group-think": something that is necessarily separatist, necessarily corrosive of any wider community, and falsely presuming not only that one has to be a member of a particular group in order to understand or represent that group's interests, but that all members of the group in question will think along similar lines.[11] The caricature misses its mark. Faced, for example, with that 1789 claim that "between the representatives and the represented there must be an absolute identity of interests," most contemporary theorists will shy away from the implications of an essential female subject, or an authentic black subject, that can be represented by any one of its kind. Far more dominant today is the notion of multiple identities or multiple "subject positions," each of which is subject to political transformation and change. An attention to difference does not entail an essentialist understanding of identity; nor does it demand any wholesale rejection of the politics of competing ideas. But then the very sophistication of contemporary theories of identity can paralyze development; the very distance people have traveled from the caricatures of their position can remove them from democracy as it currently exists. In both the theoretical and the movement-centered literature which I now go on to discuss, issues of difference have been construed within a robustly democratic future that bears little relationship to contemporary political life. One of the challenges of democracy is how to combine the insights from such discussion with prescriptions that can be made relevant to representative democracy as practiced today.

Democracy as Public Contestation

Much of the contemporary literature on democracy and difference operates with notions of a more active and vigorous democracy that depends crucially on public debate. Rejecting both the false harmony that stamps out difference, and the equally false essentialism that defines people through some single, authentic identity, many theorists look to a democracy which maximizes citizen participation, and requires us to engage and contest with one another. In a recent essay on feminism and democracy,

Susan Mendus suggests that difference is the rationale for democracy, and that "whereas traditional democratic theory tends to construe difference as an obstacle to the attainment of a truly democratic state, feminist theory should alert us to the possibility that difference is rather what necessitates the pursuit of democracy."[12] In his work on multiculturalism, Charles Taylor calls for a politics of democratic empowerment as the way of dealing with demands for equal recognition without thereby entrenching people in fragmented identities.[13] In his discussion of the republican revival, Cass Sunstein argues for a deliberative democracy to which all citizens will have equal access, and where all perspectives can be equally addressed.[14]

All such arguments assume equality of access (without necessarily exploring the conditions that would deliver this result), and all differentiate themselves from merely majoritarian decision-making by anticipating some process of transformation and change. Where the classically liberal resolution of difference relies on a combination of private spaces and majority norms (these in turn established by majority vote), the democratic resolution of difference expects us to engage more directly with each other. We bring our differences to the public stage; we revise them through public debate. Major disagreements then surface between those who anticipate a full "resolution" in some newly achieved public consensus, and those who see differences as contingent but never as "difference" going away. The first position looks more utopian than the second, but both operate at a level of generality that barely touches on democracy as practiced today.

Consider William Connolly's arguments in *Identity/Difference*,[15] which are particularly interesting in that they both say what should happen and why it almost certainly won't. Here, a "robust" politics of democratic engagement is presented as something that neither evades nor confirms difference: a politics that enables people to disturb settled conventions and expose settled identities. All identities are formed through difference – you know who you are through your difference from some other – and all identities are simultaneously threatened by the difference(s) of the other. There is always a danger that identities will be dogmatized into some naturalistic or unchanging essence, and always a danger that difference will generate destructive resentments and fears. What keeps these at bay is a politics of mutual challenge and disruption in which we are constantly reminded of the contingent nature of our identities. This politics depends in turn on the successful permeation of a "culture of genealogy" which helps us to see our identities as ambiguous and contestable and contested. Democracy then appears as an exciting engagement with difference: the challenge of "the other"; the disruption of certainties; the recognition of ambiguities within one's self as well as one's differences with others.

All this is tremendously refreshing, and in no way relies on a future transcendence of difference. But just at the point where he has achieved the philosophical resolution, Connolly backs off from claiming any immediate relevance for today. The confidence that enables people to dispense with settled identities or to accept the contingencies of fate may not be available to those suffering from economic inequality and political exclusion. Indeed, in an environment characterized by systematic inequality, the appeals to a robust democracy in which no one shelters behind accusations of the other could "too readily be received as yet another attack on those already excluded from democratic politics."[16]

> One compelling attraction of democracy is that it enables anyone to engage in fundamental riddles of existence through participation in a public politics that periodically disturbs and denaturalizes elements governing the cultural unconscious. But these same characteristics can intensify the reactive demand to redogmatize conventional identities if a large minority of the society is already suffering under severe burden of material deprivation and effective exclusion from the good life offered to a majority.[17]

Robust democracy then becomes possible only when economic inequalities are substantially reduced. My problem with this is not that it begs the question of how we might achieve such a precondition (we all have difficulties answering this), but that so much of what currently drives a politics of identity and difference is precisely the sense of deprivation and exclusion that Connolly sees as making such a politics so dangerous. Again, this is a point Connolly himself makes, noting that against the background of US neo-conservatism, any politics of identity and difference tends to fuel "the energies of *ressentiment* and the dogmatization of identity."[18] The philosophical resolution of democracy and difference remains largely that.[19]

Democracy Inside Social Movements

The second context in which these discussions take place is as interventions into specific movements that have formed around the politics of race, gender,

sexuality, and ethnicity. All these movements have involved a critique of the phony essentialisms that disguised systematic difference and inequality; nearly all of them, however, have also generated their own essentialisms that at some point or other claimed a unified female or lesbian or black or some other experience. Thus feminists took issue with the gender amnesia that transformed man "into a paradigm of humankind as such"[20] but, in the further explorations of sexual difference, they often insisted on a primary distinction between men and women that obscured further differences between women. Lesbian feminists took issue with the hegemonic controls of a heterosexual norm but, in the search for an affirming identity, they often constructed "the" authentic lesbian who would not tolerate differences of sexual practice or political attitudes within the lesbian community.[21] Anti-racists took issue with the mythologies of nation that had rendered black people invisible but, in the subsequent racial dualism that focused so exclusively on differences between "black" and "white" they tended to obscure the cultural and religious pluralism that characterizes the many non-white minorities.[22]

The problems of essentialism have, as a consequence, figured largely in the internal politics and debates of these movements. Much contemporary attention is focused on the conditions that can articulate group difference without thereby "disciplining" group members into a single authentic identity; in the process, many have suggested limits to the very notion of "a" group. As Shane Phelan puts it in her discussion of lesbian feminism in the United States: "Politics that ignores our identities, that makes them 'private', is useless; but nonnegotiable identities will enslave us whether they are imposed from within or without."[23] Speaking from the British context, Stuart Hall has suggested that we should pay more attention to the ways in which black experience is a diaspora experience, one in which the constructions of history and politics and culture are therefore fundamental, and not to be captured through notions of an essential black subject.[24] He talks here of "the end of innocence," "the recognition of the extraordinary diversity of subject positions, social experiences and cultural identities which compose the category 'black,'"[25] and the impossibility of grounding the black subject or black experience in the essentialisms of nature or any other such guarantee.

These arguments cut across the balder distinction between ideas and presence, for what is being identified are differences in experiences and identities within what has hitherto been seen as an all-embracing category or group. It is not simply that "black" people or women or lesbians will disagree among themselves as to the appropriate policies and ideas and goals (they will vote for different parties, for example), but that their very senses of what it means to be black or female or lesbian will necessarily vary. In the context of the political movements with which these arguments engage, there seem to be two important implications. One is that the diversity of "subject positions" should be reflected within the organizational structures that define who does or doesn't get into the conversation. There should be no privileging of some voices as more authentic than others, and no coercive imposition of a supposedly unified point of view. The other implication, however, is that there is no way of knowing in advance whether this diversity has been successfully acknowledged. Any prior setting of the boundaries risks restoring some version of the authentic subject, for even if the boundaries are significantly pluralized, they still define in advance what are the appropriate or relevant differences. Thus Stuart Hall argues that it is no longer possible to represent "the black subject" without reference to class, gender, sexuality, ethnicity. But if this were taken as a series of guidelines about the different characteristics that must be covered within the membership of some campaigning organization, that would hardly be doing justice to his critique.

This is a problem that in some way or another besets every radical initiative, whether it is a matter of deciding whom to invite to address a meeting, who is to join an editorial board, or which groups are to participate in a campaign. We have become sufficiently attuned to the politics of presence to distrust the notion that anyone can "stand in" for anyone else, and sufficiently alert to the coercive powers of homogeneity to want to reflect diversity. But the critiques of essentialism deprive us of any simple mechanism for achieving the appropriate balance, and remind us that diversity is too great to be captured in any categorical list.

In the context of political movements, this is not such a serious difficulty. At their best, such movements already enjoy the kind of robust democracy that is proposed as an ideal for the polity as a whole: allowing for, indeed incapable of containing, the kind of contestation and mutual challenge that acknowledges difference and simultaneously disrupts it. The vehemence of debate indicates both a recurrent tendency towards essentialism and a continuous challenge to this: people are tough enough to resist prior classification and far too argumentative to accept someone else's definition of their selves. It is also worth noting that the fluidity of this politics

lends itself more easily to a kind of learning through trial and error, for none of the consequences that people may derive from their current understandings of identity or difference is likely to be set in stone. The larger difficulties arise where we seek out more compromised intervention into democracies that are still pretty feeble.

Political Prescriptions for the Polity as a Whole

When we turn to the political prescriptions that might flow from a new understanding of democracy and difference, we are not dealing in far-off utopias: There is a range of policies already proposed or implemented; and change is neither distant nor unlikely. The problem, rather, is that because such prescriptions operate in a half-way house of remedial reform, they are less able to resolve the contradictory pressures between the politics of ideas and the politics of presence. The kinds of mechanisms I have in mind include the quota systems adopted by a number of European political parties to achieve gender parity in elected assemblies, the redrawing of boundaries around black-majority constituencies to raise the number of black politicians elected in the United States, and the longer established power-sharing practices of those European consociational democracies that have distributed executive power and economic resources between different religious and linguistic groups. In each of these instances, the initiatives operate within the framework of an existing (not very robust) democracy. Tensions that might more readily resolve themselves in a future ferment of activity and deliberation become more acute in what everyone knows is a compromised situation.

All the more immediate proposals for reform insist on deliberate intervention as necessary to break the link between social structures of inequality or exclusion and the political reflection of these in levels of participation and influence. All of them also agree in looking to specifically *political* mechanisms – rather than, or sometimes as well as, longer term social transformation. They take issue therefore with the complacencies of a free market in politics, which sees political equality as sufficiently guaranteed by the procedures of one person one vote; they also challenge the more standard radical alternative, which has focused attention on prior economic or social change. Whatever their differences on other issues, the traditions of revolutionary Marxism and welfare state social reform have tended to agree on a broadly materialist analysis of the problems of political equality, seeing equal political access as something that depends on more fundamental changes in social, economic, and sometimes educational, conditions. The current interest in achieving equal or proportionate presence reverses this, focusing instead on institutional mechanisms – its critics would say "political fixes" – that can achieve more immediate change.

The roots of this reversal lie partly in frustration with what has proved an unbelievably slow process of structural transformation (*first* eliminate the sexual division of labor … the racial ordering of income and education and employment … the class patterning that decides children's futures – is it any wonder we search for short cuts?) But political frustration is not new, and people do not normally change direction just because things take so long. The additional impetus comes from the kind of arguments already outlined, which suggest that the range of political ideas and preferences is seriously constrained by the characteristics of the people who convey them. In a more traditional base-superstructure model, we were advised to concentrate first on generating the social conditions for equal citizenship, then to enjoy the political equalization that flows from this. Such an approach, however, treats policy choices as more straightforward than they are, and fails to observe the way that strategies devised for equality reflect the limits of those currently in power.[26] Where policy initiatives are worked out *for* rather than *with* a politically excluded constituency, they rarely engage all relevant concerns. Again, it is only if we consider the field of politics as already clearly demarcated, with all possible options already in play, that we can put much confidence in such an approach.

I do not discount the criticism that regards institutional mechanisms for achieving equal or proportionate presence as a species of diversionary "political fixing," but we should not be required to choose between these and other urgent tasks of social and economic transformation. When political exclusion is such a marked feature of contemporary democratic life, it seems inappropriate to rely on distant prospects of a more robustly participatory democracy and/or structural changes in social and economic conditions. The very distance of such prospects puts a premium on political prescriptions that can be made relevant to representative democracy as currently practiced, and most of these will involve some form of affirmative action that can guarantee more equal representation in existing decision-making assemblies. Any specifically political

mechanism, however, risks imposing a rigid definition of the identities that have to be included or the interests so far left out. The more complex understanding of multiple identities that change both over time and according to context is a potential casualty here, as is the continuing importance we would all want to attach to political disagreement and debate.

If we consider, for example, the mechanisms that might be appropriate in contemporary Britain to redress racial exclusions, one immediate problem is the diversity of non-white experience, and the major disagreements that have surfaced between taking race or ethnicity or religion as the basis of social identity and political exclusion. When we take race as the central indicator, this encourages a dualism of "black" or "white," a division of the universe which is often said to be closer to the political perceptions of Afro-Caribbeans than to the self-definitions of the significantly more numerous Asians. Tariq Modood, indeed, has argued that "the concept of Black is harmful to Asians and is a form of political identity that most Asians do not accept as their primary public identity."[27] But if we take ethnicity or religion instead, these are felt to be too closely associated with a politics of multiculturalism that has looked to the greater dissemination of knowledge about ethnic and religious minorities as the way of breaking down racial stereotypes, and has been thought insufficiently vigorous in its challenges to racism *per se*. Alternative ways of defining group identities or redressing group exclusions have become loaded with political significance, with an attention to cultural diversity being variously perceived as something that depoliticizes the anti-racist struggle or is a crucial corrective to the simplicities of racial dualism.[28]

What, in this context, is an appropriate mechanism for dealing with political exclusion? Can Asians be represented by Afro-Caribbeans, Hindus by Muslims, black women by black men? Or do these groups have nothing more in common than their joint experience of being excluded from power? In their recent book on *Racialized Boundaries*, Floya Anthias and Nira Yuval-Davies conclude that "the form of political representation which has grown out of identity politics and equal opportunities and which has attempted to represent social difference more genuinely, has created an impossible mission for itself,"[29] and that what is a positive diversity of overlapping identities becomes dangerously constrained in efforts towards proportional representation. But does this mean that nothing can be done: that given the risks, on the one hand, of an imposed and misleading uniformity, and the absurdities, on the other, of an endless search for sufficiently pluralized categories, we have to abandon the quest for specifically political mechanisms? Caucuses and quotas are the most obvious political mechanisms for dealing with political exclusion, yet both of these depend on a prior categorization of the basis on which people have been excluded. Neither seems adequate to the complexity of political identities.

The politics that has developed in the United States around the strategy of black-majority, single-member constituencies might seem more straightforward, for it seems clear enough that it is race rather than ethnicity that has been at issue in the political exclusion of African-Americans, and racial bloc voting is plausibly described as "the single most salient feature of contemporary political life."[30] But even so, a political resolution that privileges race as the prime consideration can make it more difficult for people to articulate what are complex and multiple identities: can obscure tensions, for example, around gender and class, can block out major disagreements over policy preferences and political ideas. The implication that black representatives are representative merely by virtue of being black is inevitably problematic, even where "blackness" is a less contested category.

Those who consider the problems of political equality as adequately dealt with by provision for the equal right to vote will be happy to rest their case there, but criticism of the strategy of black electoral success has not been confined to these quarters. Equally powerful criticism comes from those who regard proportionate presence as a necessary but insufficient condition, and are concerned that the focus on numbers alone can reduce political accountability, limit prospects for multi-racial coalition, and undermine the urgency of policy debate.[31] There is, in other words, a strong sense of the tensions that can develop between a politics of presence and a politics of ideas. But instead of resolving this by opting for the second over the first, critics have looked to alternative patterns of representation that can make it possible to combine the two. Some of the most innovative work in this area comes from those pressing for a return to the more competitive politics of multi-member constituencies but based on forms of proportional representation and cumulative voting that would maintain the scope for electing representatives from minority groups.[32] It is felt, in other words, that mechanisms *can* be devised which continue the gains in black political presence without forcing an either/or

choice between the politics of presence and the politics of ideas.

European initiatives on gender parity can also be seen as successfully negotiating the competing demands of ideas and presence – and here we enter the realm of policies already in position rather than proposals in contested debate. The favored strategy involves pressuring existing political parties to introduce a more balanced ticket of both women and men in their candidates for winnable seats, thus maintaining accountability through party policies and programs while changing the gender composition of elected assemblies. Often enough, the mechanism has been a straightforward quota, which has contributed to a remarkable increase in the numbers of women elected in the Nordic countries. Critics of such strategies usually rest their case on the paucity of "experienced" women, the potential loss of "good" men to politics, and the risk that the overall caliber of politicians (not too high in my opinion) will fall. They do not dwell particularly on the essentialist presumptions of "a" women's perspective, or the dangerous potential for women pressing only narrowly sectional concerns. There are just too many women for them to be considered as a unified or sectional group, and they are spread across every class or ethnic or religious dimension and every conceivable political persuasion. When it is applied to women, the politics of presence does not seriously disrupt the politics of competing ideas; it is relatively easy to pursue both of these together.

Outside the more established democracies of Europe and the United States, the arguments often start from the opposite direction, a feeling that *who* is to be represented has so far taken precedence over *what*, and that what is missing is the higher politics of ideas. One might think, for example, of the abuse of kinship networks and ethnic solidarities by political elites in post-colonial Africa, many of whom evacuated the terrain of contested policies and ideals to cultivate a power base around exclusionary identities. When the colonial powers retreated from Africa, they left behind societies in which the state had become the main avenue for economic and social advancement, and where the politics of patronage was almost doomed to flourish. In this context, people lived under what seemed an absence of politics, with the contrast between a civilian or military regime seeming of far less consequence than whether you had access to any of the rulers. As ethnic connections emerged as one of the main routes of access, ethnic rivalries became literally deadly, even when the ethnicities in question were relatively recent creations.[33] It is against this background that African radicals and writers have so eloquently called for a politics based on vision and ideals.[34]

Through all these examples, the biggest mistake is to set up ideas as the opposite of political presence: to treat ideas as totally separate from the people who carry them; or worry exclusively about the people without giving a thought to their policies and ideas. It should be said, however, that this is not such a frequent mistake as the caricatures suggest, and that those exploring equal or proportionate presence rarely regard it as a substitute for the politics of competing ideas. If anything, the most acute criticisms of the politics of presence have come from those most committed to challenging political exclusions, and the debate has long shifted beyond its either/or axis. What is, perhaps, emerging is that the more satisfactory ways of redressing group exclusion are those which are the less group-specific. This seems to be the case in relation to gender quotas, if only because the category of "woman" is so inclusive of other kinds of difference and division that it leaves open the necessary space for a multiplicity of political identities. It also seems to be the case in the proposals that have developed around the implementation of the Voting Rights Act in the United States, which have moved away from the more tightly drawn voting districts that provide a "safe seat" for minority representatives towards a larger geographical constituency that can no longer pretend to contain only one voice.

Such developments acknowledge the danger in preemptive classifications of people's political identities, and are well aware that essentialist definitions of the groups that have been excluded can work to reduce political accountability and debate. They nonetheless take issue with the more traditional treatment of diversity and difference as simply a matter of contested ideas. The overly cerebral understanding of difference has not engaged sufficiently with the problems of political presence, for it has encouraged an unacceptable level of complacency over the homogeneity of political elites. We can no longer pretend that the full range of ideas and preferences and alternatives has been adequately represented when those charged with the job of representation are all white or all male or all middle class; or that democracies complete their task of political equality when they establish a free market in political ideas. One would not want to take up permanent residence in the half-way house of remedial reform, but mechanisms should be – and can be – devised that address the problems of group exclusion without fixing the boundaries or character of each group.

Notes

1 I summarize and discuss many of these arguments in *Engendering Democracy* (Pennsylvania: University of Pennsylvania State Press, 1991). See also Jane Flax. "Beyond Equality: Gender, Justice and Difference," in G. Bock and S. James, eds., *Beyond Equality and Difference* (London: Routledge, 1992).

2 Robert A. Dahl, *Democracy and Its Critics* (New Haven: Yale University Press, 1989).

3 George Kateb, "The Moral Distinctiveness of Representative Democracy," *Ethics* 91:3 (1981): 361.

4 Cited by Silvia Vegetti Finzi, "Female Identity between Sexuality and Maternity," in Bock and James, eds., *Beyond Equality and Difference*, 128.

5 Sheila Rowbotham, "The women's movement and organising for socialism," in S. Rowbotham, L. Segal and H. Wainwright, *Beyond the Fragments: Feminism and the Making of Socialism* (London: Newcastle Socialist Centre and Islington Community Press, 1979), 61.

6 Hannah F. Pitkin, *The Concept of Representation* (Berkeley: University of California Press, 1967), 226.

7 See Shane Phelan's discussion of the way that lesbian feminists in the United States came to reject liberalism. *Identity Politics: Lesbian Feminism and the Limits of Community* (Philadelphia: Temple University Press, 1989).

8 See Susan Mendus, *Toleration and the Limits of Liberalism* (London: Macmillan, 1989).

9 I do not know if this is intrinsic to tolerance, but I suspect it is. If we could imagine a world in which difference was genuinely detached from power – in which there really were multiple differences and none carried more weight than any other – then I am not sure we would be talking of the needfor toleration. See also Kirstie McClure, "Difference, Diversity and the Limits of Toleration," *Political Theory* 18:3 (1990).

10 I owe this formulation to Peter Jones's paper "Groups, Beliefs and Identities," presented at the European Consortium for Political Research, Leiden, April 1993.

11 All these points can be found in Cynthia V. Ward, "The Limits of 'Liberal Republicanism': Why Group-Based Remedies and Republican Citizenship Don't Mix," *Columbia Law Review* 91:3 (1991). In querying the notion that *only* the members of particular disadvantaged groups can understand or represent their interests, she might usefully turn this question round to ask whether such understanding or representation is possible without the presence of *any* members of the disadvantaged groups.

12 Susan Mendus, "Losing the Faith: Feminism and Democracy" in John Dunn, ed., *Democracy: The Unfinished Journey 508BC to AD1993* (Oxford: Oxford University Press, 1992), 216.

13 Charles Taylor, *The Ethics of Authenticity* (Cambridge, MA: Harvard University Press, 1992); Charles Taylor and Amy Gutmann, *Multiculturalism and The Politics of Recognition* (Cambridge, MA: Harvard University Press, 1992).

14 Cass Sunstein, "Beyond the Republican Revival," *Yale Law Journal* 97:8 (1988).

15 William Connolly, *Identity/Difference: Democratic Negotiations of Political Paradox* (Ithaca: Cornell University Press, 1991).

16 Connolly, 197.

17 Connolly, 211.

18 Connolly, 213.

19 In a review of Connolly's book, Iris Young describes his prescriptions as "therapies." *Political Theory* 20:3 (1992): 514.

20 Adriana Cavarero, "Equality and Sexual Difference: Amnesia in Political Thought," in Bock and James, eds., *Beyond Equality and Difference*, 36.

21 Phelan, *Identity Politics*. Phelan notes in particular the rows that broke out over sado-masochism, and whether this was an "acceptable" part of lesbian identity.

22 See the essays in Tariq Modood, *Not Easy Being British: Colour, Culture and Citizenship* (Stoke on Trent: Runnymede Trust and Trentham Books, 1992). The largest non-white group in Britain is Asians of Indian origin, many of whom have felt the racial dualism of anti-racist politics rendered them invisible.

23 Phelan, *Identity Politics*, 170.

24 Stuart Hall, "New Ethnicities," in J. Donald and A. Rattansi, eds., "*Race*," *Culture and Difference* (London: Sage and Open University Press, 1992).

25 Hall, 254.

26 Obvious examples include the post-war preoccupation with full employment as a condition for equal citizenship, where full employment was either unthinkingly equated with full employment for men, or else extended formally to include women without any serious consideration of the structural changes that would then become necessary to re-order the relationship between paid and unpaid work. Will Kymlicka provides a different example in his discussion of the Trudeau reforms which set out to promote more equal citizenship in Canada, but equated full and equal participation for the native Indian population with a color-blind constitution that would dismantle the system of segregated reserves. Though widely applauded by the country's media and even opposition parties, the proposals had to be withdrawn in the face of almost unanimous opposition from the Indians themselves. Kymlicka, *Liberalism, Community and Culture* (Oxford: Clarendon Press, 1989).

27 Modood, *Not Easy Being British*, 29.

28 For an excellent overview of these debates, and an attempt to push beyond them, see the essays in Donald and Rattansi, eds., "*Race*," *Culture and Difference*.

29 Floya Anthias and Nira Yuval-Davies, *Racialized Boundaries: Race, Nation, Gender, Colour and Class and the Anti-Racist Struggle* (London: Routledge, 1992), 192.

30 S. Issacharoff, "Polarized Voting and the Political Process: The Transformation of Voting Rights Jurisprudence," *Michigan Law Review* 90:7 (1992): 1855.

31 Bernard Grofman and Chandler Davidson, eds., *Controversies in Minority Voting: The Voting Rights Act in Perspective* (Washington, DC: The Brookings Institution, 1992) provides a comprehensive range of the arguments that have developed around minority representation.

32 Lani Guinier, "The Triumph of Tokenism: The Voting Rights Act and The Theory of Black Electoral Success," *Michigan Law Review* 89:5 (1991); "No Two Seats: The Elusive Quest for Political Equality," *Virginia Law Review* 77:8 (1991). I discuss this material at greater length in "Political Inclusion and Political Presence. Or, Why Does It Matter Who Our Representatives Are?" (Paper presented at the Joint Sessions of the European Consortium on Political Research, Leiden, 2–7 April, 1993).

33 Think here of the Nigerian civil war and the attempted secession of Biafra. The Ibo people who provided the ethnic basis for Biafra only came into substantial existence as a unified "people" through this war.

34 See especially Chinua Achebe's novels and essays, especially *The Anthills of the Savannah* and *The Trouble with Nigeria*.

14

A "Selection Model" of Political Representation

Jane Mansbridge

I Introduction: Sanctions v. Selection

Many political scientists, most economists, and almost all citizens who demand more "accountability" and "transparency" routinely rely on a *sanctions model* of principal-agent relations. In this model, the interests of the principals (in politics, the constituents) are assumed to conflict with the interests of their agent (the representative). The principals must therefore monitor the agent closely, rewarding the good behavior and punishing the bad.

This article elaborates a contrasting model of principal-agent relations, which I will call a *selection model*. This model works only when a potential agent already has self-motivated, exogenous reasons for doing what the principal wants. The principal and agent thus have similar objectives even in the absence of the principal's sanctions. As a general rule, the higher the *ex ante* probability that the objectives of principal and agent will be aligned, the more efficient it is for the principal to invest resources *ex ante* in selecting the required type rather than investing *ex post* in monitoring and sanctioning.

If we view democratic political representation as a principal-agent problem, a constituent can reasonably want to adopt a selection model and save on monitoring and sanctioning whenever the representative's established direction and policies are largely those the constituent desires and the representative also has a verifiable reputation for being both competent and honest.[1] In the selection model, the representative's accountability to the constituent will typically take the form of *narrative* and even *deliberative* accountability rather than accountability based on monitoring and sanctions. In *narrative* and *deliberative accountability*, the representative explains the reasons for her actions and even (ideally) engages in two-way communication with constituents, particularly when deviating from the constituents' preferences.

In practice both selection and sanctions are always at work. Selection and sanctions map directly onto the two commonly cited motivations of representatives, the desire to make good public policy and the desire to be reelected. These two motivations are almost always mixed. The alignment of principals' and agents' objectives will also never be perfect. Thus constituents will always have some reason to monitor their representatives in order either to try to induce new behavior through the threat of sanction or simply to replace those

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representatives in the next election. Nor is the sanctions model ever pure. It is hard to imagine a representative with no intrinsic motivation to work for the policies he or she thinks good for the polity and hard to imagine any constituent voting for a representative whose preferences the constituent thought were always induced.

In democracies, elections are the main instrument for both selection and sanction. Yet tradeoffs exist, and the balance that any institution should strike between selection and sanction depends on contingency, that is, the costs and benefits of sanction and selection in a given context. The benefits of selection are high when agents will face unpredictable future situations, when agents must act speedily, creatively, flexibly, and adaptively, when they must dedicate their powers to an evolving goal and adopt different means as the need demands, when the goals are long-run rather than short-run, and when principals and agents prefer relationships based on mutual trust and common goals rather than instrumental relationships. Selection is also attractive when its costs are low – that is, in contexts where sufficient numbers of potential agents are self-motivated, where the probabilities of aligned objectives between principals and agents are high, where principals can fairly easily gather sufficient information about agents to make a reasonably accurate choice at the time of selection, and where agents can effectively self-sort into appropriate roles. Finally, selection is attractive when sanctions and monitoring are impractical or very costly.

Because both the sanction and the selection models are always mixed, it helps to think of the selection model as having selection at its core and sanctions at its periphery. In this core-periphery configuration, most of the congruence between the principals' desires and the agent's behavior is accomplished by the voters selecting a representative who is honest, competent, and already has policy goals much like the constituents'. The strongest and most central mechanism for representing the constituent's views is selection, while sanction works at the edges of the system, disciplining the selected representative's tendencies to deviation only lightly and in the most important places. Political scientists should ask descriptively what the balance between core and periphery is in different contexts and normative theorists what that balance ought to be.

In normative theory, participatory democrats who cast a critical eye on all representative relations have been particularly suspicious of selection models, as subject to elitism, corruption, and failures in citizen control of the representative. These objections have little relevance in some specifiable contexts. Normative theorists have also not sufficiently considered either the possible efficiency gains of a selection model (gains that can perhaps be normatively discounted) or the quality of the constituent-representative relationship, which can be more humanly satisfying in a system that emphasizes selection.

In relatively uncorrupt democracies, the circumstances of political life frequently produce intrinsically motivated agents, the possibility of largely aligned objectives between voters and representatives, the capacity among voters to engage relatively easily in a reasonable selection process, and mechanisms by which potential representatives sort themselves into relatively well-aligned roles. In these contexts, the voter's efforts are efficiently concentrated on selection at the front end of the process and the electoral system can normatively reinforce a commitment to the public good and a warranted relationship of trust and goodwill between representative and constituent. In the political science literature, however, the selection model, advanced in the early 1960s as one of two paths to constituency control, was eclipsed by the sanctions model in the 1970s, despite, as we shall see, data suggesting that in many circumstances the selection model had greater predictive power. This eclipse may be coming to an end. My goal in this article is to restore the selection model to the status that it had in 1963, as an equal partner to the sanctions model both descriptively and normatively.

II A Struggling Idea

Warren Miller and Donald Stokes first enunciated the selection model in 1963, when trust in government was at its peak in the United States. In their classic article on constituency influence in Congress, they specified two ways in which constituencies control their representatives. The first is "for the district to choose a Representative who so shares its views that in following his own convictions he does his constituents' will." This is the selection model. Their second is "for the Congressman to follow his (at least tolerably accurate) perceptions of district attitude in order to win re-election."[2] This is the sanctions model. Using data from the US House of Representatives, Miller and Stokes concluded that the first (selection) path predominates in social welfare issues (because parties recruit candidates on the basis of the candidates' views on these issues and voters use party identification as a major signal in the selection process), while the second (sanction) path predominates in civil

rights issues. These two paths formed the sides of their "well-known 'diamond model' of political representation," non-controversially assuming that selection played a co-equal role with sanctions.[3]

Ten years after Miller and Stokes, John Kingdon's classic *Congressmen's Voting Decisions* began discussing the mechanisms of constituency influence by stating, "The simplest mechanism through which constituents can influence a congressman is to select a person initially for office who agrees with their attitudes." Members of Congress "fully recognize the importance" of this "simple, elemental point," Kingdon wrote. "It often happens that a congressman never feels pressured by his constituency and in fact never even takes them into account, simply because he is 'their kind of people' anyway." Kingdon concluded from his interviews that "[a]pproximately three-quarters of the time … there was no conflict between the constituency position and the legislator's own attitude, at least in the congressman's mind."[4] In sum: "That the recruitment process [the selection model] affects congressmen's voting is an elemental, easy-to-understand proposition, but its profound importance cannot be emphasized too strongly."[5]

Yet only a year after Kingdon's book, his "simple," "elemental," "easy-to-understand" point of "profound importance" began to lose much of its traction in the profession, as a series of works on Congress, beginning with David Mayhew's *Congress: The Electoral Connection* and Morris Fiorina's *Representatives, Roll Calls, and Constituencies*, depicted a representative's prime motivation as the desire for reelection, with constituency control working through the sanctions made possible by this desire.[6]

Attempting to counter this trend, Robert Bernstein reported in *Elections, Representation, and Congressional Voting Behavior: The Myth of Constituency Control* that in his analysis of the House of Representatives he found "quite limited" evidence that "representatives may be influenced by reelection pressures." Instead, constituency influence over policy flowed primarily "from the constituencies' initial selections of who their representatives will be."[7] Bernstein's data and his analysis of the "myth" had no detectable effect on the prevalence of the sanctions model.

In 1994 William Bianco tried another tack, criticizing the now dominant sanctions model for its "unrealistic assumptions about the motives held by representatives and the beliefs that voters have about these motives." The standard principal-agent theory of representation generally assumed that "all incumbents prefer to shirk," that is, "act against constituent interests" with goals "antithetical" to those of the voters.[8] Bianco argued by contrast that in contemporary America by and large constituents generally "make good decisions" by applying "conditional trust," calculating roughly "the likelihood of a common interest" between them and the representatives and giving the representatives more or less leeway (engaging in different mixes of selection and sanction) depending on that calculation.[9]

At the same time that Bianco was suggesting selection as a significant counter to the then dominant sanctions model in rational choice theorizing, political scientists from the older tradition continued to use Miller and Stokes's two paths as received wisdom not even worth citing. In an important article on the way the representative system responded to public opinion change, for example, James Stimson, Michael MacKuen, and Robert Erikson assumed the two paths throughout and explicitly linked those paths to two different forms of representative motivation: "policy preferences" in the "electoral replacement" (selection) path and "expediency" in the "rational anticipation" (sanctions) path. They concluded that selection played the larger role in the Senate and presidency, while sanctions played the larger role in the House of Representatives.[10]

Thus while one group of political scientists continued uncontroversially to deploy Miller and Stokes's two paths, others saw themselves as making a contribution – perhaps even an embattled one – by stressing not only the analytic power but the simple existence of the selection path. In 1999, for example, in a chapter for an influential volume on accountability that otherwise hewed to a straight sanctions model, James Fearon challenged that model with an account entitled, "Electoral Accountability and the Control of Politicians: Selecting Good Types versus Sanctioning Poor Performance." Although Fearon, like the volume's editors, defined accountability as requiring "powers to sanction or reward the agent," on the basis of this definition he then questioned "whether elections are best thought of in terms of accountability at all." His target was "an important tradition in democratic theory [that] understands elections … as a sanctioning device that induces elected officials to do what the voters want," in which "the anticipation of not being reelected in the future leads elected officials not to shirk their obligations to voters in the present."[11] Fearon argued that if voters instead "understand elections as opportunities to choose a 'good type' of political leader, one who would act on their behalf independent of reelection incentives" (the

selection model), it "follows that electoral accountability is not necessary for elections to produce public policy that the principals (the voting public) want."[12] A selection model would also explain why voters dislike "office seekers," favor term limits, and put a high premium on principles and consistency even when their representative takes stands that they oppose, while a sanction model would wrongly predict the opposite. Fearon pointed out that selection and sanctioning "are by no means incompatible or mutually exclusive," but ultimately argued that in a game theoretic model, "Introduce *any* variation in politicians' attributes or propensities relevant to their performance in office, and it makes sense for the electorate to focus *completely* on choosing the best type when it comes time to vote."[13] The editors of the volume did not engage with or try to answer this strong challenge to their model, referring to it only in a brief summary in the introduction.

Meanwhile, economists had been developing their own line of thought on these matters. In 1985, in the first edited volume directly addressing the principal-agent problem, John Pratt and Richard Zeckhauser gave one page of their 35-page introduction to a pithy summary of the possibility of "alignment of objectives." When "productivity is the goal," they wrote,

> … principals and agents will seek situations in which purposes line up naturally. If we can get work that we like, we needn't worry about our boss's standing over us. Moreover, if we do not shirk, and there is no need for monitoring, we can share in the resulting cost savings.

They produced the examples of members of religious organizations and family businesses, student athletes working wholeheartedly at summer maintenance because they welcome the exercise, college presidents and corporate executives placing "like-minded managers in positions of responsibility," and politicians appointing people "who share their goals, who will make the choices regarding welfare or the environment that they would make." They concluded, "Those who share one's objectives tend to carry them out; monitoring and conflict are reduced, and such people may even make themselves available at a cheaper price." Thus, "alignment of objectives is beneficial to the performance of an agency relationship," and "both agent and principal have an incentive to make a good match."[14]

Two years later, another economist applied the selection model more fully to politics. In 1987 John Lott distinguished between guaranteeing quality through threat and knowing quality "prepurchase." In the second case (the selection model), "voters classify politicians by their 'pure ideological' beliefs…. Politicians are seen as directly consuming 'having done the right thing'…. If this altruistic consumption motive accurately describes political actions, cheating of constituency groups is effectively reduced or eliminated." After examining whether or not politicians' votes changed in the US House of Representatives in their last term before retiring and finding that to an overwhelming degree they did not, Lott claimed empirical support for the prepurchase knowledge (selection) model.[15]

Almost a decade later, the economist Geoffrey Brennan again took aim at the "economic theory of politics," in which "common practice" assigns "uniformly self-interested motivations to all agents," relies on electoral competition for representatives' incentives to act in the interests of their constituents, and thus problematically "encourages institutional economists to overlook potentially important aspects of institutional design – those which depend on the operation of selection devices or 'screens' rather than on incentive devices or 'sanctions.'" He argued to the contrary that "selection is a potentially significant dimension of any institution's operation and that the methods of economic analysis tend to suppress that dimension." Rather than assuming "motivational homogeneity," he wrote,

> if one can identify the less knavish from the more knavish, one can locate the less knavish in those employments in which knavishness is most destructive. Put another way, … such virtue as exists in society will be a positive resource for that society, and should be located in its highest valued use just like any other resource.[16]

For efficiency, if "virtue is a resource that commands a higher social value in these non-market institutions [e.g., politics, bureaucracy, and the judiciary], … the good functioning of society will depend on the extent to which the relatively virtuous are selected for non-market offices." Non-material rewards of different sorts would particularly encourage self-motivated agents to self-select into appropriate jobs.[17]

In a set of major works from 1997 to the present, Timothy Besley has recently posed the same contrast between a sanctions model and a selection model.[18] "At the core" of the method of "Public Choice,"[19] he writes, lies the assumption that, in James Buchanan's words,

"Individuals must be modeled as seeking to further their own narrow self-interest, narrowly defined," with "no suggestion that improvement lies in the selection of some morally superior individuals who will use their powers in some 'public interest.'"[20] Besley counters: "But good government … also requires good leaders – persons of character and wisdom." While "first generation models" influenced by Public Choice adopt only a sanctions perspective with "elections as an incentive mechanism," "second generation models" such as his own look at "the implications of agents who differ in their type," with elections serving "two key roles: creating incentives and selecting the best type." "Fiduciary duty," a form of intrinsic motivation that includes pursuing both honesty and "the interest of citizens at large," is an "important model of motivation in politics that has received less attention in modeling the behavior of politicians." Yet voters can and do select on this motivation.[21]

As Besley was developing his version of the selection model, other economists were coming around to this perspective. David Lee, Enrico Moretti and Matthew Butler, for example, summarized "two fundamentally different views of the role of elections in policy formation" as follows:

> In one view [the sanctions model], voters can affect candidates' policy choices: competition for votes induces politicians to move…. In the alternative view [the selection model], voters merely elect policies: politicians cannot make credible promises to moderate their policies, and elections are merely a means to decide which one of two opposing policy views will be implemented.[22]

They concluded that the selection model was empirically more predictive in the US House of Representatives.

As economists, Brennan, Besley, and Lee, Moretti and Butler were unaware of the similar empirical conclusions drawn in political science by Miller and Stokes, Kingdon, Bernstein, Bianco, and Stimpson, McKuen and Erikson, all of whose data suggested that the selection model explained as much as, or more than, the sanctions model. Yet even in political science this line of thought had tended again and again to fade from view. Thus while Bernstein cited Kingdon, he did not cite Miller and Stokes on this point. Bianco cited neither Miller and Stokes, nor Kingdon, nor Bernstein. Fearon cited neither Miller and Stokes, nor Kingdon, nor Bernstein, nor Bianco. Each new David picking up the slingshot knew little or nothing of past stones that had bounced to the ground.[23]

It is not quite clear why the sanctions model had this Teflon effect for so long. Perhaps the selection model suffers from an intrinsic lack of intellectual interest, as Pratt and Zeckhauser speculated. Perhaps self-interest as a motivation is easier to model or is attractive for other reasons.[24] Perhaps self-motivated agents, particularly those inspired by the common good, are simply harder to explain than externally-motivated agents. Perhaps common interests are harder to explain than conflicting interests. But the greater efficiency of the selection model when it is feasible and its seemingly greater predictive power in the US Presidency, Senate and even, in many studies, the US House of Representatives make it a formidable empirical competitor to the sanctions model.

I turn now to the implications of the selection model's three necessary components: self-motivated agents, aligned objectives, and the selecting and sorting mechanisms that facilitate such alignment.

III Self-Motivated Agents

Since the work of Douglas McGregor in 1960, management theorists have often distinguished between what McGregor called "Theory X," appropriate to situations in which employees will avoid work if they can and do not care about organizational goals, and "Theory Y," appropriate to situations in which employees intrinsically enjoy their work, just as they enjoy play or leisure, and can be internally committed to the aims of the organization. Self-motivated employees, McGregor theorized, would be the more likely to exercise imagination, ingenuity, and creativity in their work.[25]

In Theory Y, the intrinsic motivation of an employee can be of any kind – a desire to solve puzzles, to exercise outdoors, or to keep things neat. In politics also, the intrinsic motivation of a representative can be of any kind. A representative might, in principle, promote lower taxes simply because he or she personally had a lot of property subject to tax. Certain occupations, however – including politics in relatively uncorrupt democracies – attract agents whose intrinsic motivations include what might be called public spirit, that is, concern with the common good and at least some willingness to make sacrifices in material interest for that good.[26] Although the mix of motivations in any given individual will almost always include some extrinsic motivation and will probably also include forms of intrinsic motivation not based on public

spirit (such as the desires to feel efficacious, stand by one's comrades, or not be overruled), in non-corrupt democracies where politics does not produce great pecuniary rewards political office will tend to attract actors with some intrinsic public-spirited motivation.

Yet public spirit is vulnerable to being undermined by three factors associated with the sanctions model: extrinsic incentives, monitoring, and a culture that assumes self-interest as the primary motivation.

Psychological research has established that in many circumstances extrinsic motivation drives out intrinsic motivation, although extrinsic rewards framed as either inherent to the task or honoring the actor's intrinsic motivation do not have this negative effect. Extrinsic rewards can "crowd out" intrinsic rewards and motivation in real life as well as laboratory experiments, and such crowding out will be most problematic when the agent has originally been selected for intrinsic motivation.[27]

Monitoring may also drive out intrinsic motivation, particularly when the subjects of the monitoring perceive it as expressing distrust. As Onora O'Neill puts it, "Plants don't flourish when we pull them up too often to check how their roots are growing." Thus the "audit explosion" in bureaucracy tends to undermine the "real work" of professionals. "Trust often invites reciprocal trust" in a virtuous spiral,[28] while "institutionalized suspicion undermines trust."[29] As for elected representatives, Richard Fenno quotes one member of Congress saying, "To me, representative government means you hire a guy to use his own judgment; and if you don't like what he does, you fire him. But you don't keep after him all the time. If it isn't my function to use my judgment, then what the hell is my function? And if that's not my function, I don't want the job."[30]

Even the act of describing most behavior in self-interested terms tends to undermine public-spirited motivation. The theory that self-interest is the major causal explanation for human behavior seems to play a role in its own confirmation. Citing several experiments supporting this phenomenon, Dale Miller suggests possible explanations. First, "The image of the human being as self-interested leads to the creation of the kinds of social institutions (e.g., workplaces, schools, governments) that transform the image into reality." Second, the implicit norm that one should act self-interestedly affects behavior because norms tend to change in the direction of the perceived majority's norms. Third, thinking of oneself as one of the few non-self-interested people in a group implies that one's altruistic behavior will have only a miniscule potential effect.[31]

For these reasons, although institutional designers have argued in the past that institutional arrangements based on self-interest will be the most impervious to destruction,[32] such arrangements also have the potential for crowding out public spirit. In democratic political systems, for example, the close races with little incumbency that are necessary to make the sanctions model work sometimes drive away the most public-spirited potential agents.

IV Aligned Objectives

The selection model requires not only an internally motivated agent but also an alignment between the objectives of the principal and the self-motivated agent. Normatively, the closer representatives come to having common interests with their constituents, the less the constituents need to protect themselves against the greater power of the representatives. In the extreme, completely common interests could legitimate large inequalities of power, as long as – an important qualification – the less powerful could take back equal power when interests began to diverge and as long as the two other conditions of legitimately unequal power – the maintenance of equal respect and the opportunity for individual development – were fulfilled.[33] The alignment of objectives can take place not only on the high ground of similar understandings of what is best for the nation as a whole but also on what is best for particular individuals or communities, such as farmers, miners, or inner city residents.

Context affects the supply of aligned objectives. First, "good fits are most likely in homogeneous districts."[34] Second, context-specific norms and institutions encourage public spirit and discourage the more obvious forms of corruption[35] – as in the quite different interactions of culture and institutions in Sweden, in the English, German, and French civil service, and in the clergy of many religions. Third, widespread competence in potential representatives increases the supply of aligned potential agents, both because competence is required to further aligned objectives and because competence fosters internal motivation.

Context also affects the demand for aligned objectives. Recognizing that no principal and agent ever have perfectly aligned objectives, a "contingency" application of the selection model asks when it makes most sense for the principal to tolerate some divergence. Other things equal, a selection model is preferable when a principal

needs an agent capable of flexible, adaptive, and creative performance, discretion in negotiation, and dedication to long-run aims, as well as when tools for adequate monitoring and sanctioning are absent or expensive.[36] In organizational theory, "high commitment" management practices, based implicitly on a selection model, are most effective in such contexts.[37] In politics, descriptive representation (by geography, occupation, religion, tribe, race, gender, or any other factor), one form of a selection model, is most in demand when interests are uncrystalized and the representative must exercise discretion[38] or when the standard forms of monitoring and sanctioning are either counterproductive or weak. Thus constitutional conventions, which have no subsequent elections, rely heavily for their legitimacy on selection models with a strong dose of descriptive representation.

V Selection and Sorting

The third necessary feature of an effective selection system involves accurate selection and sorting as well as the capacity to "de-select" easily when circumstances change. For accurate selection, the principal must have sufficiently good information at the time of selection about the potential agent's motivation (and thus the likelihood of aligned objectives). In appropriate conditions, agents also sort themselves into jobs and organizations whose aims match their own intrinsic motivation as closely as possible. In political representation, ease of de-selection usually depends on the capacities of ancillary institutions such as political parties and the media.

Voters often select not only on policy direction and competence but on intrinsic motivation, or "character." The less a voter knows about policies, the more rational it is to select on character.[39] Citizens may also want to choose "a good man" or "a good woman"[40] in part because they trust their own capacities, honed over a lifetime of social interaction, to choose well on this dimension. Finally, when voters find it hard to monitor their representatives, they may act like firms in a "low-enforcement environment," which "heavily invest in screening of potential employees, stressing that character is more important than the possession of specific skills."[41] When a collective action problem is voluntary, for example, both cooperators and defectors search for signals of a potential partner's character type, and if that evidence is relatively easy to collect, an efficient equilibrium will emerge, since cooperators will choose cooperators and defectors will be left without partners.[42] So too both principals and potential agents seeking a relationship based on aligned objectives will benefit if the agents can send a signal that is hard to manipulate.[43]

In countries with relatively corrupt systems or inexperienced voters, potential representatives find it hard to send accurate signals. Such countries can benefit from the side-effects of a war of independence, which allows some future leaders to give a costly signal of their willingness to give their lives for their country. The willingness of George Washington in the United States, Nkrumah in Ghana, Mandela in South Africa, Nehru in India, Tito in Yugoslavia, Mao in China, and others elsewhere to risk imprisonment or death in wars of independence earned them the trust of the citizens in contexts where more subtle forms of public spirit were hard to measure. As a result, wars of independence can (although they do not inevitably) generate the selection of genuinely public-spirited leaders for a time, before those leaders, not tempered by potential sanction, become ego-maniacal or corrupt. Once the generation from the wars of independence has died, voters have access to less reliable signals and the quality of the leadership is likely to decline.

Religious leaders too can send costly signals of non-self-interested motivation. In many forms of Judaism and Islam such a signal derives from devotion to a life of learning, when the cost of learning an ancient, non-vernacular language or memorizing large amounts of a foundational text may guarantee a meager living but have no clear payoff in significant wealth. In such cases, and in the absence of other reliable signals in the political world, it may be functional for people to select such religious leaders over secular leaders more likely to be motivated primarily by self-interest. Along the same lines, in the United States today citizens sometimes gauge public spirit from the willingness of the wealthy to invest their fortunes in their own political campaigns. In the absence of corruption (which insures a monetary payoff to taking office), the public may reasonably take such investments as evidence of public-spirited (if sometimes also wrong-headed or ego-driven) commitment to a cause. Voting against majority sentiment or against one's party sends another visible and costly signal of one's commitment and integrity.[44]

Repeated interaction is the most frequent basis for interpreting an actor's internal motivations.[45] In the absence of personal experience with a potential agent's past behavior, principals often rely on the agent's reputation within a network of individuals who have been better placed to observe those actions over time.[46]

Professional networks – including the professional civil service in such countries as France, England, Germany, and Sweden – help create such reputations. Political parties play the same role for legislative candidates.

When both costly signals and reliable reputations are hard to come by, principals – including citizens choosing their representatives – often fall back on stereotypes, from which they infer both aligned objectives (shared interests) and the competence and honesty of the potential representative.[47] Although accuracy regarding any individual may be poor and a decision made by stereotype may be unjust to a given individual, if a stereotype is at all true of a group in general, that stereotype allows a principal to take the average characteristics of a group as a decisional cue to the density of a particular trait (e.g., cooperators vs. defectors) in the group.[48] For most citizens in large-scale advanced democracies, however, the party identification of a candidate serves as the most important indicator of policy alignment, and, for some, even of character.

De-selection (which Besley calls "ex post selection"[49]) generates an even worse information problem. Although the voter now has access to the public record of the representative's behavior in office, the representative also has an increased capacity to make her record look better than it is through easier access to the media and public events, the franking privilege, and the publicity attendant on constituency service. The selection model is not normatively tenable unless the citizenry retains sufficient capacity to remove representatives who have gotten out of touch with the prevailing objectives of the district's voters.[50] Thus party systems, other networks, and the media play a critical informational role, as does the internal competitiveness and vitality of the party system.

Self-selection among potential agents can also serve as an important sorting mechanism. Non-profit organizations often act differently from private firms because the managers, acting from more intrinsic motivations, "sort themselves, each gravitating to the types of organizations that he or she finds … most compatible."[51] Potential political representatives engage heavily in this sorting process. Those who might otherwise be interested in running for office refrain from the investment if their personal policy orientations do not sufficiently reflect the orientations of their potential constituents.[52] And when the orientations of their constituents change (through changed boundaries in the district, changing demographics, or the entry of new generational cohorts with new political views), many elected representatives retire and new candidates are drawn into politics. "If your conscience and your district disagree too often," members of Congress like to say, "you're in the wrong business."[53]

Low compensation plays two contradictory roles in this sorting process. The pay for mission-oriented agents must be high enough to facilitate a sorting that selects for competence, but low enough to facilitate a sorting that selects for mission-orientation. The clergy and monks of the religions that demand celibacy or relative poverty have traditionally responded to these disincentives by sorting themselves on the dimension of mission-orientation. Low-paying "citizen legislatures" and public offices have generated the same self-sorting, with the same tension between sorting for competence and sorting for mission-orientation.

Self-sorting by low compensation is highly inegalitarian, as members of different groups bring greatly unequal resources to the sort. Unsalaried or uncompetitively compensated positions tend to attract individuals with additional resources to support themselves and their families, while sorting on "citizen duty" also disproportionately attracts members of the middle and professional classes, who have been socialized to value that form of duty.[54] Although religious, local, and ideological commitments sometimes cut across class in creating a mission-oriented motivation to run for office, the frequent class bias of those who take underpaid offices can make aligned objectives less likely and communication with working-class constituents more difficult. Low compensation also increases the risk of corruption.

VI Accountability and Transparency

In standard principal-agent theory, accountability means that a principal "has powers to sanction or reward the agent": *accountability as sanction*. In ordinary parlance sanctions are also often central to accountability: "When people seek to hold someone accountable, they are usually planning some kind of punishment."[55]

Yet an earlier understanding of accountability stresses "giving an account" (*rendre compte, Rechenschaft abgeben*).[56] When the principal and agent have largely aligned objectives, the focus of accountability shifts from monitoring and sanctioning to the agent's giving reasons for his or her acts, either through (one-way) *narrative accountability* or (two-way) *deliberative accountability*.[57]

Narrative and deliberative accountability work best when the principal, even if unhappy with the result, can see that the intrinsic motivation underlying the aligned

objectives remains unchanged. Representatives can relatively easily explain changes in policy by new facts and circumstances, but changes in principles throw doubt on the consistency of their characters.[58] The selection model has the problem that narrative and deliberative accountability also work best when representatives can give full explanations in interaction with their constituents, an opportunity that few if any large-scale representative systems provide.[59]

No matter how selection-based, every system needs some monitoring of both elected officials and bureaucrats. Yet that monitoring need not be systematic and on-going. Matthew McCubbins and Thomas Schwartz contend that it is more efficient for individual citizens and interest groups to send in alarms when they come across wrongdoing ("fire alarm" oversight) rather than engage in continual monitoring ("police patrol" oversight).[60] Fire alarm oversight is particularly appropriate in high-commitment systems when intrinsic motivation on the part of the agent produces a high probability of honest, competent, and aligned behavior.

What organizational theorists call "network" – or "horizontal," or "professional" – accountability can also substitute effectively for the "vertical" accountability standard of the sanctions model.[61] If members of a network have a strong enough internal commitment to the norms of their profession, or even if the members have only a self-interested concern for the reputation of their network, they will have an incentive to monitor and sanction the behavior of others in that network to keep potential defectors up to network standards. Parties often play this role, particularly in disciplined party systems. These networks of horizontal accountability, along with recruitment systems and larger social norms, help produce honesty and competence outside any system of electoral sanctions. When these processes are functioning effectively, the amount of monitoring and sanctioning needed outside the network (e.g., through the electoral system) is only the minimum that experience shows is necessary to prevent the unraveling of a system based primarily on internal incentives and horizontal accountability. That is often not very much.

A similar analysis holds for transparency, that familiar cure for the ills of democracy advocated by both the public and many political scientists. Although some transparency is good, indeed necessary, for democracy, and many situations could benefit from more of it, more transparency is not always better. In contexts where the elected representatives are in general competent, honest, and well aligned with their constituents, each increase in efforts to produce transparency above an important minimum can create costs in efficiency and in motivation.[62] Many negotiations, great and small, are best conducted behind relatively closed doors. Negotiators need to show those with whom they are negotiating that they understand their positions. Accordingly, they need to be able to say things that some of their constituents might consider fraternizing with the enemy. They need to be able to explore avenues that, after exploration, they might repudiate. They need to able to act creatively and empathetically, without scrutinizing every word for how it will play in public.[63]

When transparency has such costs, we should favor not extreme *transparency in process* (for example making all committee meetings public), but instead *transparency in rationale* – in procedures, information, reasons, and the facts on which the reasons are based. In the Supreme Court of the United States the deliberations and the negotiations are secret, but the facts and reasons on which the decisions are based are public. When EU bureaucrats have been asked to be more "transparent," they have in most cases responded appropriately in this more communicative fashion – giving reasons, explanations and facts, and improving notification, rather than opening their processes to public monitoring.[64] A selection model of political representation, based on justified trust in the motivations and underlying orientation of the representative, makes transparency in the process less necessary.

VII Non-Hierarchical Selection

The selection model of representation should not be confused with either the "trustee" form derived from Edmund Burke or the elitism of Joseph Schumpeter. Trustee representation is only one instance of the selection model, and it is the least democratic kind. Both the word "trustee" itself and Burke's own stance suggest that the trustee is wiser and more far-seeing than his constituents, and for this reason more fit to rule. Linguistically, a trustee is "one to whom something is entrusted, one trusted to keep or administer something" or "one holding legal title to property which he must administer for the benefit of a beneficiary,"[65] with the strong implication that the trustee knows better what is good for the trust's beneficiaries than do the beneficiaries themselves. A financial trust is often created on the paternalistic assumption that it is better if the beneficiary never gets his or her hands on the funds at all.

Burke's stance was also elitist. Although in his speech to his constituents at Bristol he said only that a representative betrays his constituents if he sacrifices his judgment to their opinion, in his correspondence Burke made it clear that, like many of his class and time, he was skeptical about the capacities of "the people."[66] Bernard Manin makes a convincing case that in Burke's era electoral representation implied for many what Manin calls "the principle of distinction," that is, the idea that representatives "should rank higher than their constituents in wealth, talent, and virtue."[67]

Schumpeter too did not hide his disdain for the "typical citizen," whose "primitive impulses, infantilisms and criminal propensities" erupt in a crowd, whose "disillusioning" openness to subconscious messages makes him prey to false advertising, who pays scant attention to matters that do not engage his "immediate personal and pecuniary" interests, and who, in Schumpeter's most famous phrase, "drops down to a lower level of performance once he enters the political field."[68]

Yet the selection model of political representation need imply no more hierarchy than any representative process, whether based on sanctions or selection. The selection of a representative can rest purely on a division of labor, as the Abbé de Siéyès suggested years ago.[69] When the US constitution was being debated in 1787-88, and the Federalists advanced their principle of distinction, the Anti-Federalists opposed that principle, arguing that representation required "likeness" and "resemblance" to constituents so that representatives could "possess their sentiments and feelings."[70] Both Federalists and Anti-Federalists assumed a model of representation based primarily on selection, but the criteria for selection were hierarchical in the one case and egalitarian in the other.

The selection model in developed democracies today has lost many of the hierarchical trappings associated with its "trustee" form. In Besely's formulation, for example, citizens select a "citizen-candidate" from among themselves – although in both sanction and selection models constituents generally choose representatives who are more highly educated and with more experience in politics than most of their supporters. Today when voters say they want to select a "good man" or "good woman" as a representative, they often seem to want someone like them, but with the interest, competence, and honesty to be a legislator. Edmund Burke did not present himself to his constituents as being "like them."

VIII Homogeneity and Extended Incumbency – How Evil, Really?

The selection model is associated in practice with two features usually considered troubling for the quality of democracy: homogeneous districts and extended incumbency. As Fenno's "Congressman C" put it, "A congressman who comes from a homogeneous district like mine will vote the way his district wants most of the time because he's so much like them."[71] Once selected for overall direction and competence, a representative from a homogeneous district need only continue to be authentically herself, avoid corruption, and work hard.[72] If nothing changes – that is, the boundaries of the district do not change, younger voters maintain the same preferences and interests as their elders, new groups do not enter, the representative continues to be as constituency-centered, policy-congruent, honest, and competent as before, and no new challenger outshines the incumbent on these matters enough to outweigh the loss in experience – the same process that gave rise to selection can be expected to generate a long incumbency.

By contrast, heterogeneous districts encourage the threat of sanctions. With two or more groups trying to achieve different goals, a candidate for election or reelection must cobble together a majority by giving as many groups as possible as much as possible of what they want. These actions, at least, will be induced. Small shifts in the district's composition or the representative's actions can also cause an upset, making extended incumbency less likely.

The positive case for homogeneity is simple. The more homogeneous the district, the greater the proportion of voters who can be satisfied with their representative – a satisfaction that carries over, to a lesser degree, to the legislature as a whole.[73] If representation had only the goal of voter satisfaction, the ideal electoral district in a first-past-the-post single member system would always be one that included only constituents with exactly the same political preferences.[74] In a homogeneous district, communication between representatives and constituents is also easier. Representatives loosen up, feel relaxed, and communicate easily with their core constituencies. Constituents find it easier to contact a representative whom they view as "like them." In the United States, for example, Black constituents are more likely to contact Black representatives and White constituents more likely to contact Whites.[75]

On the negative side, homogeneity is never total, and near-homogeneity lets a representative ignore the minority.[76] The more homogeneous districts are, therefore, the more critical it is to have institutions through which minorities in the district can both make connections with surrogate representatives in other districts and promote their needs and interests in associations that reach across district boundaries.

Homogeneity also risks increasing complacency and narrowmindedness. As more citizens move to districts where others share their core political values (as is happening between but perhaps not within states in the United States today),[77] they find it easier to select representatives who intrinsically share their views. Their political lives will become proximately more satisfactory as a result. But in these more homogeneous political spaces, neither voters nor representatives will have to pay the price of trying to communicate with others whom they do not immediately understand.[78] They may also not feel the need for compromises at the legislative level. Lack of diversity may foster extremism.[79] Short-run political satisfaction may be bought at the expense of long-run growth in understanding and capacity to compromise.

The positive case for incumbency is also simple and somewhat similar to that for homogeneity. In non-corrupt systems, long stretches of repeated reelection and the absence of opposition often signal a satisfied constituency. Incumbency also promotes communication between representative and constituent. The longer the selected representative remains in office, the better constituents will know the representative and her staff. Constituents will have had more chances to see the representative in person or to write and receive a reply. They will have built a relationship with the representative that, although necessarily distant, facilitates, at least in the best case, warranted trust and further communication.[80] Finally, with a good, internally motivated representative, incumbency increases voters' control over the legislature. The voters retain in office someone who has learned the ropes, made the contacts, become expert on relevant policies, and, as a result of experience, has more impact on legislative outcomes than a newcomer could have.[81]

In a selection model, voters do not exercise control over the institutions of government by exercising control over the *representative*, getting the representative to do something the representative would otherwise not do through the threat of being voted out. In a pure selection model, voters would have zero control over the representative. Rather, voters get the *legislature* to do what it would otherwise not do by placing in it a representative who will pursue the policies that they favor. The voters' ultimate goal is not control over a particular representative but a fair share of control over the entire legislature. In a selection model, as we have seen, incumbency usually increases the voters' control over the legislature by making the instrument of their control, the representative, more effective.

The negative side to incumbency derives primarily from the difficulty of removing the representative. Normatively, the viability of the selection model depends not only on good information at the times of initial selection and potential de-selection but also on ease of removal when the selected representative is no longer aligned with the constituents' needs and desires. Yet in contrast to incumbency itself, certain advantages that come with incumbency lower "electoral control"[82] in both a sanctions and a selection model. Although necessarily facing fixed terms and the requirement of reelection, incumbents can draw, unlike challengers, on the renown that comes with their office as well as on gratitude for past policy work and constituency service. The franking privilege, staff, and travel allowances that let them communicate appropriately with their constituents are paid from government budgets, while challengers must pay for equivalent publicity from their pockets or by raising money from supporters. Thus if the legislator changes (becoming lazy, corrupt, legislature-centered, or simply tired of going out on the hustings) or if the constituency changes (through district boundary changes, generational or mobility replacement, or an exogenous policy shock), the very capacities for communication and trust-building that are normatively positive features of incumbency when representative and constituents are well aligned make it harder for challengers to get their credentials before the public when that alignment slips.

Incumbency, in short, can indicate either genuine constituent satisfaction or constituent disempowerment. Interrogating each incumbency requires first asking some questions with relatively easy answers: Does the representative by and large promote policies and a larger political direction that the majority of constituents approve? How satisfied are the majority and minority of constituents with their representative? It also requires questions that are harder to answer: Is satisfaction (or dissatisfaction) with the representative the result of ignorance or manipulation? Have scandals, indications of corruption, or other derelictions of duty affected the incumbent's majority? Will the existing media system

publicize departures from citizen preferences or interests? Is there a lively set of interest groups that could bring attention to such departures and promote policies that would not otherwise be on the agenda? Are the citizens active in other forms of politics and therefore able to inform themselves easily and take action skillfully if their current representative no longer seems appropriate? Is the internal party system vital, self-policing, and continually infused with new activists and new ideas, or is it dormant, in the pocket of the incumbent, and relatively closed to newcomers? Although it is not easy to answer such questions, such an effort is required before we treat high rates of incumbency as evidence of democratic failure.

In addition to possibly signaling reduced voter control over democratic institutions due to incumbency advantage or corruption, extended incumbency may also exact a price in citizen activism. One would expect even positive, genuinely chosen, incumbency to undermine citizen political activity because once constituents have selected an honest and competent representative with approximately their own political views, they can turn to other matters, letting the representative get on with the business of politics. If representatives retain their constituents' loyalties and thus face few challenges at election time, the voters also will not have the stimulus of a close election to bring their attention back to politics. Yet the picture is not completely bleak. In some contexts, homogeneous districts with long-standing incumbents and satisfied constituents free up citizens for other forms of citizen activism.[83]

Nor would a theorist of common-interest politics like Rousseau value highly the forms of political participation that derive from either fascination with a close electoral race or fear of one's own side losing that race. Rousseau wanted citizens to "fly to the assemblies" in order to do their part in bringing a good polity into being, not because they feared that the other side might win.[84] A politics that produces turnout through enmity or conflicting material interests is not likely to cultivate attachment to the common interest. Thus while a selection model of political representation may reduce citizen activism, that result is far from necessary. And the close race that is the ideal of many a political scientist does not have indisputably positive normative qualities.

When a selection model of political representation is feasible, it may be better to look for incentives to citizen activism less in the process of electing representatives than in more direct forms of action. Citizen initiatives, now used only to initiate referenda, could trigger mandatory public hearings in which elected representatives or the bureaucrats responsible for an unpopular policy face questions and objections from the public and have to explain their reasons for these policies. Such citizen initiatives could also trigger representative citizens' assemblies composed of randomly selected citizens and modeled loosely on the ancient Greek system of the lot. Local, state, and national ombuds offices could accept individual and group petitions and class action cases. Citizen-directed vouchers allocating tax monies could fund associations to represent different political interests. Police beat meetings, participatory budgets and other empowered institutions in which citizens act directly could make or heavily influence policy at the local level.[85] Citizen action in these realms would not substitute for but could enhance the relationships citizens have with their representatives.

IX Conclusion: The Normative Side of Selection

Ideally, politics should not be a market relationship. Voting for one candidate rather than another should not be like buying one toaster rather than another. At its best political representation demands a communicative relationship. In political representation, "we," plural, have many relationships with our representatives. We do not always agree with our representatives or one another, and we have conflicting interests with our representation and with one another. Accordingly, in any instance the representative-constituent relationship as well as the constituent-constituent relationship may be fraught with tension. In this tension, if the representative cares only about votes and the minorities in the constituency do not have enough votes, cannot get them, and cannot work in coalition, that ends the story. In a selection model much depends on the character of a representative's internal motivation. Normatively, such a representative should be open to persuasion. Even losing minorities should be able to respect the representative while making a deliberative case to both other citizens and their common representative that the representative's policy choice was wrong.

The characters of the representative and the constituents are also formed in the representative-constituent relation. A sanctions model, based on inducing a representative's preferences through the threat of electoral defeat replaces an expectation of common interest between representative and constituent with an expectation that

the representative will "shirk," ideologically or in other ways, and that sanctions are therefore necessary to bring her to heel. Such expectations are sometimes amply warranted. But they are not costless. They affect who will enter politics, what relationships they will attempt to establish with their constituents, and how those constituents will see the political system. A selection model, when feasible, will attract more internally-motivated candidates into politics. The character of these representatives and their approaches to politics will in turn affect how the constituents think of their polity and what they want from it.

Despite its disadvantages, in short, the selection model has several normatively satisfying features. It couples intrinsic motivation on the part of the representative with control (over the legislature, not the representative) on the part of the voter. Constituents will tend to get behavior that is more dedicated, more adaptive to long-run goals, and more flexible in the means from an honest, competent representative who intrinsically wants to pursue the same kinds of policies the constituents want than from a representative who, seeking only reelection, responds only to the promise of votes or the threat of withdrawing those votes. The harder it is to monitor and sanction, the more reason constituents have to distrust a representative who acts only for such extrinsic rewards.

Beyond efficiency, constituents can take some satisfaction from the quality of their relationship with an intrinsically motivated representative. A selection model privileges commitment to the common interest over the more self-interested motive of desiring reelection. Many constituents can also feel – correctly – that their representative is like them, at least in policy objectives and often in their overall approach to life. The constituent-representative relationship can be one of trust, even warmth. Although distant, it can partake of some of the characteristics of friendship, with an expectation of common interests. Without knowing each other personally, both partners in the relationship can wish the other well. Particularly in a country as populous as the United States, close communication between represented and representative is difficult on a national scale, making this kind of relationship hard to foster. A selection model both builds on and creates such relationships.

A "contingency" theory adapts the size of the selection core and sanction periphery to the empirical context. While monitoring should never be entirely absent and representatives should always be removable, a selection model works well in relatively uncorrupt polities where, by and large, representatives sort themselves into districts where they can present themselves as being what they are and internally want to be, and where constituents have sufficient information at the time of selection to make a reasonable choice. When feasible, a selection model will direct the attention of constituent and representative to the common interest and will foster that interest. It will also be more efficient than a model based on monitoring and sanctions. Thus whenever the ingredients of self-motivated agents, aligned objectives, and the appropriate selecting and sorting mechanisms are available, democracies that can base their representative systems primarily on selection will tend to succeed in competition with societies in which the political system has to operate primarily through sanctions.

Notes

1 Some kinds of representation (e.g., surrogate representation, Mansbridge 2003) and representational claims (see Saward 2006) do not take a principal-agent form. This article will discuss representation only as a principal-agent problem. It will also concentrate largely on the US case, which has generated most of the work promoting a sanctions model. In party list proportional representation systems and some other disciplined party systems, the party usually selects representatives primarily on party loyalty (including policy preference), competence and honesty. It then adapts its own platform to a greater or lesser degree in response to potential voter sanctions. Parties range from the most internally motivated or "gyroscopic" (responding largely to the members' principles and ideology) to the most externally motivated (responding largely to electoral inducements or sanctions).

2 Miller and Stokes 1963, p. 50.

3 Erikson 2006. By 2006, Miller and Stokes (1963) had become the fifth most cited article in the *American Political Science Review* (Sigelman 2006, pp. 667–669), although not necessarily because of the two paths. In the top three journals for American politics (*APSR*, *AJPS*, and *JOP*), just over a third (34 percent) of the 125 articles citing this article referred to both paths, while 38 percent mentioned neither path, 27 percent mentioned the sanctions path alone, and less than one percent (one article) mentioned the selection path alone. I thank Philip Jones for this analysis.

4 Kingdon 1973, pp. 44, 45; 1981, p. 46 (revised from first edition for clarity). Kingdon reports even less conflict in Northern Democratic, urban, and high majority districts. Presumably about a quarter of the legislative votes were induced (see "Electoral Consequences" later in the same chapter).

5 Kingdon 1973, p. 46.

6 Mayhew 1974. Fiorina 1974.

7 Bernstein 1989, p. 101. In his summary, "Constituency influence does not flow primarily from electoral threats against those in office, but rather from the initial selection of representatives. … The desire for reelection has only marginal impact in shifting members from ideological preferences should those preferences differ from the preferences of their constituencies" (pp. 104–5).

8 Bianco 1994, pp. 26–27. For example, John Ferejohn (1986, p. 12, cited in Bianco 1994, p. 28) had designed his principal-agent game so that "the voter's problem is to police moral hazard [sanctions model] rather than to find and elect the more capable or benevolent officeholders [selection model]." Anthony Downs (1957, p. 28) had earlier argued that contestants for office "formulate policies in order to win elections [sanctions model], rather than winning elections in order to formulate policies [selection model]."

9 Bianco 1994, pp. 87, 160. Bianco explicitly adopted the central procedural assumption in rational choice analysis that rational actors "evaluate the consequences of different actions in light of [their] goals" (p. 39) but contested the motivational assumption that "rational actors are invariably motivated by economic self-interest" (p. 40) and particularly that, in Terry Moe's words, legislators should be "assumed to be motivated by reelection. Their preferences over issues of policy and structure are induced" (1990, pp. 27–28, cited in Bianco 1994, p. 31).

10 Stimson, MacKuen and Erikson 1995, p. 560; they did not discuss the differences between their findings and those of either Kingdon 1973 or Bernstein 1989. Although the article does not explicitly cite Miller and Stokes on the two paths, both Stimson (personal communication) and Erikson (2006, p. 674) were guided by that analysis.

11 Fearon 1999, pp. 55, 56.

12 Fearon 1999, p. 56. A "good type" has the characteristics of having policy preferences similar to those of the voter, being honest and principled, and being sufficiently skilled (Fearon 1999, pp. 59, 68).

13 Fearon 1999, pp. 57, 77 (emphasis in original).

14 Pratt and Zeckhauser 1985, p. 15.

15 Lott 1987, p. 183. Looking at changes in voting patterns across retiring and non-retiring members of Congress between the 94th (1975–76) and 95th (1977–78) Congresses, Lott reported that "92 percent of the 216 regressions indicate that politicians in their last period do not behave any differently than other politicians" (1987, p. 179; see also literature review in Bender and Lott 1996). With a more precise methodology, however, Rothenberg and Sanders (2000) did show leavers changing their votes more than non-leavers in their last period in office (by .033 to .039 on a −1 to +1 liberal-conservative scale), although not to the degree predicted by sanctions theory and no more among retirees than among those going on to statewide office, some of whom a sanctions theory would predict to have an incentive to remain consistent. They conclude that even a member who moves her vote when leaving "is likely to agree with her constituents a large percentage of the time" (2000, p. 322), a result consistent with a "selection core, sanction periphery" hypothesis.

16 Brennan 1996, pp. 257–9. He, quoting Alexander Hamilton: "The assumption of universal venality in human nature is little less an error in political reasoning than the assumption of universal rectitude" ([1788] 1961, p. 458, in Brennan 1996, p. 260).

17 Brennan 1996, pp. 259–60, drawing in part on thoughts in *The Federalist Papers*. He also notes that "on at least some occasions, the same institutional device [e.g., elections] will perform both incentive and selection functions" (p. 262).

18 Besley and Coate 1997. Besley and Ghatak 2005. Besley 2005; 2006.

19 By "Public Choice" Besley (2006, p. 29) means "the work beginning in the Virginia School in the 1950s," which has "three distinctive features," of which the first is "the assumption of rational self-interest in the study of political interactions." (The second is the use of constitutions to constrain self-interest and the third the assumption of a state whose legitimacy is limited to the domain to which freely contracting agents would agree.) Besley (2006, p. 38) also associates the first assumption with "the Chicago approach to political economy."

20 Buchanan 1989, pp. 18, 20. Quoted in Besley 2006, p. 29.

21 Besley 2006, pp. 2, 106, 37, 40–41, citing Barro (1973) and Ferejohn (1986) *inter alia* as examples of "first generation" sanction models. For Besley, politicians are "congruent" (or simply "good") if for fiduciary or other reasons they "share voters' objectives exactly" (pp. 109, 176), and "dissonant" (or "bad") if they are less than fully competent and thus find it costly to do what voters want, if they are influenced by special interest groups to pursue directions contrary to those of the voters, if they have private agendas contrary to those of the voters (including ideological dispositions as well as rent-seeking desires), and even if they do constituency service that promotes their own reelection but distracts them from the public interest.

22 Lee, Moretti and Butler 2004, p. 807.

23 A clearer line of research had emerged in economics: Fearon (1999) cited Lott (1987) and primarily the economic literature; Besley (2004; 2006) similarly cited both earlier economists and Fearon. With the more recent works, the selection model can now be said to play in the economic analysis of political representation a role

co-equal with that of sanctions, and economists are now turning their intelligences to the issues a selection model might raise (see, e.g., Kartik and McAfee 2007). In the rational choice subfield in political science, sophisticated scholars are also beginning automatically to add selection to sanctions (e.g., Ferejohn and Rosenbluth 2009, identifying the two models as the "'moral hazard' and 'adverse selection' perspectives"). In political theory, Pettit has recently distinguished between "indicative" and "responsive" representation (2008; see also 2009).

24 Mansbridge 1990.

25 The field of public administration in the early 1940s also saw a "great debate" (Carr 1999, p. 4) between Carl Friedrich (1940) and Herbert Finer (1941) on the best way to secure responsible and ethical conduct among public officials. Friedrich argued for selecting self-motivated persons who sincerely wanted to work for the public interest and reinforcing those internal commitments, while Finer argued for external sanctions and controls. Neither argued for a contingency theory or core-periphery combination balanced to match the context; neither pointed out that when a context can support a selection model a sanctions model will be relatively inefficient; and neither argued normatively for cultivating common interests or good relationships between principals and agents.

26 Besley and Ghatak (2005, p. 616) mention "doctors who are committed to saving lives, researchers to advancing knowledge, judges to promoting justice, and soldiers to defending their country in battle."

27 See Deci, Koestner and Ryan 1999; Kruglanski et al. 1975; Deci and Ryan 1985; Frey 1997; Bohnet et al., 2001. I thank Iris Bohnet for this last suggestion.

28 O'Neill 2002, pp. 19, 49, 25.

29 Behn 2001, p. 83. See also: Philp 2004, p. 22; Anechiaro and Jacobs 1996, p. 202; and Goodin 1980; 1982 on moral incentives.

30 Fenno 1978, p. 170.

31 Miller 1999, p. 1053. On the prevalence of the norm of self-interest, Miller cites, among others, Alexis de Tocqueville in the mid-nineteenth century observing that "Americans … enjoy explaining almost every act of their lives on the principle of self-interest…. I think that in this they often do themselves less than justice, for sometimes in the United States, as elsewhere, one sees people carried away by the … spontaneous impulses natural to man. But the Americans are hardly prepared to admit that they do give way to emotions of this sort" ([1835]1969, p. 546, in Miller 1999, p. 1057). See also Eliasoph 1998.

32 See Mansbridge 1990.

33 Mansbridge 1980, 235–247.

34 Fenno 1978, p. 125; see below, section VIII.

35 By corruption here I mean only "behavior which deviates from the formal duties of a public role because of private-regarding (personal, close family, private clique) pecuniary or status gains; or violates rules against the exercise of certain types of private-regarding influence" (Nye 1967, p. 419).

36 Sanctions models are not necessarily inflexible. "Anticipatory representation," in which the representative's behavior is induced by the prospect at the next election of the voters' retrospective judgments on the representative's past performance, is far more flexible than "promissory representation," in which the representative's behavior is induced by fear of retaliation if she does not keep promises made at the first election (Mansbridge 2003). Yet, in a selection model voters usually give the representative even more leeway.

37 Baron and Kreps 1999.

38 Mansbridge 2003.

39 In the United States, women, who are on the average less informed about politics than men (Delli Carpini and Keeter 1996) and also have had less political power (and may therefore rely less on sanctions), have traditionally been more likely than men to choose their representatives on the basis of character (Andersen and Shabad 1979). Popkin (1991) also stresses signs of character as one that voters use in selecting representatives.

40 Miller and Stokes 1963. Fenno 1978.

41 Bohnet et al. 2001, p. 132.

42 Frank 1988.

43 Bianco 1994, p. 56. Mansbridge 1999, p. 305.

44 Fearon 1999, p. 63. Kartik and McAfee 2007.

45 See Dixit (2002, p. 703): "repetition creates scope for building a reputation about one's type."

46 Shapiro 2005, p. 276. Bianco 1994, p. 152.

47 Bianco 1994, pp. 59, 120.

48 See Popkin 1991.

49 Besley 2004.

50 See below on incumbency.

51 Weisbrod 1988, pp. 31–32. Besley and Ghatak (2005) thus advocate heterogeneity among missions, whether in the non-profit or other sectors (e.g., among different kinds of public schools), to make this sorting process most efficient. Different kinds of incentives attract different kinds of individuals (Brennan 1996; Bohnet and Oberholzer-Gee 2002), with the "currency" of reward helping in the sort. For example, when direct payments are low but certain consumption expenses high (research equipment for academics, religious edifices for clerics, well-trained clerks for judges), if these forms of compensation enhance desired output, they "cost" the principal less as well as improving the sort, being of greater value to individuals already motivated to produce the desired output (Brennan 1996).

52 Fenno 1978. Lawless and Fox 2005.

53 Fenno 1978, p. 142. Also Cox and Katz 2002.

54 Prewitt (1970), criticizing a form of the selection model among Bay area councilmen.

55 Fearon 1999, p. 55. Behn 2001, p. 4.

56 The *Oxford English Dictionary* (2nd edn.) on "accountability" gives as a substantive definition only "liability to give

an account of, and answer for, discharge of duties or conduct," touching on sanctions only through the implications of the phrase "answer for," which nevertheless has narrative overtones. On accountability as giving an account (showing, explaining, and justifying past actions), see Behn 2001, p. 4; Philp 2004, p. 12; and O'Neill 2002, p. 58.

57 The opinions of the US Supreme Court exemplify pure narrative accountability. In deliberative accountability principal and agent both ask questions and give answers, exploring whether or not they remain mutually aligned and whether the grounds of their alignment might have changed.

58 I thank Richard Zeckhauser for this suggestion.

59 See Bianco 1994; Kingdon 1981, p. 48.

60 McCubbins and Schwartz 1984. See also Aberbach (1990) on "alarm-based" vs. "constant-surveillance" models and Anechiaro and Jacobs (1996) on the counterproductive effects of monitoring and sanctions in New York City.

61 See Goodin (2003) for network accountability in nonprofit institutions, arguing that accountability based on "praising or shaming and shunning" (p. 12) will work most effectively among actors motivated by the public good. Yet networks can also function as "cozy cabals covering one another's incompetence"; thus the networks themselves often require some external monitoring and sanctions (p. 41). See also Keohane and Nye (2001) on network accountability in international organizations.

62 See O'Neill (2002) against transparency.

63 As Naurin (2004) points out, transparency impedes mutually-disclosive negotiations because often the most useful disclosures cannot be public. The costs are particularly great in potentially "integrative" or win-win solutions (Follett [1925] 1942; Fisher and Ury 1981). Examining transcripts of legislatures, Steiner et al. (2004) conclude that expressions of respect and understanding of others' positions are more frequent in closed sessions of the legislature than in public ones. On the deliberative costs and benefits of transparency, see Elster (1995; 1998) and Chambers (2004).

64 Lodge 1994. Also see Keohane and Nye (2001, p. 230) and Magnette (2003, p. 151).

65 *Webster's Third New International Dictionary, Unabridged* (1993), s.v. "trustee."

66 Burke [1774] 1889; Burke to the Duke of Richmond, 26 September 1775, *Correspondence*, 3:218, quoted in Herzog 1998, p. 523 (also pp. 34, 504–27).

67 Manin 1997, p. 94. By contrast, in modern societies principals may decide that they want to select agents more talented and virtuous than they, but this is not entailed by the model.

68 Schumpeter [1942] 1962, pp. 257, 258, 260, 262.

69 See Manin, 1997, p. 3.

70 Brutus 15 November 1787, in Storing (1981, vol. 2, p. 380), cited in Manin (1997, p. 110).

71 Fenno 1978, p. 142.

72 See Fenno (2007) on the importance of authenticity to both constituents and representatives. The association between selection and either homogeneity or incumbency is far from perfect. In a homogeneous district, a representative motivated only by the desire to hold office could give the constituents exactly the policies they want, never change the formula, and thus continue to be reelected. In a heterogeneous district, a representative motivated only by her convictions regarding the common good could offer the constituents an overarching vision and personal characteristics that they admire, never change that presentation, and thus continue to be reelected. Presidential candidates in the United States work largely on a selection model, particularly in their second term, but face a highly heterogeneous constituency.

73 Brunell (2006), using ANES data to measure satisfaction; see Buchler 2005 for a model. On competitive versus homogenous districts, see the debate between Issacharoff (2002a; 2002b) and Persily (2002).

74 Brunell 2006, p. 80. Persily 2002, p. 668. In this case a single-member district system would begin to approximate multi-member proportional representation.

75 On relaxed communication, Fenno 1978; on contacting, Gay 2002.

76 Guinier (1994, p. 135) argues, for example, that relatively homogeneous racial districts reduce the incentive to appeal across racial lines. List systems of proportional representation are vulnerable to a similar criticism (see e.g., Horowitz 2003).

77 On increased sorting between states in the US, see Bishop (2008); on within-state sorting, see Rhode and Strumpf (2003). For evidence that geographical sorting has more effect than redistricting on incumbency, see Oppenheimer (2005). In the extreme, geographical sorting could eventually produce the territorially-based equivalent of proportional representation.

78 See e.g., Mutz (2006) on citizens' distaste for discussing politics with others who disagree.

79 See e.g., Sunstein 2003.

80 Alice Wolf, currently my representative in the Massachusetts state legislature, exemplifies the incumbency feature of the selection model. She embodies the political stances of many of her constituents so well that she ran unopposed from her first election as a state representative in 1996 through 2004, when she had only token opposition. Her constituents judge her aligned objectives and internal motivation and the alignment of her motives with theirs on the basis primarily of a reputation established over time among informed activists and spread through informal networks.

81 This pattern would hold even without institutional seniority advantages in the legislature. In the ideal, each citizen should have equal control over the legislature. It seems hard to produce this result, however, without forbidding the accumulation of experience among legislators, a course that has normative and practical costs.

82 Ansolabehere and Snyder 2002, p. 329. Note that "incumbency *advantage*" is no more than "the increment to the vote margin that a candidate gains by virtue of being the incumbent" (Erikson and Wright 1993, p. 100); it does not include the underlying partisan advantage accruing from a relatively homogeneous political district (Alford and Brady 1989; Oppenheimer 2005, p. 137).

83 E.g., with Alice Wolf in the Massachusetts legislature, turnout rates in her district drop, because only those who make a fetish of citizen duty bother to vote in an election for a representative who runs unopposed or with only token opposition. Yet that district (Cambridge, Massachusetts) is a relative hotbed of political activity despite having senators and representatives in the national and state governments whom the voters rarely replace. While far from typical, the city makes the point that competitive elections are not always necessary for citizen activism.

84 Because Rousseau ([1762] 1997) opposed a representative conception of sovereignty, his views may not be thought relevant on this point. Yet he also painted a more compelling picture than any other theorist of the decline of a polity when its citizens fail to desire the common good.

85 See e.g., Warren and Pearse (2008); Schmitter (1995); essays in Fung and Wright (2003).

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PART IV

Justice

15

Justice as Fairness

John Rawls

1. It might seem at first sight that the concepts of justice and fairness are the same, and that there is no reason to distinguish them, or to say that one is more fundamental than the other.[1] I think that this impression is mistaken. In this paper I wish to show that the fundamental idea in the concept of justice is fairness; and I wish to offer an analysis of the concept of justice from this point of view. To bring out the force of this claim, and the analysis based upon it, I shall then argue that it is this aspect of justice for which utilitarianism, in its classical form, is unable to account, but which is expressed, even if misleadingly, by the idea of the social contract.

To start with I shall develop a particular conception of justice by stating and commenting upon two principles which specify it, and by considering the circumstances and conditions under which they may be thought to arise. The principles defining this conception, and the conception itself, are, of course, familiar. It may be possible, however, by using the notion of fairness as a framework, to assemble and to look at them in a new way. Before stating this conception, however, the following preliminary matters should be kept in mind.

Throughout I consider justice only as a virtue of social institutions, or what I shall call practices.[2] The principles of justice are regarded as formulating restrictions as to how practices may define positions and offices, and assign thereto powers and liabilities, rights and duties. Justice as a virtue of particular actions or of persons I do not take up at all. It is important to distinguish these various subjects of justice, since the meaning of the concept varies according to whether it is applied to practices, particular actions, or persons. These meanings are, indeed, connected, but they are not identical. I shall confine my discussion to the sense of justice as applied to practices, since this sense is the basic one. Once it is understood, the other senses should go quite easily.

Justice is to be understood in its customary sense as representing but *one* of the many virtues of social institutions, for these may be antiquated, inefficient, degrading, or any number of other things, without being unjust. Justice is not to be confused with an all-inclusive vision of a good society; it is only one part of any such conception. It is important, for example, to distinguish that sense of equality which is an aspect of the concept of justice from that sense of equality which belongs to a more comprehensive social ideal. There may well be inequalities which one concedes are just, or at least not unjust, but which, nevertheless, one wishes, on other grounds, to do away with. I shall focus attention, then, on the usual sense of justice in which it is essentially the elimination of arbitrary distinctions and the establishment, within the structure of a practice, of a proper balance between competing claims.

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Finally, there is no need to consider the principles discussed below as *the* principles of justice. For the moment it is sufficient that they are typical of a family of principles normally associated with the concept of justice. The way in which the principles of this family resemble one another, as shown by the background against which they may be thought to arise, will be made clear by the whole of the subsequent argument.

2. The conception of justice which I want to develop may be stated in the form of two principles as follows: first, each person participating in a practice, or affected by it, has an equal right to the most extensive liberty compatible with a like liberty for all; and second, inequalities are arbitrary unless it is reasonable to expect that they will work out for everyone's advantage, and provided the positions and offices to which they attach, or from which they may be gained, are open to all. These principles express justice as a complex of three ideas: liberty, equality, and reward for services contributing to the common good.[3]

The term "person" is to be construed variously depending on the circumstances. On some occasions it will mean human individuals, but in others it may refer to nations, provinces, business firms, churches, teams, and so on. The principles of justice apply in all these instances, although there is a certain logical priority to the case of human individuals. As I shall use the term "person," it will be ambiguous in the manner indicated.

The first principle holds, of course, only if other things are equal: that is, while there must always be a justification for departing from the initial position of equal liberty (which is defined by the pattern of rights and duties, powers and liabilities, established by a practice), and the burden of proof is placed on him who would depart from it, nevertheless, there can be, and often there is, a justification for doing so. Now, that similar particular cases, as defined by a practice, should be treated similarly as they arise, is part of the very concept of a practice; it is involved in the notion of an activity in accordance with rules.[4] The first principle expresses an analogous conception, but as applied to the structure of practices themselves. It holds, for example, that there is a presumption against the distinctions and classifications made by legal systems and other practices to the extent that they infringe on the original and equal liberty of the persons participating in them. The second principle defines how this presumption may be rebutted.

It might be argued at this point that justice requires only an equal liberty. If, however, a greater liberty were possible for all without loss or conflict, then it would be irrational to settle on a lesser liberty. There is no reason for circumscribing rights unless their exercise would be incompatible, or would render the practice defining them less effective. Therefore no serious distortion of the concept of justice is likely to follow from including within it the concept of the greatest equal liberty.

The second principle defines what sorts of inequalities are permissible; it specifies how the presumption laid down by the first principle may be put aside. Now by inequalities it is best to understand not *any* differences between offices and positions, but differences in the benefits and burdens attached to them either directly or indirectly, such as prestige and wealth, or liability to taxation and compulsory services. Players in a game do not protest against there being different positions, such as batter, pitcher, catcher, and the like, nor to there being various privileges and powers as specified by the rules; nor do the citizens of a country object to there being the different offices of government such as president, senator, governor, judge, and so on, each with their special rights and duties. It is not differences of this kind that are normally thought of as inequalities, but differences in the resulting distribution established by a practice, or made possible by it, of the things men strive to attain or avoid. Thus they may complain about the pattern of honors and rewards set up by a practice (e.g., the privileges and salaries of government officials) or they may object to the distribution of power and wealth which results from the various ways in which men avail themselves of the opportunities allowed by it (e.g., the concentration of wealth which may develop in a free price system allowing large entrepreneurial or speculative gains).

It should be noted that the second principle holds that an inequality is allowed only if there is reason to believe that the practice with the inequality, or resulting in it, will work for the advantage of *every* party engaging in it. Here it is important to stress that *every* party must gain from the inequality. Since the principle applies to practices, it implies that the representative man in every office or position defined by a practice, when he views it as a going concern, must find it reasonable to prefer his condition and prospects with the inequality to what they would be under the practice without it. The principle excludes, therefore, the justification of inequalities on the grounds that the disadvantages of those in one position are outweighed by the greater advantages of those in another position. This rather simple restriction is the main modification I wish to make in the utilitarian principle as usually understood. When coupled with the

notion of a practice, it is a restriction of consequence,[5] and one which some utilitarians, e.g., Hume and Mill, have used in their discussions of justice without realizing apparently its significance, or at least without calling attention to it.[6] Why it is a significant modification of principle, changing one's conception of justice entirely, the whole of my argument will show.

Further, it is also necessary that the various offices to which special benefits or burdens attach are open to all. It may be, for example, to the common advantage, as just defined, to attach special benefits to certain offices. Perhaps by doing so the requisite talent can be attracted to them and encouraged to give its best efforts. But any offices having special benefits must be won in a fair competition in which contestants are judged on their merits. If some offices were not open, those excluded would normally be justified in feeling unjustly treated, even if they benefited from the greater efforts of those who were allowed to compete for them. Now if one can assume that offices are open, it is necessary only to consider the design of practices themselves and how they jointly, as a system, work together. It will be a mistake to focus attention on the varying relative positions of particular persons, who may be known to us by their proper names, and to require that each such change, as a once for all transaction viewed in isolation, must be in itself just. It is the system of practices which is to be judged, and judged from a general point of view: unless one is prepared to criticize it from the standpoint of a representative man holding some particular office, one has no complaint against it.

3. Given these principles one might try to derive them from a priori principles of reason, or claim that they were known by intuition. These are familiar enough steps and, at least in the case of the first principle, might be made with some success. Usually, however, such arguments, made at this point, are unconvincing. They are not likely to lead to an understanding of the basis of the principles of justice, not at least as principles of justice. I wish, therefore, to look at the principles in a different way.

Imagine a society of persons amongst whom a certain system of practices is *already* well established. Now suppose that by and large they are mutually self-interested; their allegiance to their established practices is normally founded on the prospect of self-advantage. One need not assume that, in all senses of the term "person," the persons in this society are mutually self-interested. If the characterization as mutually self-interested applies when the line of division is the family, it may still be true that members of families are bound by ties of sentiment and affection and willingly acknowledge duties in contradiction to self-interest. Mutual self-interestedness in the relations between families, nations, churches, and the like, is commonly associated with intense loyalty and devotion on the part of individual members. Therefore, one can form a more realistic conception of this society if one thinks of it as consisting of mutually self-interested families, or some other association. Further, it is not necessary to suppose that these persons are mutually self-interested under all circumstances, but only in the usual situations in which they participate in their common practices.

Now suppose also that these persons are rational: they know their own interests more or less accurately; they are capable of tracing out the likely consequences of adopting one practice rather than another; they are capable of adhering to a course of action once they have decided upon it; they can resist present temptations and the enticements of immediate gain; and the bare knowledge or perception of the difference between their condition and that of others is not, within certain limits and in itself, a source of great dissatisfaction. Only the last point adds anything to the usual definition of rationality. This definition should allow, I think, for the idea that a rational man would not be greatly downcast from knowing, or seeing, that others are in a better position than himself, unless he thought their being so was the result of injustice, or the consequence of letting chance work itself out for no useful common purpose, and so on. So if these persons strike us as unpleasantly egoistic, they are at least free in some degree from the fault of envy.[7]

Finally, assume that these persons have roughly similar needs and interests, or needs and interests in various ways complementary, so that fruitful cooperation amongst them is possible; and suppose that they are sufficiently equal in power and ability to guarantee that in normal circumstances none is able to dominate the others. This condition (as well as the others) may seem excessively vague; but in view of the conception of justice to which the argument leads, there seems no reason for making it more exact here.

Since these persons are conceived as engaging in their common practices, which are already established, there is no question of our supposing them to come together to deliberate as to how they will set these practices up for the first time. Yet we can imagine that from time to time they discuss with one another whether any of them has a legitimate complaint against their established institutions.

Such discussions are perfectly natural in any normal society. Now suppose that they have settled on doing this in the following way. They first try to arrive at the principles by which complaints, and so practices themselves, are to be judged. Their procedure for this is to let each person propose the principles upon which he wishes his complaints to be tried with the understanding that, if acknowledged, the complaints of others will be similarly tried, and that no complaints will be heard at all until everyone is roughly of one mind as to how complaints are to be judged. They each understand further that the principles proposed and acknowledged on this occasion are binding on future occasions. Thus each will be wary of proposing a principle which would give him a peculiar advantage, in his present circumstances, supposing it to be accepted. Each person knows that he will be bound by it in future circumstances the peculiarities of which cannot be known, and which might well be such that the principle is then to his disadvantage. The idea is that everyone should be required to make *in advance* a firm commitment, which others also may reasonably be expected to make, and that no one be given the opportunity to tailor the canons of a legitimate complaint to fit his own special conditions, and then to discard them when they no longer suit his purpose. Hence each person will propose principles of a general kind which will, to a large degree, gain their sense from the various applications to be made of them, the particular circumstances of which being as yet unknown. These principles will express the conditions in accordance with which each is the least unwilling to have his interests limited in the design of practices, given the competing interests of the others, on the supposition that the interests of others will be limited likewise. The restrictions which would so arise might be thought of as those a person would keep in mind if he were designing a practice in which his enemy were to assign him his place.

The two main parts of this conjectural account have a definite significance. The character and respective situations of the parties reflect the typical circumstances in which questions of justice arise. The procedure whereby principles are proposed and acknowledged represents constraints, analogous to those of having a morality, whereby rational and mutually self-interested persons are brought to act reasonably. Thus the first part reflects the fact that questions of justice arise when conflicting claims are made upon the design of a practice and where it is taken for granted that each person will insist, as far as possible, on what he considers his rights. It is typical of cases of justice to involve persons who are pressing on one another their claims, between which a fair balance or equilibrium must be found. On the other hand, as expressed by the second part, having a morality must at least imply the acknowledgment of principles as impartially applying to one's own conduct as well as to another's, and moreover principles which may constitute a constraint, or limitation, upon the pursuit of one's own interests. There are, of course, other aspects of having a morality: the acknowledgment of moral principles must show itself in accepting a reference to them as reasons for limiting one's claims, in acknowledging the burden of providing a special explanation, or excuse, when one acts contrary to them, or else in showing shame and remorse and a desire to make amends, and so on. It is sufficient to remark here that having a morality is analogous to having made a firm commitment in advance; for one must acknowledge the principles of morality even when to one's disadvantage.[8] A man whose moral judgments always coincided with his interests could be suspected of having no morality at all.

Thus the two parts of the foregoing account are intended to mirror the kinds of circumstances in which questions of justice arise and the constraints which having a morality would impose upon persons so situated. In this way one can see how the acceptance of the principles of justice might come about, for given all these conditions as described, it would be natural if the two principles of justice were to be acknowledged. Since there is no way for anyone to win special advantages for himself, each might consider it reasonable to acknowledge equality as an initial principle. There is, however, no reason why they should regard this position as final; for if there are inequalities which satisfy the second principle, the immediate gain which equality would allow can be considered as intelligently invested in view of its future return. If, as is quite likely, these inequalities work as incentives to draw out better efforts, the members of this society may look upon them as concessions to human nature: they, like us, may think that people ideally should want to serve one another. But as they are mutually self-interested, their acceptance of these inequalities is merely the acceptance of the relations in which they actually stand, and a recognition of the motives which lead them to engage in their common practices. *They* have no title to complain of one another. And so provided that the conditions of the principle are met, there is no reason why they should not allow such inequalities. Indeed, it would be short-sighted of them to do so, and could result, in most cases, only from their being dejected by the bare knowledge, or perception, that others are better situated. Each person will,

however, insist on an advantage to himself, and so on a common advantage, for none is willing to sacrifice anything for the others.

These remarks are not offered as a proof that persons so conceived and circumstanced would settle on the two principles, but only to show that these principles could have such a background, and so can be viewed as those principles which mutually self-interested and rational persons, when similarly situated and required to make in advance a firm commitment, could acknowledge as restrictions governing the assignment of rights and duties in their common practices, and thereby accept as limiting their rights against one another. The principles of justice may, then, be regarded as those principles which arise when the constraints of having a morality are imposed upon parties in the typical circumstances of justice.

4. These ideas are, of course, connected with a familiar way of thinking about justice which goes back at least to the Greek Sophists, and which regards the acceptance of the principles of justice as a compromise between persons of roughly equal power who would enforce their will on each other if they could, but who, in view of the equality of forces amongst them and for the sake of their own peace and security, acknowledge certain forms of conduct insofar as prudence seems to require. Justice is thought of as a pact between rational egoists the stability of which is dependent on a balance of power and a similarity of circumstances.[9] While the previous account is connected with this tradition, and with its most recent variant, the theory of games,[10] it differs from it in several important respects which, to forestall misinterpretations, I will set out here.

First, I wish to use the previous conjectural account of the background of justice as a way of analyzing the concept. I do not want, therefore, to be interpreted as assuming a general theory of human motivation: when I suppose that the parties are mutually self-interested, and are not willing to have their (substantial) interests sacrificed to others, I am referring to their conduct and motives as they are taken for granted in cases where questions of justice ordinarily arise. Justice is the virtue of practices where there are assumed to be competing interests and conflicting claims, and where it is supposed that persons will press their rights on each other. That persons are mutually self-interested in certain situations and for certain purposes is what gives rise to the question of justice in practices covering those circumstances. Amongst an association of saints, if such a community could really exist, the disputes about justice could hardly occur; for they would all work selflessly together for one end, the glory of God as defined by their common religion, and reference to this end would settle every question of right. The justice of practices does not come up until there are several different parties (whether we think of these as individuals, associations, or nations and so on, is irrelevant) who do press their claims on one another, and who do regard themselves as representatives of interests which deserve to be considered. Thus the previous account involves no general theory of human motivation. Its intent is simply to incorporate into the conception of justice the relations of men to one another which set the stage for questions of justice. It makes no difference how wide or general these relations are, as this matter does not bear on the analysis of the concept.

Again, in contrast to the various conceptions of the social contract, the several parties do not establish any particular society or practice; they do not covenant to obey a particular sovereign body or to accept a given constitution.[11] Nor do they, as in the theory of games (in certain respects a marvelously sophisticated development of this tradition), decide on individual strategies adjusted to their respective circumstances in the game. What the parties do is to *jointly* acknowledge certain *principles* of appraisal relating to their common *practices* either as already established or merely proposed. They accede to standards of judgment, not to a given practice; they do not make any specific agreement, or bargain, or adopt a particular strategy. The subject of their acknowledgment is, therefore, very general indeed; it is simply the acknowledgment of certain principles of judgment, fulfilling certain general conditions, to be used in criticizing the arrangement of their common affairs. The relations of mutual self-interest between the parties who are similarly circumstanced mirror the conditions under which questions of justice arise, and the procedure by which the principles of judgment are proposed and acknowledged reflects the constraints of having a morality. Each aspect, then, of the preceding hypothetical account serves the purpose of bringing out a feature of the notion of justice. One could, if one liked, view the principles of justice as the "solution" of this highest order "game" of adopting, subject to the procedure described, principles of argument for all coming particular "games" whose peculiarities one can in no way foresee. But this comparison, while no doubt helpful, must not obscure the fact that this highest order "game" is of a special sort.[12] Its significance is that its various pieces represent aspects of the concept of justice.

Finally, I do not, of course, conceive the several parties as necessarily coming together to establish their common practices for the first time. Some institutions may, indeed, be set up *de novo*; but I have framed the preceding account so that it will apply when the full complement of social institutions already exists and represents the result of a long period of development. Nor is the account in any way fictitious. In any society where people reflect on their institutions they will have an idea of what principles of justice would be acknowledged under the conditions described, and there will be occasions when questions of justice are actually discussed in this way. Therefore if their practices do not accord with these principles, this will affect the quality of their social relations. For in this case there will be some recognized situations wherein the parties are mutually aware that one of them is being forced to accept what the other would concede is unjust. The foregoing analysis may then be thought of as representing the actual quality of relations between persons as defined by practices accepted as just. In such practices the parties will acknowledge the principles on which it is constructed, and the general recognition of this fact shows itself in the absence of resentment and in the sense of being justly treated. Thus one common objection to the theory of the social contract, its apparently historical and fictitious character, is avoided.

5. That the principles of justice may be regarded as arising in the manner described illustrates an important fact about them. Not only does it bring out the idea that justice is a primitive moral notion in that it arises once the concept of morality is imposed on mutually self-interested agents similarly circumstanced, but it emphasizes that, fundamental to justice, is the concept of fairness which relates to right dealing between persons who are cooperating with or competing against one another, as when one speaks of fair games, fair competition, and fair bargains. The question of fairness arises when free persons, who have no authority over one another, are engaging in a joint activity and amongst themselves settling or acknowledging the rules which define it and which determine the respective shares in its benefits and burdens. A practice will strike the parties as fair if none feels that, by participating in it, they or any of the others are taken advantage of, or forced to give in to claims which they do not regard as legitimate. This implies that each has a conception of legitimate claims which he thinks it reasonable for others as well as himself to acknowledge. If one thinks of the principles of justice as arising in the manner described, then they do define this sort of conception. A practice is just or fair, then, when it satisfies the principles which those who participate in it could propose to one another for mutual acceptance under the aforementioned circumstances. Persons engaged in a just, or fair, practice can face one another openly and support their respective positions, should they appear questionable, by reference to principles which it is reasonable to expect each to accept.

It is this notion of the possibility of mutual acknowledgment of principles by free persons who have no authority over one another which makes the concept of fairness fundamental to justice. Only if such acknowledgment is possible can there be true community between persons in their common practices; otherwise their relations will appear to them as founded to some extent on force. If, in ordinary speech, fairness applies more particularly to practices in which there is a choice whether to engage or not (e.g., in games, business competition), and justice to practices in which there is no choice (e.g., in slavery), the element of necessity does not render the conception of mutual acknowledgment inapplicable, although it may make it much more urgent to change unjust than unfair institutions. For one activity in which one can always engage is that of proposing and acknowledging principles to one another supposing each to be similarly circumstanced; and to judge practices by the principles so arrived at is to apply the standard of fairness to them.

Now if the participants in a practice accept its rules as fair, and so have no complaint to lodge against it, there arises a prima facie duty (and a corresponding prima facie right) of the parties to each other to act in accordance with the practice when it falls upon them to comply. When any number of persons engage in a practice, or conduct a joint undertaking according to rules, and thus restrict their liberty, those who have submitted to these restrictions when required have the right to a similar acquiescence on the part of those who have benefited by their submission. These conditions will obtain if a practice is correctly acknowledged to be fair, for in this case all who participate in it will benefit from it. The rights and duties so arising are special rights and duties in that they depend on previous actions voluntarily undertaken, in this case on the parties having engaged in a common practice and knowingly accepted its benefits.[13] It is not, however, an obligation which presupposes a deliberate performative act in the sense of a promise, or contract, and the like.[14] An unfortunate mistake of proponents of the idea of the social contract was to suppose that

political obligation does require some such act, or at least to use language which suggests it. It is sufficient that one has knowingly participated in and accepted the benefits of a practice acknowledged to be fair. This prima facie obligation may, of course, be overridden: it may happen, when it comes one's turn to follow a rule, that other considerations will justify not doing so. But one cannot, in general, be released from this obligation by denying the justice of the practice only when it falls on one to obey. If a person rejects a practice, he should, so far as possible, declare his intention in advance, and avoid participating in it or enjoying its benefits.

This duty I have called that of fair play, but it should be admitted that to refer to it in this way is, perhaps, to extend the ordinary notion of fairness. Usually acting unfairly is not so much the breaking of any particular rule, even if the infraction is difficult to detect (cheating), but taking advantage of loop-holes or ambiguities in rules, availing oneself of unexpected or special circumstances which make it impossible to enforce them, insisting that rules be enforced to one's advantage when they should be suspended, and more generally, acting contrary to the intention of a practice. It is for this reason that one speaks of the sense of fair play: acting fairly requires more than simply being able to follow rules; what is fair must often be felt, or perceived, one wants to say. It is not, however, an unnatural extension of the duty of fair play to have it include the obligation which participants who have knowingly accepted the benefits of their common practice owe to each other to act in accordance with it when their performance falls due; for it is usually considered unfair if someone accepts the benefits of a practice but refuses to do his part in maintaining it. Thus one might say of the tax-dodger that he violates the duty of fair play: he accepts the benefits of government but will not do his part in releasing resources to it; and members of labor unions often say that fellow workers who refuse to join are being unfair: they refer to them as "free riders," as persons who enjoy what are the supposed benefits of unionism, higher wages, shorter hours, job security, and the like, but who refuse to share in its burdens in the form of paying dues, and so on.

The duty of fair play stands beside other prima facie duties such as fidelity and gratitude as a basic moral notion; yet it is not to be confused with them.[15] These duties are all clearly distinct, as would be obvious from their definitions. As with any moral duty, that of fair play implies a constraint on self-interest in particular cases; on occasion it enjoins conduct which a rational egoist strictly defined would not decide upon. So while justice does not require of anyone that he sacrifice his interests in that *general position* and procedure whereby the principles of justice are proposed and acknowledged, it may happen that in particular situations, arising in the context of engaging in a practice, the duty of fair play will often cross his interests in the sense that he will be required to forego particular advantages which the peculiarities of his circumstances might permit him to take. There is, of course, nothing surprising in this. It is simply the consequence of the firm commitment which the parties may be supposed to have made, or which they would make, in the general position, together with the fact that they have participated in and accepted the benefits of a practice which they regard as fair.

Now the acknowledgment of this constraint in particular cases, which is manifested in acting fairly or wishing to make amends, feeling ashamed, and the like, when one has evaded it, is one of the forms of conduct by which participants in a common practice exhibit their recognition of each other as persons with similar interests and capacities. In the same way that, failing a special explanation, the criterion for the recognition of suffering is helping one who suffers, acknowledging the duty of fair play is a necessary part of the criterion for recognizing another as a person with similar interests and feelings as oneself.[16] A person who never under any circumstances showed a wish to help others in pain would show, at the same time, that he did not recognize that they were in pain; nor could he have any feelings of affection or friendship for anyone; for having these feelings implies, failing special circumstances, that he comes to their aid when they are suffering. Recognition that another is a person in pain shows itself in sympathetic action; this primitive natural response of compassion is one of those responses upon which the various forms of moral conduct are built.

Similarly, the acceptance of the duty of fair play by participants in a common practice is a reflection in each person of the recognition of the aspirations and interests of the others to be realized by their joint activity. Failing a special explanation, their acceptance of it is a necessary part of the criterion for their recognizing one another as persons with similar interests and capacities, as the conception of their relations in the general position supposes them to be. Otherwise they would show no recognition of one another as persons with similar capacities and interests, and indeed, in some cases perhaps hypothetical, they would not recognize one another as persons at all, but as complicated objects involved in a complicated activity. To recognize another as a person

one must respond to him and act towards him in certain ways; and these ways are intimately connected with the various prima facie duties. Acknowledging these duties in *some* degree, and so having the elements of morality, is not a matter of choice, or of intuiting moral qualities, or a matter of the expression of feelings or attitudes (the three interpretations between which philosophical opinion frequently oscillates); it is simply the possession of one of the forms of conduct in which the recognition of others as persons is manifested.

These remarks are unhappily obscure. Their main purpose here, however, is to forestall, together with the remarks in Section 4, the misinterpretation that, on the view presented, the acceptance of justice and the acknowledgment of the duty of fair play depends in everyday life solely on there being a *de facto* balance of forces between the parties. It would indeed be foolish to underestimate the importance of such a balance in securing justice; but it is not the only basis thereof. The recognition of one another as persons with similar interests and capacities engaged in a common practice must, failing a special explanation, show itself in the acceptance of the principles of justice and the acknowledgment of the duty of fair play.

The conception at which we have arrived, then, is that the principles of justice may be thought of as arising once the constraints of having a morality are imposed upon rational and mutually self-interested parties who are related and situated in a special way. A practice is just if it is in accordance with the principles which all who participate in it might reasonably be expected to propose or to acknowledge before one another when they are similarly circumstanced and required to make a firm commitment in advance without knowledge of what will be their peculiar condition, and thus when it meets standards which the parties could accept as fair should occasion arise for them to debate its merits. Regarding the participants themselves, once persons knowingly engage in a practice which they acknowledge to be fair and accept the benefits of doing so, they are bound by the duty of fair play to follow the rules when it comes their turn to do so, and this implies a limitation on their pursuit of self-interest in particular cases.

Now one consequence of this conception is that, where it applies, there is no moral value in the satisfaction of a claim incompatible with it. Such a claim violates the conditions of reciprocity and community amongst persons, and he who presses it, not being willing to acknowledge it when pressed by another, has no grounds for complaint when it is denied; whereas he against whom it is pressed can complain. As it cannot be mutually acknowledged it is a resort to coercion; granting the claim is possible only if one party can compel acceptance of what the other will not admit. But it makes no sense to concede claims the denial of which cannot be complained of in preference to claims the denial of which can be objected to. Thus in deciding on the justice of a practice it is not enough to ascertain that it answers to wants and interests in the fullest and most effective manner. For if any of these conflict with justice, they should not be counted, as their satisfaction is no reason at all for having a practice. It would be irrelevant to say, even if true, that it resulted in the greatest satisfaction of desire. In tallying up the merits of a practice one must toss out the satisfaction of interests the claims of which are incompatible with the principles of justice.

6. The discussion so far has been excessively abstract. While this is perhaps unavoidable, I should now like to bring out some of the features of the conception of justice as fairness by comparing it with the conception of justice in classical utilitarianism as represented by Bentham and Sidgwick, and its counterpart in welfare economics. This conception assimilates justice to benevolence and the latter in turn to the most efficient design of institutions to promote the general welfare. Justice is a kind of efficiency.[17]

Now it is said occasionally that this form of utilitarianism puts no restrictions on what might be a just assignment of rights and duties in that there might be circumstances which, on utilitarian grounds, would justify institutions highly offensive to our ordinary sense of justice. But the classical utilitarian conception is not totally unprepared for this objection. Beginning with the notion that the general happiness can be represented by a social utility function consisting of a sum of individual utility functions with identical weights (this being the meaning of the maxim that each counts for one and no more than one),[18] it is commonly assumed that the utility functions of individuals are similar in all essential respects. Differences between individuals are ascribed to accidents of education and upbringing, and they should not be taken into account. This assumption, coupled with that of diminishing marginal utility, results in a prima facie case for equality, e.g., of equality in the distribution of income during any given period of time, laying aside indirect effects on the future. But even if utilitarianism is interpreted as having such restrictions built into the utility function, and even if it is supposed that these restrictions have in practice much the same

result as the application of the principles of justice (and appear, perhaps, to be ways of expressing these principles in the language of mathematics and psychology), the fundamental idea is very different from the conception of justice as fairness. For one thing, that the principles of justice should be accepted is interpreted as the contingent result of a higher order administrative decision. The form of this decision is regarded as being similar to that of an entrepreneur deciding how much to produce of this or that commodity in view of its marginal revenue, or to that of someone distributing goods to needy persons according to the relative urgency of their wants. The choice between practices is thought of as being made on the basis of the allocation of benefits and burdens to individuals (these being measured by the present capitalized value of their utility over the full period of the practice's existence), which results from the distribution of rights and duties established by a practice.

Moreover, the individuals receiving these benefits are not conceived as being related in any way: they represent so many different directions in which limited resources may be allocated. The value of assigning resources to one direction rather than another depends solely on the preferences and interests of individuals as individuals. The satisfaction of desire has its value irrespective of the moral relations between persons, say as members of a joint undertaking, and of the claims which, in the name of these interests, they are prepared to make on one another;[19] and it is this value which is to be taken into account by the (ideal) legislator who is conceived as adjusting the rules of the system from the center so as to maximize the value of the social utility function.

It is thought that the principles of justice will not be violated by a legal system so conceived provided these executive decisions are correctly made. In this fact the principles of justice are said to have their derivation and explanation; they simply express the most important general features of social institutions in which the administrative problem is solved in the best way. These principles have, indeed, a special urgency because, given the facts of human nature, so much depends on them; and this explains the peculiar quality of the moral feelings associated with justice.[20] This assimilation of justice to a higher order executive decision, certainly a striking conception, is central to classical utilitarianism; and it also brings out its profound individualism, in one sense of this ambiguous word. It regards persons as so many *separate* directions in which benefits and burdens may be assigned; and the value of the satisfaction or dissatisfaction of desire is not thought to depend in any way on the moral relations in which individuals stand, or on the kinds of claims which they are willing, in the pursuit of their interests, to press on each other.

7. Many social decisions are, of course, of an administrative nature. Certainly this is so when it is a matter of social utility in what one may call its ordinary sense: that is, when it is a question of the efficient design of social institutions for the use of common means to achieve common ends. In this case either the benefits and burdens may be assumed to be impartially distributed, or the question of distribution is misplaced, as in the instance of maintaining public order and security or national defense. But as an interpretation of the basis of the principles of justice, classical utilitarianism is mistaken. It *permits* one to argue, for example, that slavery is unjust on the grounds that the advantages to the slaveholder as slaveholder do not counterbalance the disadvantages to the slave and to society at large burdened by a comparatively inefficient system of labor. Now the conception of justice as fairness, when applied to the practice of slavery with its offices of slaveholder and slave, would not allow one to consider the advantages of the slaveholder in the first place. As that office is not in accordance with principles which could be mutually acknowledged, the gains accruing to the slaveholder, assuming them to exist, cannot be counted as in *any* way mitigating the injustice of the practice. The question whether these gains outweigh the disadvantages to the slave and to society cannot arise, since in considering the justice of slavery these gains have no weight at all which requires that they be overridden. Where the conception of justice as fairness applies, slavery is *always* unjust.

I am not, of course, suggesting the absurdity that the classical utilitarians approved of slavery. I am only rejecting a type of argument which their view allows them to use in support of their disapproval of it. The conception of justice as derivative from efficiency implies that judging the justice of a practice is always, in principle at least, a matter of weighing up advantages and disadvantages, each having an intrinsic value or disvalue as the satisfaction of interests, irrespective of whether or not these interests necessarily involve acquiescence in principles which could not be mutually acknowledged. Utilitarianism cannot account for the fact that slavery is always unjust, nor for the fact that it would be recognized as irrelevant in defeating the accusation of injustice for one person to say to another, engaged with him in a common practice and debating its merits, that nevertheless it

allowed of the greatest satisfaction of desire. The charge of injustice cannot be rebutted in this way. If justice were derivative from a higher order executive efficiency, this would not be so.

But now, even if it is taken as established that, so far as the ordinary conception of justice goes, slavery is always unjust (that is, slavery by definition violates commonly recognized principles of justice), the classical utilitarian would surely reply that these principles, as other moral principles subordinate to that of utility, are only generally correct. It is simply for the most part true that slavery is less efficient than other institutions; and while common sense may define the concept of justice so that slavery is unjust, nevertheless, where slavery would lead to the greatest satisfaction of desire, it is not wrong. Indeed, it is then right, and for the very same reason that justice, as ordinarily understood, is usually right. If, as ordinarily understood, slavery is always unjust, to this extent the utilitarian conception of justice might be admitted to differ from that of common moral opinion. Still the utilitarian would want to hold that, as a matter of moral principle, his view is correct in giving no special weight to considerations of justice beyond that allowed for by the general presumption of effectiveness. And this, he claims, is as it should be. The every day opinion is morally in error, although, indeed, it is a useful error, since it protects rules of generally high utility.

The question, then, relates not simply to the analysis of the concept of justice as common sense defines it, but the analysis of it in the wider sense as to how much weight considerations of justice, as defined, are to have when laid against other kinds of moral considerations. Here again I wish to argue that reasons of justice have a *special* weight for which only the conception of justice as fairness can account. Moreover, it belongs to the concept of justice that they do have this special weight. While Mill recognized that this was so, he thought that it could be accounted for by the special urgency of the moral feelings which naturally support principles of such high utility. But it is a mistake to resort to the urgency of feeling; as with the appeal to intuition, it manifests a failure to pursue the question far enough. The special weight of considerations of justice can be explained from the conception of justice as fairness. It is only necessary to elaborate a bit what has already been said as follows.

If one examines the circumstances in which a certain tolerance of slavery is justified, or perhaps better, excused, it turns out that these are of a rather special sort. Perhaps slavery exists as an inheritance from the past and it proves necessary to dismantle it piece by piece; at times slavery may conceivably be an advance on previous institutions. Now while there may be some excuse for slavery in special conditions, it is never an excuse for it that it is sufficiently advantageous to the slaveholder to outweigh the disadvantages to the slave and to society. A person who argues in this way is not perhaps making a wildly irrelevant remark; but he is guilty of a moral fallacy. There is disorder in his conception of the ranking of moral principles. For the slaveholder, by his own admission, has no moral title to the advantages which he receives as a slaveholder. He is no more prepared than the slave to acknowledge the principle upon which is founded the respective positions in which they both stand. Since slavery does not accord with principles which they could mutually acknowledge, they each may be supposed to agree that it is unjust: it grants claims which it ought not to grant and in doing so denies claims which it ought not to deny. Amongst persons in a general position who are debating the form of their common practices, it cannot, therefore, be offered as a reason for a practice that, in conceding these very claims that ought to be denied, it nevertheless meets existing interests more effectively. By their very nature the satisfaction of these claims is without weight and cannot enter into any tabulation of advantages and disadvantages.

Furthermore, it follows from the concept of morality that, to the extent that the slaveholder recognizes his position vis-à-vis the slave to be unjust, he would not choose to press his claims. His not wanting to receive his special advantages is one of the ways in which he shows that he thinks slavery is unjust. It would be fallacious for the legislator to suppose, then, that it is a ground for having a practice that it brings advantages greater than disadvantages, if those for whom the practice is designed, and to whom the advantages flow, acknowledge that they have no moral title to them and do not wish to receive them.

For these reasons the principles of justice have a special weight; and with respect to the principle of the greatest satisfaction of desire, as cited in the general position amongst those discussing the merits of their common practices, the principles of justice have an absolute weight. In this sense they are not contingent; and this is why their force is greater than can be accounted for by the general presumption (assuming that there is one) of the effectiveness, in the utilitarian sense, of practices which in fact satisfy them.

If one wants to continue using the concepts of classical utilitarianism, one will have to say, to meet this criticism, that at least the individual or social utility functions

must be so defined that no value is given to the satisfaction of interests the representative claims of which violate the principles of justice. In this way it is no doubt possible to include these principles within the form of the utilitarian conception; but to do so is, of course, to change its inspiration altogether as a moral conception. For it is to incorporate within it principles which cannot be understood on the basis of a higher order executive decision aiming at the greatest satisfaction of desire.

It is worth remarking, perhaps, that this criticism of utilitarianism does not depend on whether or not the two assumptions, that of individuals having similar utility functions and that of diminishing marginal utility, are interpreted as psychological propositions to be supported or refuted by experience, or as moral and political principles expressed in a somewhat technical language. There are, certainly, several advantages in taking them in the latter fashion.[21] For one thing, one might say that this is what Bentham and others really meant by them, at least as shown by how they were used in arguments for social reform. More importantly, one could hold that the best way to defend the classical utilitarian view is to interpret these assumptions as moral and political principles. It is doubtful whether, taken as psychological propositions, they are true of men in general as we know them under normal conditions. On the other hand, utilitarians would not have wanted to propose them merely as practical working principles of legislation, or as expedient maxims to guide reform, given the egalitarian sentiments of modern society.[22] When pressed they might well have invoked the idea of a more or less equal capacity of men in relevant respects if given an equal chance in a just society. But if the argument above regarding slavery is correct, then granting these assumptions as moral and political principles makes no difference. To view individuals as equally fruitful lines for the allocation of benefits, even as a matter of moral principle, still leaves the mistaken notion that the satisfaction of desire has value in itself irrespective of the relations between persons as members of a common practice, and irrespective of the claims upon one another which the satisfaction of interests represents. To see the error of this idea one must give up the conception of justice as an executive decision altogether and refer to the notion of justice as fairness: that participants in a common practice be regarded as having an original and equal liberty and that their common practices be considered unjust unless they accord with principles which persons so circumstanced and related could freely acknowledge before one another, and so could accept as fair. Once the emphasis is put upon the concept of the mutual recognition of principles by participants in a common practice the rules of which are to define their several relations and give form to their claims on one another, then it is clear that the granting of a claim the principle of which could not be acknowledged by each in the general position (that is, in the position in which the parties propose and acknowledge principles before one another) is not a reason for adopting a practice. Viewed in this way, the background of the claim is seen to exclude it from consideration; that it can represent a value in itself arises from the conception of individuals as separate lines for the assignment of benefits, as isolated persons who stand as claimants on an administrative or benevolent largesse. Occasionally persons do so stand to one another; but this is not the general case, nor, more importantly, is it the case when it is a matter of the justice of practices themselves in which participants stand in various relations to be appraised in accordance with standards which they may be expected to acknowledge before one another. Thus however mistaken the notion of the social contract may be as history, and however far it may overreach itself as a general theory of social and political obligation, it does express, suitably interpreted, an essential part of the concept of justice.[23]

8. By way of conclusion I should like to make two remarks: first, the original modification of the utilitarian principle (that it requires of practices that the offices and positions defined by them be equal unless it is reasonable to suppose that the representative man in *every* office would find the inequality to his advantage), slight as it may appear at first sight, actually has a different conception of justice standing behind it. I have tried to show how this is so by developing the concept of justice as fairness and by indicating how this notion involves the mutual acceptance, from a general position, of the principles on which a practice is founded, and how this in turn requires the exclusion from consideration of claims violating the principles of justice. Thus the slight alteration of principle reveals another family of notions, another way of looking at the concept of justice.

Second, I should like to remark also that I have been dealing with the *concept* of justice. I have tried to set out the kinds of principles upon which judgments concerning the justice of practices may be said to stand. The analysis will be successful to the degree that it expresses the principles involved in these judgments when made by competent persons upon deliberation and reflection.[24] Now every people may be supposed to have the concept of justice, since in the life of every society there

must be at least some relations in which the parties consider themselves to be circumstanced and related as the concept of justice as fairness requires. Societies will differ from one another not in having or in failing to have this notion but in the range of cases to which they apply it and in the emphasis which they give to it as compared with other moral concepts.

A firm grasp of the concept of justice itself is necessary if these variations, and the reasons for them, are to be understood. No study of the development of moral ideas and of the differences between them is more sound than the analysis of the fundamental moral concepts upon which it must depend. I have tried, therefore, to give an analysis of the concept of justice which should apply generally, however large a part the concept may have in a given morality, and which can be used in explaining the course of men's thoughts about justice and its relations to other moral concepts. How it is to be used for this purpose is a large topic which I cannot, of course, take up here. I mention it only to emphasize that I have been dealing with the concept of justice itself and to indicate what use I consider such an analysis to have.

Notes

1 An abbreviated version of this paper (less than one-half the length) was presented in a symposium with the same title at the American Philosophical Association, Eastern Division, December 28, 1957, and appeared in the *Journal of Philosophy*, LIV, 653–62.

2 I use the word "practice" throughout as a sort of technical term meaning any form of activity specified by a system of rules which defines offices, roles, moves, penalties, defenses, and so on, and which gives the activity its structure. As examples one may think of games and rituals, trials and parliaments, markets and systems of property. I have attempted a partial analysis of the notion of a practice in a paper "Two Concepts of Rules," *Philosophical Review*, LXIV (1955), 3–32.

3 These principles are, of course, well-known in one form or another and appear in many analyses of justice even where the writers differ widely on other matters. Thus if the principle of equal liberty is commonly associated with Kant (see *The Philosophy of Law*, tr. by W. Hastie, Edinburgh, 1887, pp. 56 f.), it may be claimed that it can also be found in J.S. Mill's *On Liberty* and elsewhere, and in many other liberal writers. Recently H.L.A. Hart has argued for something like it in his paper "Are There Any Natural Rights?," *Philosophical Review*, LXIV (1955), 175–91 [reprinted as Chapter 20 of this volume]. The injustice of inequalities which are not won in return for a contribution to the common advantage is, of course, widespread in political writings of all sorts. The conception of justice here discussed is distinctive, if at all, only in selecting these two principles in this form; but for another similar analysis, see the discussion by W.D. Lamont, *The Principles of Moral Judgment* (Oxford, 1946), ch. v.

4 This point was made by Sidgwick, *Methods of Ethics*, 6th edn. (London, 1901), Bk. III, ch. v, sec. 1. It has recently been emphasized by Sir Isaiah Berlin in a symposium, "Equality," *Proceedings of the Aristotelian Society*, n.s. LVI (1955–6), 305 f.

5 In the paper referred to above, note 2, I have tried to show the importance of taking practices as the proper subject of the utilitarian principle. The criticisms of so-called "restricted utilitarianism" by J.J.C. Smart, "Extreme and Restricted Utilitarianism," *Philosophical Quarterly*, VI (1956), 344–54, and by H.J. McCloskey, "An Examination of Restricted Utilitarianism," *Philosophical Review*, LXVI (1957), 466–85, do not affect my argument. These papers are concerned with the very general proposition, which is attributed (with what justice I shall not consider) to S.E. Toulmin and P.H. Nowell-Smith (and in the case of the latter paper, also, apparently, to me); namely, the proposition that particular moral actions are justified by appealing to moral rules, and moral rules in turn by reference to utility. But clearly I meant to defend no such view. My discussion of the concept of rules as maxims is an explicit rejection of it. What I did argue was that, in the *logically special* case of practices (although actually quite a common case) where the rules have special features and are not moral rules at all but legal rules or rules of games and the like (except, perhaps, in the case of promises), there is a peculiar force to the distinction between justifying particular actions and justifying the system of rules themselves. Even then I claimed only that restricting the utilitarian principle to practices as defined strengthened it. I did not argue for the position that this amendment alone is sufficient for a complete defense of utilitarianism as a general theory of morals. In this paper I take up the question as to how the utilitarian principle itself must be modified, but here, too, the subject of inquiry is not all of morality at once, but a limited topic, the concept of justice.

6 It might seem as if J.S. Mill, in paragraph 36 of Chapter v of *Utilitarianism*, expressed the utilitarian principle in this modified form, but in the remaining two paragraphs of the chapter, and elsewhere, he would appear not to grasp the significance of the change. Hume often emphasizes that *every* man must benefit. For example, in discussing the utility of general rules, he holds that they are requisite to the "wellbeing of every individual"; from a stable system of property "every individual person must find himself a gainer in balancing the account …" "Every member of society is sensible of this interest; everyone expresses this sense to his fellows along with the resolution he has taken of squaring his actions by it, on the conditions that others will do the same." *A Treatise of Human Nature*, Bk. III, Pt. II, sec. II, par. 22.

7 It is not possible to discuss here this addition to the usual conception of rationality. If it seems peculiar, it may be worth remarking that it is analogous to the modification of the utilitarian principle which the argument as a whole is designed to explain and justify. In the same way that the satisfaction of interests, the representative claims of which violate the principles of justice, is not a reason for having a practice (see Section 7), unfounded envy, within limits, need not be taken into account.

8 The idea that accepting a principle as a moral principle implies that one generally acts on it, failing a special explanation, has been stressed by R.M. Hare, *The Language of Morals* (Oxford, 1952). His formulation of it needs to be modified, however, along the lines suggested by P.L. Gardiner, "On Assenting to a Moral Principle," *Proceedings of the Aristotelian Society*, n.s. LV (1955), 23–44. See also C.K. Grant, "Akrasia and the Criteria of Assent to Practical Principles," *Mind*, LXV (1956), 400–7, where the complexity of the criteria for assent is discussed.

9 Perhaps the best known statement of this conception is that given by Glaucon at the beginning of Book II of Plato's *Republic*. Presumably it was, in various forms, a common view among the Sophists; but that Plato gives a fair representation of it is doubtful. See K.R. Popper, *The Open Society and Its Enemies*, rev. edn. (Princeton, 1950), pp. 112–18. Certainly Plato usually attributes to it a quality of manic egoism which one feels must be an exaggeration; on the other hand, see the Melian Debate in Thucydides, *The Peloponnesian War*, Book V, ch. VII, although it is impossible to say to what extent the views expressed there reveal any current philosophical opinion. Also in this tradition are the remarks of Epicurus on justice in *Principal Doctrines*, XXXI–XXXVIII. In modern times elements of the conception appear in a more sophisticated form in Hobbes's *The Leviathan* and in Hume's *A Treatise of Human Nature*, Bk. III, Pt. II, as well as in the writings of the school of natural law such as Pufendorf's *De jure naturae et gentium*. Hobbes and Hume are especially instructive. For Hobbes's argument see Howard Warrender's *The Political Philosophy of Hobbes* (Oxford, 1957). W.J. Baumol's *Welfare Economics and the Theory of the State* (London, 1952), is valuable in showing the wide applicability of Hobbes's fundamental idea (interpreting his natural law as principles of prudence), although in this book it is traced back only to Hume's *Treatise*.

10 See J. von Neumann and O. Morgenstern, *The Theory of Games and Economic Behavior*, 2nd edn. (Princeton, 1947). For a comprehensive and not too technical discussion of the developments since, see R. Duncan Luce and Howard Raiffa, *Games and Decisions: Introduction and Critical Survey* (New York, 1957). Chs. VI and XIV discuss the developments most obviously related to the analysis of justice.

11 For a general survey see J.W. Gough, *The Social Contract*, 2nd edn. (Oxford, 1957), and Otto von Gierke, *The Development of Political Theory*, tr. by B. Freyd (London, 1939), Pt. II, ch. II.

12 The difficulty one gets into by a mechanical application of the theory of games to moral philosophy can be brought out by considering among several possible examples, R.B. Braithwaite's study, *Theory of Games as a Tool for the Moral Philosopher* (Cambridge, 1955). On the analysis there given, it turns out that the fair division of playing time between Matthew and Luke depends on their preferences, and these in turn are connected with the instruments they wish to play. Since Matthew has a threat advantage over Luke, arising purely from the fact that Matthew, the trumpeter, prefers both of them playing at once to neither of them playing, whereas Luke, the pianist, prefers silence to cacophony, Matthew is allotted 26 evenings of play to Luke's 17. If the situation were reversed, the threat advantage would be with Luke. See pp. 36 f. But now we have only to suppose that Matthew is a jazz enthusiast who plays the drums, and Luke a violinist who plays sonatas, in which case it will be fair, on this analysis, for Matthew to play whenever and as often as he likes, assuming, of course, as it is plausible to assume, that he does not care whether Luke plays or not. Certainly something has gone wrong. To each according to his threat advantage is hardly the principle of fairness. What is lacking is the concept of morality, and it must be brought into the conjectural account in some way or other. In the text this is done by the form of the procedure whereby principles are proposed and acknowledged (Section 3). If one starts directly with the particular case as known, and if one accepts as given and definitive the preferences and relative positions of the parties, whatever they are, it is impossible to give an analysis of the moral concept of fairness. Braithwaite's use of the theory of games, insofar as it is intended to analyze the concept of fairness, is, I think, mistaken. This is not, of course, to criticize in any way the theory of games as a mathematical theory, to which Braithwaite's book certainly contributes, nor as an analysis of how rational (and amoral) egoists might behave (and so as an analysis of how people sometimes actually do behave). But it is to say that if the theory of games is to be used to analyze moral concepts, its formal structure must be interpreted in a special and general manner as indicated in the text. Once we do this, though, we are in touch again with a much older tradition.

13 For the definition of this prima facie duty, and the idea that it is a special duty, I am indebted to H.L.A. Hart. See his paper "Are There Any Natural Rights?," *Philosophical Review*, LXIV (1955), 185 f. [reprinted as Chapter 20 of this volume].

14 The sense of "performative" here is to be derived from J.L. Austin's paper in the symposium, "Other Minds," *Proceedings of the Aristotelian Society*. Supplementary Volume (1946), pp. 170–4.

15 This, however, commonly happens. Hobbes, for example, when invoking the notion of a "tacit covenant," appeals not to the natural law that promises should be kept but to his fourth law of nature, that of gratitude. On Hobbes's shift

from fidelity to gratitude, see Warrender, *The Political Philosophy of Hobbes* (Oxford, 1957), pp. 51–2, 233–7. While it is not a serious criticism of Hobbes, it would have improved his argument had he appealed to the duty of fair play. On his premises he is perfectly entitled to do so. Similarly Sidgwick thought that a principle of justice, such as every man ought to receive adequate requital for his labor, is like gratitude universalized. See *Methods of Ethics*, Bk. III, ch. v, sec. 5. There is a gap in the stock of moral concepts used by philosophers into which the concept of the duty of fair play fits quite naturally.

16 I am using the concept of criterion here in what I take to be Wittgenstein's sense. See *Philosophical Investigations* (Oxford, 1953); and Norman Malcolm's review, "Wittgenstein's *Philosophical Investigations*," *Philosophical Review*, LXIII (1954), 543–7. That the response of compassion, under appropriate circumstances, is part of the criterion for whether or not a person understands what "pain" means, is, I think, in the *Philosophical Investigations*. The view in the text is simply an extension of this idea. I cannot, however, attempt to justify it here. Similar thoughts are to be found, I think, in Max Scheler, *The Nature of Sympathy*, tr. by Peter Heath (New Haven, 1954). His way of writing is often so obscure that I cannot be certain.

17 While this assimilation is implicit in Bentham's and Sidgwick's moral theory, explicit statements of it as applied to justice are relatively rare. One clear instance in *The Principles of Morals and Legislation* occurs in ch. x, footnote 2 to sec XL: "… justice, in the only sense in which it has a meaning, is an imaginary personage, feigned for the convenience of discourse, whose dictates are the dictates of utility, applied to certain particular cases. Justice, then, is nothing more than an imaginary instrument, employed to forward on certain occasions, and by certain means, the purposes of benevolence. The dictates of justice are nothing more than a part of the dictates of benevolence, which, on certain occasions, are applied to certain subjects. …" Likewise in *The Limits of Jurisprudence Defined*, ed. by C.W. Everett (New York, 1945), pp. 117 f., Bentham criticizes Grotius for denying that justice derives from utility; and in *The Theory of Legislation*, ed. by C.K. Ogden (London, 1931), p. 3, he says that he uses the words "just" and "unjust" along with other words "simply as collective terms including the ideas of certain pains or pleasures." That Sidgwick's conception of justice is similar to Bentham's is admittedly not evident from his discussion of justice in Bk. III, ch. v of *Methods of Ethics*. But it follows, I think, from the moral theory he accepts. Hence C.D. Broad's criticisms of Sidgwick in the matter of distributive justice in *Five Types of Ethical Theory* (London, 1930), pp. 249–53, do not rest on a misinterpretation.

18 This maxim is attributed to Bentham by J.S. Mill in *Utilitarianism*, ch. v, par. 36. I have not found it in Bentham's writings, nor seen such a reference. Similarly James Bonar, *Philosophy and Political Economy* (London, 1893), p. 234 n. But it accords perfectly with Bentham's ideas. See the hitherto unpublished manuscript in David Baumgardt, *Bentham and the Ethics of Today* (Princeton, 1952), App. IV. For example, "the total value of the stock of pleasure belonging to the whole community is to be obtained by multiplying the number expressing the value of it as respecting any one person, by the number expressing the multitude of such individuals" (p. 556).

19 An idea essential to the classical utilitarian conception of justice. Bentham is firm in his statement of it: "It is only upon that principle [the principle of asceticism], and not from the principle of utility, that the most abominable pleasure which the vilest of malefactors ever reaped from his crime would be reprobated, if it stood alone. The case is, that it never does stand alone; but is necessarily followed by such a quantity of pain (or, what comes to the same thing, such a chance for a certain quantity of pain) that the pleasure in comparison of it, is as nothing: and this is the true and sole, but perfectly sufficient, reason for making it a ground for punishment" (*The Principles of Morals and Legislation*, ch. II, sec. iv. See also ch. x, sec. x, footnote 1). The same point is made in *The Limits of Jurisprudence Defined*, pp. 115 f. Although much recent welfare economics, as found in such important works as I.M.D. Little, *A Critique of Welfare Economics*, 2nd edn. (Oxford, 1957) and K.J. Arrow, *Social Choice and Individual Values* (New York, 1951), dispenses with the idea of cardinal utility, and uses instead the theory of ordinal utility as stated by J.R. Hicks, *Value and Capital*, 2nd edn. (Oxford, 1946), Pt. I, it assumes with utilitarianism that individual preferences have value as such, and so accepts the idea being criticized here. I hasten to add, however, that this is no objection to it as a means of analyzing economic policy, and for that purpose it may, indeed, be a necessary simplifying assumption. Nevertheless it is an assumption which cannot be made in so far as one is trying to analyze moral concepts, especially the concept of justice, as economists would, I think, agree. Justice is usually regarded as a separate and distinct part of any comprehensive criterion of economic policy. See, for example, Tibor Scitovsky, *Welfare and Competition* (London, 1952), pp. 59–69, and Little, *A Critique of Welfare Economics*, 2nd edn., ch. VII.

20 See J.S. Mill's argument in *Utilitarianism*, ch. v, pars. 16–25.

21 See D.G. Ritchie, *Natural Rights* (London, 1894), pp. 95 ff., 249 ff. Lionel Robbins has insisted on this point on several occasions. See *An Essay on the Nature and Significance of Economic Science*, 2nd edn. (London, 1935), pp. 134–43, "Interpersonal Comparisons of Utility: A Comment," *Economic Journal*, XLVIII (1938), 635–41, and more recently, "Robertson on Utility and Scope," *Economica*, n.s. XX (1953), 108 f.

22 As Sir Henry Maine suggested Bentham may have regarded them. See *The Early History of Institutions* (London, 1875), pp. 398 ff.

23 Thus Kant was not far wrong when he interpreted the original contract merely as an "Idea of Reason"; yet he still thought of it as a *general* criterion of right and as providing a general theory of political obligation. See the second part of the essay, "On the Saying 'That may be right in theory but has no value in practice'" (1793), in *Kant's Principles of Politics*, tr. by W. Hastie (Edinburgh, 1891). I have drawn on the contractarian tradition not for a general theory of political obligation but to clarify the concept of justice.

24 For a further discussion of the idea expressed here, see my paper, "Outline of a Decision Procedure for Ethics," in the *Philosophical Review*, LX (1951), 177–97. For an analysis, similar in many respects but using the notion of the ideal observer instead of that of the considered judgment of a competent person, see Roderick Firth, "Ethical Absolutism and the Ideal Observer," *Philosophy and Phenomenological Research*, XII (1952), 317–45. While the similarities between these two discussions are more important than the differences, an analysis based on the notion of a considered judgment of a competent person, as it is based on a kind of judgment, may prove more helpful in understanding the features of moral judgment than an analysis based on the notion of an ideal observer, although this remains to be shown. A man who rejects the conditions imposed on a considered judgment of a competent person could no longer profess to *judge* at all. This seems more fundamental than his rejecting the conditions of observation, for these do not seem to apply, in an ordinary sense, to making a moral judgment.

16

Nozick's Entitlements

Onora O'Neill

Introduction[1]

In *Anarchy, State and Utopia*[2] Robert Nozick revives, clarifies and in many ways strengthens Locke's defence of individual property rights. Like Locke he eschews utilitarian arguments in favour of individual property rights and starts from the position that individuals have certain basic (natural) rights and duties, in particular the rights not to be harmed in life, health, and liberty. If his argument is successful, Nozick will have shown that it follows from these basic rights that individuals may justly acquire complete control over unlimited resources without needing the consent of all whose liberty will be restricted by these property rights. He will also have shown that other proposed principles of distributive justice cannot be grounded on a commitment to individual rights. If the Lockean argument can be made convincing we face a clear dilemma: either we cannot be fully committed to individual (basic) rights, or we must accept that it is unjust to limit or in any way to regulate the holdings of individuals. The dilemma is not trivial. Justice, in Nozick's view, precludes any restriction of individual property rights, and so is not merely compatible with but requires a capitalist economic order.

I shall accept Nozick's starting point here, but query his conclusions. I start therefore by assuming that individuals have at least the rights not to be harmed in life, health, or liberty, but that their property rights – rights to control resources – have yet to be established. I also accept that Nozick has shown that a minimal state can (though undoubtedly it did not) arise without violation of individual basic rights, but that extensions of state activity beyond enforcing the law against harms and threatened harms to life, health and liberty have not been established.[3]

Theories of Distributive Justice

Nozick starts his argument in favour of a Lockean principle of distributive justice by considering rival theories and their defects. He classifies theories of distributive justice so that whole ranges of theories can be levelled with one objection. Theories of distributive justice can be divided in two ways. They can be patterned or unpatterned, and they can be historical or unhistorical.

Patterned theories of distributive justice require that resources should be distributed 'along with some natural dimension, weighted sum of natural dimensions or lexicographic ordering of natural dimensions' (p. 156). When

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a distribution is patterned there is some dimension such that each individual's ranking on that dimension corresponds to the ranking of his share of resources. Patterned principles of distribution are historical if they distribute on a dimension which summarizes past actions (e.g. moral merit or hours worked); they are unhistorical if they distribute on a dimension which does not refer to past actions (e.g. I.Q. or race). The most celebrated patterned principles of distributive justice include 'to each according to his merit', 'to each according to his need', and 'to each according to his contribution'.

Unpatterned principles of distributive justice do not assign shares of resources in proportion to individuals' ranking on some dimension. Such principles may also be either historical or unhistorical. Principles of distribution which are neither historical nor patterned specify the structure or profile of just distributions, but do not assign particular individuals to particular positions within these distributions. Nozick calls such principles 'current time-slice principles' or 'end-result principles' (p. 154). End-result principles may vary greatly in strength. A principle which states that no distribution is just in which the average income of the top quintile is more than four times the average of the bottom quintile is exemplified by an enormous range of distributions. A utilitarian principle which holds only those distributions just which maximize utility can be exemplified by more than one distribution. A strictly egalitarian principle requiring the same amount for each person is met only by distributions in which the size of each individual's share is determined, and so is not only an end-result principle but incidentally patterned. It determines not only the profile of distributions but the size of individual shares for any given total of resources, so is extensionally equivalent to a patterned principle requiring distribution in proportion to individuals' (equal) humanity.

This continuity is revealing. End-result principles and patterned principles differ in that the former usually do not determine the size of individuals' shares, and the latter do. But their similarity is more important. Both are principles for determining the (relative) size of shares. Neither sort of principle is concerned with the composition of individuals' shares, but only with their size. Neither sort of principle can regard confiscation-with-replacement as unjust since they determine only how much people should have, and not which things they should have.

Nozick's theory of just distribution, the entitlement theory, is neither an end-result nor a patterned theory. It is unpatterned and historical. It specifies just distribution not by giving a rule for the size of individual shares, nor by stating a mandatory profile or range of profiles for the pattern made by the sizes of individual shares, but by listing procedures by which individuals may justly acquire title to particular resources. Hence the name, 'entitlement theory'. According to entitlement theory the size of just holdings is always determinate, but this does not determine the holdings' justice, which depends solely on the methods by which an individual acquires holdings. Nozick therefore calls entitlement theory an historical principle of justice, in that it too holds that 'past circumstances or actions of people can create differential entitlements' (p. 155). But it is an historical principle of justice in a very different sense from that in which certain patterned principles are historical. For it requires not that the size of shares be proportioned to past action, but that particular items be acquired by particular procedures. According to entitlement theory 'an injustice can be worked by moving from one distribution to another structurally identical one' (p. 155). This statement is too weak. Entitlement can also be disregarded by changing the composition of individual holdings without altering their size. What is distinctive about entitlement theory is that it connects individuals with *particular* holdings acquired by *particular* procedures.

Nozick's Argument Against Redistributive Theories

Nozick advances a single argument to counter end-result and patterned principles of distributive justice. The argument leans heavily on one attractive and distracting example. Suppose some distribution of holdings which is just either according to a pattern or according to an end-result theory of distribution. Then transfers are made, for example, premium payments to Wilt Chamberlain by thousands of basketball fans who want to watch him play. The result is a new distribution, distinct from the first, which may not conform to the pattern or end-result in terms of which the first distribution was justified. More generally,

> any favored pattern would be transformed into one unfavored by the principle, by people choosing to act in various ways … to maintain a pattern one must continually interfere to stop people from transferring resources as they wish to. (p. 163)

So also to maintain a desired end-result. Yet intuitively there seems to be nothing very wrong about premium payments to Wilt Chamberlain.

But this will hardly do as an argument against patterned and end-state principles of justice or for entitlement

theory. The argument presupposes, so does not demonstrate, that it is wrong to interfere to restore disturbed patterns or end-states, and that such restorations are always redistributive and violate individuals' property rights. But it is just these property rights which have yet to be established. All the theories of distributive justice Nozick classifies assign individuals some sorts of property rights – some claim to exercise some control over some resources. They differ in the extent of these rights. For example, theories, which hold that pattern-restoring interference by the state maintains rather than violates the rights of individuals, regard property rights as limited in certain ways – perhaps by an upper limit on individual holdings, or on what individuals may do with what they hold, or on how or to whom they may transfer it. Nozick comments at one point that we lack a theory of property (p. 171). We do indeed, but the lack cannot warrant the assumption (cf. pp. 281–2) that individual property rights are rights to control resources in all ways, to dispose of them however and to whomever the owner wishes, or to accumulate them without limit. This interpretation of property rights must be established *before* the restoration of patterns or end-states by state action can be rejected as unjustified interference which violates individuals' rights. Nozick is quite right when he points out that 'socialist society would have to forbid capitalist acts between consenting adults' (p. 163). So it would; but this restriction of liberty might be compatible with or required by justice if the property rights of individuals are less than full capitalist property rights, i.e. are not rights to control any amount of material resources in all ways, subject only to the condition of not violating others' basic rights not to be harmed in life, health, or liberty.

Until Nozick provides an argument to show that property rights must be full capitalist property rights the Wilt Chamberlain example shows nothing. We can infer little from an intuition that there is nothing very wrong about making premium payments to Chamberlain, particularly when other intuitions suggest nothing very wrong in a bit of pattern-restoring redistribution by the method of taxing Chamberlain's now enlarged earnings. And even if Nozick had shown such restoration of patterns unjust, he would not have shown that it must involve unpredictable state depredations of individuals' holdings. It can be done by familiar devices such as income tax and welfare payments, and can allow many (though not all) capitalist acts to continue untrammelled. Nozick therefore exaggerates when he suggests that restoration requires 'continuous interference with individuals' actions and choices' (p. 166). The restoration of patterns (whether or not it is just) falls short of continuous interference.

Entitlement Theory

If Nozick's refutation of patterned and end-result theories of justice is inconclusive, then entitlement theory must be judged on the arguments presented for it without the support of finding itself the only contender in a vanquished field. Nozick presents an inductive definition of entitlement theory: (p. 151)

1. A person who acquires a holding in accordance with the principle of justice in acquisition is entitled to that holding.
2. A person who acquires a holding in accordance with the principle of justice in transfer, from someone entitled to the holding, is entitled to the holding.
3. No one is entitled to a holding except by (repeated) applications of (1) and (2).

As it stands this definition is extremely general. It can be applied only when the two further principles mentioned – the principles of just acquisition and just transfer – are specified. To these a third, a principle of rectification, would have to be added if we were to know what should be done about breaches of the first two principles. If we are to assess entitlement theory then we should look for precise formulations of at least the first two principles and arguments in favour of these particular formulations. Amazingly, Nozick writes 'I shall not attempt that task here' (p. 153). However, there is more to be said, since Nozick relents and sketches a principle of just acquisition.

I shall now consider this sketch and the possibilities of making it more detailed. I fail to give the same consideration to the principle of just transfer not because it is unproblematic,[4] but because it is less fundamental. If there are no entitlements no problem arises about transferring them. If Nozick is to justify a principle of just acquisition which will show patterned and end-result principles of just distribution untenable, he must both show that property rights must be full capitalist property rights and explain how particular individuals acquire such title to particular resources.

Just Acquisition

Just transfers lead to just acquisitions only when the previous holdings were just. Without a principle of just acquisition entitlement theory can view holdings only as conditionally just. Hence the importance of the

principle of just acquisition. Nozick's principle is Lockean: title is acquired by mixing labour with unowned objects, provided that 'enough and as good' is left for others. This principle has a long history, and seems to have the advantage of a certain nonarbitrariness over other principles of just acquisition. Although it would be difficult to give reasons for thinking that the holdings of a specific date – say 1900, or, if you like, 1500 – were just, it is worth considering what would be lost by formulating such a principle of justice in acquisition:

> (1) A person who has held a holding since 1900 is entitled to that holding.

The arbitrariness of the date is perhaps compensated for by the ascertainability of holdings at that date. Nozick even provides an argument for thinking that such arbitrariness might be laundered out over the years:

> … it is held that the operation of the system over time washes out any significant effects from the initial set of holdings. As an example of the latter, if almost anyone would have bought a car from Henry Ford, the supposition that it was an arbitrary matter who held the money then (and so bought) would not place Henry Ford's earnings under a cloud. (p. 158)

But this is too quick. If *A* and others would buy from *C*, but only *A* has the resources to do so, and *A* has no just title to these resources, then when *A* buys an *x*, *A*'s holding of *x* is still not just (it was acquired with ill-gotten funds) and equally *C*'s holding of *A*'s payment is just only if *C* had title to the *x* he sold. Henry Ford's holdings after sales will be tainted if his holdings of the means of production of Ford motor cars was tainted; his customers' holding of their cars will be tainted if the purchase money was tainted. Lack of entitlement is not generally transferred in sales, but transfers do nothing to reduce the total of unjust holdings. Entitlement theory cannot avoid the liabilities of being an historical theory, and Nozick has good reason, despite his misplaced faith in laundry, to look for a non-arbitrary principle of acquisition.[5]

He claims to find this principle sketched in Locke's chapter on Property in the *Second Treatise*. Yet his attitude to Lockean scripture is ambivalent. The questions he raises about Locke's theory (pp. 174–5) are a hilarious – and penetrating – piece of philosophical writing. But the fun Nozick gets from exploring Locke's problems is merely fun; it is not demolition. For if entitlement theory is to work, some principle of just acquisition must be provided. There must be some way by which persons can come to hold previously unheld things, and this method must yield full capitalist property rights if Nozick is to sustain his claims against principles of distributive justice whose maintenance needs state intervention. If Nozick is right there must be something which a person can do to a thing which will make it his own to use, neglect, alienate, or destroy as he chooses.

In arguing towards these conditions, Nozick does two things to Locke's principle of just acquisition: he streamlines it and extends it. I shall argue that his extention is plausible and powerful, but that the streamlining unfortunately smooths away an indispensable part of Locke's theory, the part which tries to explain why the mixer of labour is entitled to the product. If this part is restored property rights can be explained, at the cost of some extra assumptions, but the property rights so established are not full capitalist property rights.

Locke and Nozick on Mixing Labour

Locke and Nozick both see it as their task to 'show how men might come to have a property … without any express compact' (§ 24).[6] They will do this by showing that private property rights do not violate others' rights, who therefore need not be consulted. If their argument succeeds they will show that private property rights are part of the (basic) right of liberty and so not merely compatible with but required by justice.

Certain sorts of acquisition of property clearly violate others' basic rights. For example, slavery is incompatible with the right to liberty. But according to Locke and Nozick control over things need not violate others' liberty if there remains 'enough and as good left in common for others' (§ 26). If *A* appropriates some natural object, such as acorns, grass or water (Locke) or grains of sand (Nozick) (§§ 27–9: p. 175), but there remains enough unappropriated for others to do anything they might have done before *A*'s appropriation, then the appropriator has not violated any rights. Each person has as large a liberty as before, 'for he that leaves as much as another can make use of does as good as take nothing at all' (§ 31).

The problem is to be sure that the 'enough and as good' proviso is not violated. On this point Nozick and Locke diverge. Locke is worried:

> Nobody could think himself injured by the drinking of another man, though he took a good draught, who

> had a whole river of the same water left him to quench his thirst. And the case of land and water, where there is enough of both, is perfectly the same. (§ 32)

This suggests that there may be many places where there is not enough and as good remaining once a certain amount of appropriation has happened. Locke points backwards to underpopulated days when:

> it was impossible for any man, this way, to entrench upon the right of another or to acquire to himself a property to the prejudice of his neighbour, who would still have room for as good and as large a possession (after the other had taken out his) as before it was appropriated. (§ 35)

He points to 'the inland vacant places of America' (§ 36) and other waste lands (§ 45), though he admits that unappropriated land will vanish with the use of money (§ 47).

Nozick overcomes the worry by pointing out that it is possible to compensate others for their lost liberty. If appropriation and enclosure leave no further land or resources to appropriate, the propertyless have lost the right to use the resources appropriated but this will be justifiable if their overall position is not worsened (pp. 175–9), if the opportunities gained through others' appropriations at least compensate for the liberties lost. There is no need to point out vacant places or unappropriated resources to show present holdings justifiable, no need indeed to use acorns and grains of sand as examples: one has only to demonstrate that the present situation leaves the propertyless no worse off than they would be in an (admittedly hard to describe) baseline situation (p. 177). This extension of the 'enough and as good' proviso shows that Locke's theory need not reckon unjust all situations in which some sorts of resources have been entirely appropriated, leaving some people without property of this sort or the chance to appropriate any. It is enough (and as good) to compensate others with equivalent resources and opportunities, and not necessary for there to be either the same or the same sorts of items as existed before appropriation began. For it is only *after* appropriation that there are entitlements to *particular* resources. No rights are violated because the Stone Age way of life has been destroyed by appropriation, provided there is a compensating bundle of opportunities and resources.[7] Liberty of the person does not require any particular set of resources or opportunities.

So far this account of Locke's and Nozick's principles of just acquisition has shown how a system of private property could exist without violation of rights. But no argument yet given explains how one rather than another individual acquires a particular holding. Nor does consideration of the 'enough and as good' proviso show that there would be anything unjust about reassigning holdings, provided that the 'general post' of holdings does not violate the proviso.

This gap, of course, is supposed to be filled by the claim that entitlement is produced by mixing one's labour. However, the transition from

> *A* mixed his labour with *x*

to

> *A* is entitled to (has the right to control) *x*

requires justification. Nozick believes that we should 'hold onto the notions of earning, producing, entitlement, desert and so forth' (p. 155). But, of course, holding on is not enough; we need an argument too. And this argument proves perennially elusive.

Locke pointed out one line of argument when he said of the original use of nature's products:

> The fruit or venison which nourishes the wild Indian, who knows no enclosure, and is still a tenant in common, must be his and so his – i.e. a part of him, that another can no longer have any right to it before it can do him any good for the support of his life. (§ 25)

In this case entitlement requires incorporation and the right to control follows from the liberty of the person. But most appropriation is not literally incorporation. The point of property rights is gone if we can't have things unless we eat them: for even without property rights we can still use what nature provides. Locke therefore tries to push appropriation back from the moment of consumption to the moment when an item is removed 'from that common state Nature placed it in' (§ 26) and claims that 'by this labour something is annexed to it that excludes the common right of men' (§ 26). When we appropriate we mix our labour, and the final product is therefore not only nature's but ours, since it incorporates something of us, our 'work' or 'labour'. We come to own things not because we incorporate them, but because they incorporate (part of) us:

> … every man has a 'property' in his own 'person'. This nobody has any right to but himself. The 'labour' of his body and the 'work' of his hands, we may say, are properly his. Whatsoever, then, he removes out of the state that nature hath provided and left it in, he hath mixed his labour with it, and joined to it something that is his own, and thereby makes it his property. (§ 26).

The transition in this argument from 'joined to it something that is his own' to 'makes it his property' has been given various ingenious glosses by Locke's commentators. One view suggests that he made an illegitimate transition from 'work' or 'labour' in the sense of *activity* (whose control is justified by liberty of the person) to 'work' or 'labour' in the sense of *product* (whose control therefore remains unjustified).[8] Another engaging suggestion is that Locke was misled by thinking of production as reproduction. Aristotelianly conceived, in which 'something' is mixed with Nature, 'the common mother of all', and the result is the begetter's own.[9] This is not a plausible attribution to a writer who believes that mothers and fathers have equal and limited rights (§ 52). Nozick himself raises only questions. He points out the many difficulties in the way of assigning complete ownership to the contributor of one factor of production (pp. 174–5), and the more fundamental problem of understanding why any rights should accrue from mixing one's labour. Why should not labouring be a way of losing one's labour, of improving what is 'in the common state'? Why, at best, should the labourer acquire more than a share in the final product in proportion to his contribution?

Locke's Solution

I want to suggest that Locke provides an explanation of 'how a property begins', which can be dug from the text without much exegetical ingenuity, but requires a retreat from Nozick's streamlined Locke. This explanation too rest on a dubious premiss.

Locke's starting point is that the Earth is common property:

> God, who hath given the world to men in common, hath also given them reason to make use of it to the best advantage of life and convenience. (§ 25)

He has therefore to explain how common property can give way to private property. Nozick, by contrast, sets out to explain how what is *unowned* can become private property (p. 174). But this simplification does more than eliminate a redundant theological framework. There is a substantial difference between arguing from an initial equal liberty to use natural resources and arguing from an initial equal liberty to use them 'to the best advantage of life and convenience'. Again and again Locke states that the purpose of property is that men should not only use, but make the best possible use of resources.

> 'God has given us all things richly'. Is the voice of reason confirmed by inspiration? But how far has He given it us – 'to enjoy'? As much as any one can make use of to any advantage of life before it spoils, so much he may by his labour fix a property in. (§ 30)

This 'non-waste condition' Nozick sees as merely a means to ensure that the 'enough and as good' proviso is met for as long as possible (p. 176). But if property is linked to making the best possible use of resources, then we must avoid waste even when there is no danger of violating the 'enough and as good' proviso. For we do not improve or use to advantage what we waste even when our waste does not deprive others of any opportunities.

As Locke sees it, the non-waste condition limits appropriations because our productive powers and our capacities to consume are both limited. He belabours this point in §§ 31–4:

> As much land as a man tills, plants, improves, cultivates and can use the product of, so much is his property. (§ 31)
>
> God, when He gave the world in common to all mankind, commanded man also to labour, and the penury of his condition required it of him. God and his reason commanded him to subdue the earth – i.e. improve it for the benefit of life and therein lay out something upon it that was his own, his labour. (§ 31)
>
> God gave the world to men in common, but since He gave it them for their benefit and the greatest conveniences of life they were capable to draw from it, it cannot be supposed He meant it should always remain common and uncultivated. He gave it to the use of the industrious and rational … (§ 33)

And finally:

> subduing or cultivating the earth and having dominion, we see, are joined together. The one gave title to the other. (§ 34)

which leads straight on to an explicit claim that *production requires individual property:*

> God, by commanding to subdue gave authority to appropriate. And the condition of human life, which requires labour and materials to work on, necessarily introduces private possessions. (§ 34)

and to the claim that *individual property maximizes production:*

> he who appropriates land to himself does not lessen but increases the common stock of mankind. (§ 37)

From these passages it is easy to reconstruct a valid argument showing how title is acquired by the mixer of labour. It might run:

1. *A* mixes his labour with *x*.
2. *A* improves *x*.
3. *A* can improve only what he has the right to control.
4. *A* has the right to control *x*.

Locke would argue more strongly that we ought to (try to) control some *x*'s, since we have a duty to improve the Earth. But the above argument leaves it open whether we have duties to seek property rights.

Line (2) of this argument is merely an interpretation of line (1): to mix one's labour with something is not merely to cause a change in it but to improve it in some way (perhaps to make it more desirable or more accessible). Both Nozick and Locke would presumably accept this restriction on the sense of 'mixing one's labour'. They would not think that Locke's acorn gatherers appropriate the forest floor by leaving their footprints there; they only appropriate the now gathered acorns.

But line (3) of the argument is implausible. Locke is arguing that the conditions of production demand the entitlement of producers. Property rights are rights to use nature productively (improve it), not just to use it. Such improvements, Locke alleges, can only be made when producers have property rights. This belief is untenable on two counts. Production can take place when producers do not have complete control of resources; and it can take place when they have no right to control resources. Much productive labour is collective; much has been produced without individual holdings; even more without full capitalist property rights. On the other hand complete (or even partial) but unjustified control is also often sufficient for production. Even thieves or squatters may improve their 'holdings'. Locke's argument can justify individual property rights only when they are a necessary condition of production, hence in many cases could justify no sort of property right.

Even in those cases where he could justify individual property rights, these would not be full capitalist property rights. Since control is justified as a requirement of improving things, it could never extend to a right to destroy or fail to make productive use of some resource. The Parable of the Talents is not far from Locke's mind.

It seems therefore that Locke's argument to show why the mixer of labour should have title has two defects from Nozick's point of view. First, it rests on a false premiss about the requirements of production; secondly it leads to too weak a conclusion. If entitlement theory is to be rescued both defects must be overcome.

Line 3 of the argument might perhaps be replaced by the weaker

> (3′) *A* will improve best what he has the right to control.

In this case the justification of private property rights would be that they provide better incentives and lead to more efficient production than can be achieved either with noncapitalist property rights or by mere possessors. Nozick alludes to these considerations as 'the familiar social considerations favoring private property' (p. 177). If we accept (3′) and disregard the familiar social considerations favouring different sorts of property rights, the argument will not hold up without an additional premiss mandating maximal production, which would suffuse the justification of property rights with a utilitarian tinge. Even were this accepted, the property rights so justified would fall short of rights to destroy or to idle productive resources, and so would not be full capitalist property rights.

Even though it might not be possible for Nozick to adapt Locke's justification of property rights, there might be some quite separate line of argument from (1) to (4). But the available lines of thought do not seem likely to lead to the desired conclusion.

Nozick might, for example, argue that labour always costs the labourer something (he suggests this approach on page 175), and so that the labourer is entitled to some sort of recompense. But this recompense is unlikely to be complete control of the product, and in any case cannot be any sort of entitlement since Nozick

holds that *nothing* is owed in virtue of unsolicited benefits conferred (p. 95). In the absence of specific contracts we do not have any right that others should compensate us for effort we voluntarily expend from which they benefit.

Alternatively Nozick might try to argue that any abridgement of full capitalist property rights abridges the liberty of the person, which includes capitalist acts between consenting adults. However, we could know that such acts were permitted by the right to liberty only on the basis of some other argument, such as the 'enough and as good' proviso, to show that such acts are not themselves rights-violating. And even were such an argument given, we would need a way of linking particular holdings to particular individuals. Without a separate argument to show how entitlement *arises*, capitalist acts would include any taking of others' possessions (to which after all they can demonstrate no entitlement), and no accumulation of such acts could establish title. Before capitalist acts between consenting adults can take place in an orderly way, there must be solitary capitalist acts. Acquisition precedes transfer.

These negative conclusions are not altered by considering Locke's supplementary argument that full capitalist property rights arise only after the introduction of money (§§ 46–50), which permits unlimited accumulation without the non-waste condition being violated. It is true that an imperishable medium of exchange allows more extensive holdings, but it will still not confer rights to hold unlimited quantities of perishable resources or to hold productive resources idle or to destroy resources. Nor, of course, will the supplementary argument give any further explanation of why particular individuals should have title to particular holdings.

Procedural and Structural Theories of Distribution

These comments on entitlement theory have been largely adverse. However, I believe that Nozick has enormously clarified the discussion of theories of just distribution by emphasizing the differences between entitlement theory and other theories. Entitlement theory is about procedures for acquiring and transferring property justly; patterned and end-result theories of distribution are about the structure of property rights of a society. There is no reason why both a structural (patterned or end-result) account and a procedural (e.g. entitlement) account of a single set of holdings should not be given. For, contrary to the implications of the Wilt Chamberlain example, many patterns and end-results are remarkably stable in the face of a system of voluntary transfers. Of course, in justifying a distribution of resources one can point one way or the other. Either one may hold that a particular structure determines whether a distribution is just, or that following certain procedures shows that it is just. But it may then turn out that the best route to a just structure is by controlling (or not controlling) procedures, or that the best way to guarantee that certain procedures are followed is to specify a range of acceptable structures for their outcomes. (If the latter point seems implausible, consider maximizing the frequency of transfers [gifts and bequests] to non-related individuals not by specifying rules facilitating such transfers, but by setting an upper limit on individual holdings.)

Nozick is alive to these possibilities, for he praises invisible-hand explanations which show 'what looks to be the product of someone's intentional design as not being brought about by anyone's intentions' (p. 19). If an end-result or pattern of distribution is sustained by following certain procedures this would be an example of an invisible-hand mechanism; similarly if certain procedures are fostered by requiring or ruling out certain end-results. Nozick himself (p. 202) points to Hayek's claim that capitalist procedures are the best route to implement Rawls's difference principle (maximizing the resources of the worst off) as a case of maintaining an end-state by adhering to procedures.

But Nozick is not so alive to the vast range of possible procedural theories of just distribution other than entitlement theory. There are many possible principles of acquisition which are weaker or less individualist than Nozick's streamlined Lockean principle, and there are many possible principles of just transfer. Such principles might justify less than full entitlement of individuals to unlimited amounts of resources of any sort. They might restrict the uses to which certain (or all) sorts of resources are put, or the persons or groups who could hold or transfer resources.

Since Nozick's argument fails to show how individuals can acquire full entitlement in the first place, he has not given reasons for rejecting other procedural theories of justice. Since the Wilt Chamberlain argument presupposes full capitalist entitlements, he has not shown why one must reject non-procedural theories of justice. Even if we share with Locke and Nozick the view that individuals have rights not to be harmed in life, health, or liberty, we have so far no reason to accept entitlement theory.

Notes

1 I would like to thank G. A. Cohen for helpful comments and conversation.

2 Robert Nozick, *Anarchy, State and Utopia*, Basic Books, New York 1974. Parenthetical page references are to this book.

3 Nozick defines the minimal state as 'protecting all its citizens against violence, theft and fraud' (p. 26). This definition jumps the gun since the latter two protections presuppose property rights which are argued for in Part II of the book.

4 The problem lies in explaining what is required of just transfers over and above their being voluntary. Involuntary transfers are clear violations of entitlement; but so are some voluntary transfers. Since Nozick thinks that the state should protect individuals against fraud, he presumably places conditions over and above mere consent on just transfers. Only informed consent will justify. Once we say this much the specification of a principle or just transfer becomes extremely intricate.

5 Later (p. 293) he suggests that historical injustices would be washed away if one could show that a given situation could have been reached by some 'hypothetical just history' not too different from the actual story. If we may rewrite history, there will be little we cannot justify.

6 John Locke, *Of Civil Government*, Second Treatise, Everyman's Library, London 1924. Parenthetical paragraph numbers refer to this work.

7 Cf. *Anarchy, State and Utopia*, p. 178, n. MacPherson holds that Locke himself extended the 'enough and as good' proviso in this way. C. B. MacPherson, *The Political Theory of Possessive Individualism*. Clarendon Press, Oxford 1962, pp. 212–14.

8 J. P. Day, 'Locke on Property,' *Philosophical Quarterly*, Vol. 16 (1966), attributes this (and kindred) confusion to Locke.

9 R. Brandt, 'Zu Locke's Lehre von Privateigentum', *Kant-Studien*, Vol. 63 (1972).

17

Justice Engendered

Martha Minow

I Introduction

(a) *What's the Difference?*

The use of anesthesia in surgery spread quickly once discovered. Yet the nineteenth-century doctors who adopted anesthesia selected which patients needed it and which deserved it. Both the medical literature and actual medical practices distinguished people's need for painkillers based on race, gender, ethnicity, age, temperament, personal habits, and economic class. Some people's pain was thought more serious than others; some people were thought to be hardy enough to withstand pain. Doctors believed that women, for example, needed painkillers more than men and that the rich and educated needed painkillers more than the poor and uneducated. How might we, today, evaluate these examples of discrimination? What differences between people should matter, and for what purposes?

The endless variety of our individualism means that we suffer different kinds of pain and may well experience pain differently. But when professionals use categories like gender, race, ethnicity, and class to presume real differences in people's pain and entitlement to help, I worry. I worry that unfairness will result under the guise of objectivity and neutrality. I worry that a difference assigned by someone with power over a more vulnerable person will become endowed with an apparent reality, despite powerful competing views. If no one can really know another's pain, who shall decide how to treat pain, and along what calculus? These are questions of justice, not science. These are questions of complexity, not justifications for passivity, because failing to notice another's pain is an act with significance.

(b) *The Problem and the Argument*

Each term, the Supreme Court and the nation confront problems of difference in this heterogeneous society. The cases that present these problems attract heightened media attention and reenact continuing struggles over the meanings of subgroup identity in a nation committed to an idea called equality. The drama of these cases reveals the enduring grip of "difference" in the public imagination, and the genuine social and economic conflicts over what particular difference come to mean over time. During the 1986 term, litigators framed for the Court issues about the permissible legal meanings of difference in the lives of individuals, minority groups, and majority groups in cases involving gender, race, ethnicity, religion, and handicap.

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Uniting these questions is the dilemma of difference. The dilemma of difference has three versions. The first version is the dilemma that we may recreate difference either by noticing it or by ignoring it. Decisions about employment, benefits, and treatment in society should not turn on an individual's race, gender, religion, or membership in any other group about which some have deprecating or hostile attitudes. Yet refusing to acknowledge these differences may make them continue to matter in a world constructed with some groups, but not others, in mind. If women's biological differences from men justify special benefits for women in the workplace, are women thereby helped or hurt? Are negative active stereotypes reinforced, and does that matter? Focusing on differences poses the risk of recreating them. Especially when used by decision makers who award benefits and distribute burdens, traits of difference can carry meanings uncontrolled and unwelcomed by those to whom they are assigned. Yet denying those differences undermines the value they may have to those who cherish them as part of their own identity.

The second version of the dilemma is the riddle of neutrality. If the public schools must remain neutral toward religion, do they do so by balancing the teaching of evolution with the teaching of scientific arguments about divine creation – or does this accommodation of a religious view depart from the requisite neutrality? Governmental neutrality may freeze in place the past consequences of differences. Yet any departure from neutrality in governmental standards uses governmental power to make those differences matter and thus symbolically reinforces them.

The third version of the dilemma is the choice between broad discretion, which permits individualized decisions, and formal rules that specify categorical decisions for the dispensing of public – or private – power. If the criminal justice system must not take the race of defendants or victims into account, is this goal achieved by granting discretion to prosecutors and jurors, who can then make individualized decisions but may also introduce racial concerns, or should judges impose formal rules specifying conditions under which racial concerns must be made explicit to guard against them? By granting discretion to officials or to private decision makers, legislators and judges disengage themselves from directly endorsing the use of differences in decisions; yet this grant of discretion also allows those decision makers to give significance to differences. Formal rules constrain public or private discretion, but their very specificity may make differences significant.

I believe these dilemmas arise out of powerful unstated assumptions about whose point of view matters and about what is given and what is mutable in the world. "Difference" is only meaningful as a comparison. I am no more different from you than you are from me. A short person is different only in relation to a tall one. Legal treatment of difference tends to take for granted an assumed point of comparison: Women are compared to the unstated norm of men, "minority" races to whites, handicapped persons to the able-bodied, and "minority" religions to "majorities." Such assumptions work in part through the very structure of our language, which embeds the unstated points of comparison inside categories that bury their perspective and wrongly imply a natural fit with the world. The term *working mother* modifies the general category *mother*, revealing that the general term carries some unstated common meanings (that is, a woman who cares for her children full time without pay), which, even if unintended, must expressly be modified. Legal treatment of difference thus tends to treat as unproblematic the point of view from which difference is seen, assigned, or ignored, rather than acknowledging that the problem of difference can be described and understood from multiple points of view.

Noticing the unstated point of comparison and point of view used in assessments of difference does not eliminate the dilemma of difference; instead, more importantly, it links problems of difference to questions of vantage point. I will argue that what initially may seem to be an objective stance may appear partial from another point of view. Furthermore, what initially appears to be a fixed and objective difference may seem from another viewpoint like the subordination or exclusion of some people by others. Regardless of which perspective ultimately seems persuasive, the possibility of multiple viewpoints challenges the assumption of objectivity and shows how claims to knowledge bear the imprint of those making the claims.

Difference may seem salient not because of a trait intrinsic to the person but instead because the dominant institutional arrangements were designed without that trait in mind. Consider the difference between buildings built without considering the needs of people in wheelchairs and buildings that are accessible to people in wheelchairs. Institutional arrangements define whose reality is to be the norm and make what is known as different seem natural. By asking how power influences knowledge, we can address the question of whether difference was assigned as an expression of domination or as a remedy for past domination. In so doing, we can determine the risks of creating a new pattern of domination while remedying unequal power relationships.

The commitment to seek out and to appreciate a perspective other than one's own animates the reasoning of some Supreme Court justices, some of the time. It is a difficult commitment to make and to fulfill. Aspects of language, social structure, and political culture steer in the opposite direction: toward assertions of absolute categories transcending human choice or perspective. It is not only that justice is created by, and defeated by, people who have genders, races, ethnicities, religions – people who are themselves situated in relation to the differences they discuss. It is also the case that justice is made by people who live in a world already made. Existing institutions and language already carve the world and already express and recreate attitudes about what counts as a difference and who or what is the relevant point of comparison. Once we see that any point of view, including one's own, *is* a point of view, we will realize that every difference we see is seen in relation to something already assumed as the starting point. Then we can expose for debate what the starting points should be. The task for judges is to identify vantage points, to learn how to adopt contrasting vantage points, and to decide which vantage points to embrace in given circumstances.

A difficulty here, as always, is who is "we." Writing not just for judges, but for all who judge, I mean to invoke a broad array of people in the exploration of justice. Yet the perspective I advance cannot escape my own critique of the partiality of every perspective. The very focus on the "difference" problem selects that problem rather than others (for example, the loss of coherence and tradition in society) as the point of discussion. My use of "we," then, represents an invitation to the reader to assent, to disagree, but above all, to engage with this focus. I use "we," moreover, to emphasize the human authorship of the problems and solutions at hand, and to avoid locutions that eliminate human pronouns.

In Part II, I explore three versions of the dilemma of difference, illustrating how they arose in the contexts of religion, ethnicity, race, gender, and handicapping conditions in cases before the Supreme Court during the 1986 term. Next, in Part III, I turn to the influence in these cases of unstated assumptions about points of reference and starting points for analysis, assumptions that are continually reinforced by established modes of thought, language, and patterns of legal reasoning.

In Part IV, I first identify how members of the Court periodically challenge these assumptions by seeking the perspective of individuals and groups unlike themselves. Unfortunately, the justices are not always successful in their efforts. Feminist scholars have done much to reveal the persistence of these assumptions, particularly the assumption that men – their needs and experiences – are the standard for individual rights, and in Part IV I go on to develop and pursue this basic feminist insight. In so doing, I also explore ways in which some feminist analyses have recreated the problems they sought to address, elaborating the idea of "woman's experience," leaving unstated the race, ethnicity, religion, and bodily condition presumed in the identification of woman's point of view.

What, then, is to be done? In Part V, I urge the judiciary to make a perpetual commitment to approach questions of difference by seeking out unstated assumptions about difference and typically unheard points of view. There will not be a rule, a concept, a norm, or a test to apply to these problems. The very yearning for simple and clear solutions is part of the difference problem. The allure of this simplicity reflects our dangerous tendency to assign differences, to pretend that they are natural, and to use categorical solutions to cut off rather than to promote understanding. Instead of a new solution, I urge struggles over descriptions of reality. Litigation in the Supreme Court should be an opportunity to endow rival vantage points with the reality that power enables, to redescribe and remake the meanings of difference in a world that has treated only some vantage points on difference as legitimate.

Far from being unmanageable, this approach describes what happens already in the best practices of justice. Justice, in this view, is not abstract, universal, or neutral. Instead, justice is the quality of human engagement with multiple perspectives framed by, but not limited to, the relationships of power in which they are formed. Decisions, then, can and must be made. Despite the distortions sometimes injected by a language of objectivity and neutrality, the Supreme Court has "engendered" justice in many cases. These cases show the commitment in contemporary statutory and constitutional law to give equality meaning for people once thought to be "different" from those in charge. From the work of this term, which is the last for Justice Powell, the first for Justice Scalia, and the first for Chief Justice Rehnquist as head of the Court, I hope to demonstrate how our common humanity wins when the Court struggles with our differences.

II A Case of Differences

Arguments before the Supreme Court engage all three versions of the difference dilemma and cut across cases otherwise differentiated by doctrine and contexts.

The dilemma arises in both equality and religion cases, and in statutory and constitutional contexts. This section explicitly draws connections across these seemingly disparate cases and explores the dilemma in cases decided in the 1986 term.

(a) *The Dilemma of Recreating Difference Both by Ignoring It and by Noticing It*

California Federal Savings & Loan Association v. Guerra (Cal Fed)[1] presented in classic form the dilemma of recreating difference through both noticing and ignoring it. Petitioners, a collection of employers, argued that a California statute[2] mandating a qualified right to reinstatement following an unpaid pregnancy disability leave amounted to special preferential treatment, in violation of Title VII's prohibition of discrimination on the basis of pregnancy.[3] Writing an opinion announcing the judgment for the Court, Justice Marshall transformed the question presented by the plaintiffs: Instead of asking whether the federal ban against discrimination on the basis of pregnancy precluded a state's decision to require special treatment for pregnancy, the majority asked whether the state could adopt a minimum protection for pregnant workers while still permitting employers to avoid treating pregnant workers differently by extending similar benefits to nonpregnant workers. Framing the problem this way, the majority ruled that "Congress intended the PDA to be 'a floor beneath which pregnancy disability benefits may not drop – not a ceiling above which they may not rise.'"[4] The majority acknowledged the risk that recognizing the difference of pregnancy could recreate its stigmatizing effects, but noted that "a State could not mandate special treatment of pregnant workers based on stereotypes or generalizations about their needs and abilities."[5] Thus, despite the federal antidiscrimination requirement, the majority found that states could direct employers to take the sheer physical disability of the pregnancy difference into account, but not any stereotyped views associated with that difference. The majority gave two responses to the problem of difference: First, accommodating pregnant workers would secure a workplace that would equally enable both female and male employees to work and have a family; second, the federal and state statutes should be construed as inviting employers to provide the same benefits to men and women in comparable situations of disability.[6]

Writing for the dissenters, Justice White maintained that the California statute required disability leave policies for pregnant workers even in the absence of similar policies for men. It thus violated the PDA, which "leaves no room for preferential treatment of pregnant workers."[7] In the face of this conflict, the federal statute must pre-empt the state law. The commands of nondiscrimination prohibit taking differences into account, Justice White argued, regardless of the impact of this neglect on people with the difference. Justice White acknowledged the majority's argument that preferential treatment would revive nineteenth-century protective legislation, perpetuating sex role stereotypes and "imped[ing] women in their efforts to take their rightful place in the workplace."[8] For Justice White, however, such arguments were irrelevant, because the Court's role was restricted to interpreting congressional intent and thus would not permit consideration of the arguments about stereotyping. Yet to some extent, the issue of stereotypes was unavoidable: The dilemma in the case, from one point of view, was whether women could secure a benefit that would eliminate a burden connected with their gender, without at the same time reactivating negative meanings about their gender.

In two other cases in the 1986 term, the Court confronted the dilemma of recreating difference in situations in which individuals claimed to be members of minority races in order to obtain special legal protections. By claiming an identity in order to secure some benefit from it, the individuals faced the dilemma that they might fuel negative meanings of that identity, meanings beyond their control. Although racial identification under federal civil rights statutes provides a means of legal redress, it also runs the risk of recreating stigmatizing associations, thereby stimulating prejudice.

In *Saint Francis College v. Al-Khazraji*,[9] a man from Iraq who had failed to secure tenure from his employer, a private college, brought a claim of racial discrimination under 42 U.S.C. section 1981. His case foundered, however, when the lower courts rejected his claim that his Arab identity constituted racial membership of the sort protected by the federal statute.

In *Shaare Tefila Congregation v. Cobb*,[10] members of a Jewish congregation whose synagogue was defaced by private individuals alleged violations of the federal guarantee against interference with property rights on racial grounds. The difference dilemma appeared on the face of the complaint: The petitioners argued that Jews are not a racially distinct group, and yet they claimed that Jews should be entitled to protection against racial discrimination because others treat them as though they were distinct. The petitioners thus demonstrated their

reluctance to have a difference identified in a way that they themselves could not control, while simultaneously expressing their desire for protection against having that difference assigned to them by others. To gain this protection, the petitioners had to identify themselves through the very category they rejected as a definition of themselves. Both the district court and the court of appeals refused to allow the petitioners to be included in the protected group on the basis of the attitudes of others, without some proof of well-established traits internal to the group. The court of appeals reasoned:

> Although we sympathize with appellant's position, we conclude that it cannot support a claim of racial discrimination solely on the basis of defendants' perception of Jews as being members of a racially distinct group. To allow otherwise would permit charges of racial discrimination to arise out of nothing more than the subjective, irrational perceptions of defendants.[11]

In contrast, one member of the appeals panel, dissenting on this point, argued: "Misperception lies at the heart of prejudice, and the animus formed of such ignorance sows malice and hatred wherever it operates without restriction."[12]

Is the cause of individualized treatment advanced by allowing groups to claim legal protections by dint of group membership, however erroneously assigned by others? Conversely, may denying these claims of legal protection against assigned difference allow the Supreme Court to avoid addressing the dilemma and thereby reenact it? In both *Shaare Tefila* and *Saint Francis*, the Court asked only whether the legislators adopting the antidiscrimination legislation shortly after the Civil War viewed Jews and Arabs as distinct races. The Court answered the question affirmatively in both cases but based its conclusion on a review of the legislative histories and contemporaneous dictionaries and encyclopedias instead of tackling the difference dilemma directly.

The Court's historical test for membership in a minority race effectively revitalized not just categorical thinking in general, but the specific categorical thinking about race prevailing in the 1860s, despite considerable changes in scientific and moral understandings of the use of abstract categories to label people and solve problems. Whether the issue is gender, religion, or race, reviving old sources for defining group difference may reinvigorate older attitudes about the meanings of group traits. Denying the presence of those traits, however, and their significance in society, deprives individuals of protection against discrimination due to outmoded or unsubstantiated conceptions of group difference.

(b) *Neutrality and Nonneutrality: The Dilemma of Government Embroilment in Difference*

The dilemma of difference appears especially acute for a government committed to acting neutrally. Neutral means might not produce neutral results, given historic practices and social arrangements that have not been neutral. For example, securing neutrality toward religious differences is the explicit goal of both the First Amendment's ban against the establishment of religion and its protection of the free exercise of religion. Thus to be truly neutral, the government must walk a narrow path between promoting or endorsing religion and failing to make room for religious exercise. Accommodation of religious practices may look nonneutral, but failure to accommodate may also seem nonneutral by burdening the religious minority whose needs were not built into the structure of mainstream institutions.

The "creation science" case, *Edwards v. Aguillard*,[13] raised the question of how the government, in the form of public schools, can respect religious differences while remaining neutral toward them. In *Edwards*, parents and students claimed that a Louisiana statute requiring public schools to teach creation science whenever they taught the theory of evolution violated the establishment clause. Community members subscribing to fundamentalist religious beliefs, however, have argued that public school instruction in evolution alone is not neutral, because it gives a persuasive advantage to views that undermine their own religious beliefs. Relying on similar arguments, the state avowed a neutral, nonreligious purpose for its statute.[14]

The majority, in an opinion by Justice Brennan, concluded that the legislation was actually intended to "provide persuasive advantage to a particular religious doctrine that rejects the factual basis of evolution in its entirety."[15] By contrast, the dissenting opinion by Justice Scalia, which was joined by Chief Justice Rehnquist, expressly tangled with the neutrality problem, noting the difficult tensions between antiestablishment and free exercise concerns and between neutrality through indifference and neutrality through accommodation. In the end, the dissent was moved by the state's attempt to avoid undermining the different views of fundamentalist Christian students, while the majority was persuaded that the statute gave an illegal preference to a particular

religious view. For both sides, however, the central difficulty was how to find a neutral position between these two risks.

In a second case, *Hobbie v. Unemployment Appeals Commission*,[16] the neutrality problem arose when the Court reviewed a state's decision to deny unemployment benefits to a woman under an apparently neutral scheme. Hobbie was discharged from her job when she refused to work during her religious Sabbath. The state argued that Hobbie's refusal to work amounted to misconduct related to her work and rendered her ineligible for unemployment benefits under a statute limiting compensation to persons who become "unemployed through no fault of their own."[17] The Court rejected this emphasis on the cause of the conflict, because the "salient inquiry" was whether the denial of unemployment benefits unlawfully burdened Hobbie's free exercise right. The Court also rejected the state's claim that making unemployment benefits available to Hobbie would unconstitutionally establish religion by easing eligibility requirements for religious adherents.[18] By requiring accommodation for free exercise, despite charges of establishing religion, the Court's solution thus framed a dilemma of neutrality: How can the government's means be neutral in a world that is not itself neutral?

A facially neutral state policy on unemployment compensation also figured in *Wimberly v. Labor & Industrial Relations Commission*.[19] Wimberly had taken a pregnancy leave from her job with no guarantee of reinstatement, and upon her return the employer told her that there were no positions available. Her application for unemployment benefits was denied under a state law disqualifying applicants unless their reasons for leaving were directly attributable to the work or to the employer. Wimberly argued that a federal statute forbidding discrimination in unemployment compensation "solely on the basis of pregnancy or termination of pregnancy"[20] required accommodation for women who leave work because of pregnancy. The Supreme Court unanimously rejected Wimberly's claim that this denial of benefits contravened the federal statute. The Court found that the state had not singled out pregnancy as the reason for withholding unemployment benefits; instead, pregnancy fell within a broad class of reasons for unemployment unrelated to work or to the employer. The Court interpreted the federal statute to forbid discrimination but not to mandate preferential treatment. In the Court's eyes, then, it was neutral to have a general rule denying unemployment benefits to anyone unemployed for reasons unrelated to the workplace or the employer.[21]

In essence, the Court interpreted the federal statutory scheme as granting discretion to state legislatures to define their own terms for disqualification from eligibility for benefits. Although many states provide unemployment benefits for women who leave their jobs because of pregnancy, subsuming it under terms like "good cause," along with other compelling personal reasons, injury, illness, or the federal ban against refusing benefits "solely on the basis of pregnancy" does not, according to the Court, compel such coverage. A state choosing to define its unemployment eligibility narrowly enough to disqualify not just those who leave work due to pregnancy but also those who leave work for good cause, illness, or compelling personal reasons may thus do so without violating federal law.

The Court in *Wimberly* rejected the argument that ignoring the difference of pregnancy produces illicit discrimination under an apparently neutral unemployment benefits rule. In *Hobbie*, on the other hand, the Court embraced the view that ignoring a religious difference produces illicit dis-crimination under an apparently neutral unemployment benefits rule. In both cases, the Court grappled with the dilemma of whether to give meaning to neutrality by recognizing or not recognizing difference.

(c) *Discretion and Formality: The Dilemma of Using Power to Differentiate*

The Court's commitment to the rule of law often leads it to specify, in formal terms, the rules that govern the decisions of others. This practice can secure adherence to the goals of equality and neutrality by ensuring that differences are not taken into account except in the manner explicitly specified by the Court. Although likely to promote accountability, this solution of formal rules has drawbacks. Making and enforcing specific rules engages the Court in the problem of reinvesting differences with significance by noticing them. Specifically requiring the Court to articulate permissible and impermissible uses of difference may enshrine categorical analysis and move further away from the ideal of treating persons as individuals. One way for the Court to resolve the difference dilemma is to grant or cede discretion to other decision makers. Then the problems from both noticing and ignoring difference, and from risking nonneutrality in means and results, are no longer problems for the Court but, instead, matters within the discretion of other private or public decision makers. This approach simply moves the problem to another forum, allowing

the decision maker with the discretion to take difference into account in an impermissible manner. The tension between formal, predictable rules and individualized judgments under discretionary standards thus assumes heightened significance in dilemmas of difference.

This dilemma of discretion and formality most vividly occupied the Court in *McCleskey v. Kemp*,[22] in which the Court evaluated charges of racial discrimination in the administration of the death penalty in Georgia's criminal justice system. A statistical study of over two thousand murder cases in Georgia during the 1970s, submitted by the defendant and assumed by the Court to be valid, demonstrated that the likelihood of a defendant's receiving the death sentence was correlated with the victim's race and, to a lesser extent, the defendant's race. According to the study, black defendants convicted of killing white victims "have the greatest likelihood of receiving the death penalty." Should the Court treat a sentencing "discrepancy that appears to correlate with race" as a defect requiring judicial constraints on prosecutorial and jury discretion, or as an unavoidable consequence of such discretion? In making this choice, the majority and the dissenters each latched onto opposing sides of the dilemma about discretion and formality.

Justice Powell, for the majority, began by asserting that the discretion of the jury is critical to the criminal justice system and operates to the advantage of criminal defendants because it permits individualized treatment rather than arbitrary application of rules. Because of the importance of discretion, unexplained racial discrepancies in the sentencing process should not be assumed to be invidious or unconstitutional. In the majority's view, recognizing claims such as McCleskey's would open the door "to claims based on unexplained discrepancies that correlate to membership in other minority groups, and even to gender" or physical appearance. This argument, perhaps meant in part to trivialize the dissent's objections by linking physical appearance with race, sex, and ethnicity, implied that discrepancies in criminal sentences are random and too numerous to control. Furthermore, in the majority's view, any attempt to channel discretion runs the risk of undermining it altogether: "It is difficult to imagine guidelines that would produce the predictability sought by the dissent without sacrificing the discretion essential to a humane and fair system of criminal justice."[23]

Justice Brennan, in dissent, approached the problem of discretion and formality from the other direction. Like the majority, Justice Brennan asserted that imposition of the death penalty must be based on an "individualized moral inquiry." To Justice Brennan, however, the statistical correlation between death sentences and the race of defendants and victims showed that participants in the state criminal justice system had, in fact, considered race and produced judgments "completely at odds with [the] concern that an individual be evaluated as a unique human being." Justice Brennan argued that "discretion is a means, not an end" and that, under the circumstances, the Court must monitor the discretion of others. Justice Brennan also responded to the majority's fear of widespread challenges to all aspects of criminal sentencing: "Taken on its face, such a statement seems to suggest a fear of too much justice.... The prospect that there may be more widespread abuse than McCleskey documents may be dismaying, but it does not justify complete abdication of our judicial role."[24]

Justice Stevens, also in dissent, argued that there remains a middle road between forbidding the death penalty and ignoring, in the name of prosecutorial and jury discretion, the correlation between the death penalty and the defendant's and victim's races. He urged a specific rule: The class of defendants eligible for the death penalty should be narrowed to the category of cases, identified by the study, in which "prosecutors consistently seek, and juries consistently impose, the death penalty without regard to the race of the victim or the race of the offender."[25]

For the majority in *McCleskey*, constricting prosecutorial and jury discretion would push toward so regulated a world that the criminal justice system would no longer produce particularized, individualized decisions about defendants. For the dissenters, the Court's acquiescence in unmonitored prosecutorial and jury discretion, in the face of sentencing disparities correlated with race, condoned and perpetuated racial discrimination and thereby allowed racial stereotyping to be substituted for individualized justice.

Debate among the justices last term in an entirely different context exposed a similar tension between rules and discretion. In *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos (Presiding Bishop)*,[26] the Court considered whether the federal statute exempting religious organizations from nondiscrimination requirements in their employment decisions arising out of nonprofit activities violated the establishment clause. The Court's majority endorsed the legislative grant of discretion to religious organizations while rejecting the discharged engineer's claims that such state accommodation unconstitutionally promotes religion.

The opinions in the case clearly illustrate the dilemma of discretion. The majority reasoned that under the exemption the preference for religion was not exercised by the government but, rather, by the church. Justice O'Connor, however, pointed out in her concurring opinion that allowing discretion to the private decision maker to use religion in his decisions inevitably engaged the government in that differentiation. The Court could not, simply by protecting the discretion of religious organizations, escape consideration of the tension between the constitutional command against promoting religion and the constitutional demand for free exercise of religion. Instead, Justice O'Connor argued, in distinguishing constitutional accommodation of religion from unconstitutional assistance to religious organizations, the Court must evaluate the message of the government's policy as perceived by an "objective observer."[27]

Justice Brennan's separate opinion also treated this tension as unavoidable. Yet Justice Brennan focused on the risk that case-by-case review by the Court would chill the very freedom assured to religious organizations. He therefore endorsed a categorical exemption from the ban against religious discrimination in employment for the nonprofit activities of religious organizations but argued for reserving judgment as to profit-making activities. Like Justice Stevens in *McCleskey*, Justice Brennan searched for a formal rule that could preserve discretion for other decision makers while also implementing the Court's special commitment to protect individuals from categorical, discriminatory treatment.

(d) *The Dilemmas in Sum*

Other cases before the Court have raised one or more aspects of the difference dilemma. The Court's voluntary affirmative action cases, during the 1986 term and earlier, directly present dilemmas about recreating difference, risking nonneutral means to transform nonneutral ends, and choosing between rules and discretion in an effort to avoid categorical decisions. Decisions about handicapped persons also raise perplexing issues about when the Court should permit public and private decision makers to make the difference of handicap matter. The Court comes down one way or another in each case, but the splits between majority and minority views persist and recreate the dilemmas. The next section argues that assumptions buried within the dilemmas make them seem more difficult than they need be. The task, then, is to articulate those assumptions and to evaluate the choices that remain for decision makers.

III Behind and Beyond the Dilemma

The dilemma of difference appears unresolvable. The risk of nonneutrality – the risk of discrimination – accompanies efforts both to ignore and to recognize difference in equal treatment and special treatment; in color blindness or gender blindness and in affirmative action; in governmental neutrality and in governmental preferences; and in decision makers' discretion and in formal constraints on discretion. Yet the dilemma is not as intractable as it seems. What makes it seem so difficult are unstated assumptions about the nature of difference. Once articulated and examined, these assumptions can take their proper place among other choices about how to treat difference. I will explore here the assumptions underlying the dilemma of difference, assumptions that usually go without saying.

(a) *The Five Unstated Assumptions*

Assumption 1: Difference Is Intrinsic, Not Relational

> [M]any of us have never conceived of ourselves only as somebody's other. (Barbara Christian)[28]

Can and should the questions about who is different be resolved by a process of discovering intrinsic differences? Is difference an objective, verifiable matter rather than something constructed by social attitudes? By posing legal claims through the difference dilemma, litigants and judges treat the problem of difference as what society or a given decision maker should do about the "different person" – a formulation that implicitly assigns the label of difference to that person.

The difference inquiry functions by pigeonholing people into sharply distinguished categories based on selected facts and features. Categorization helps people cope with complexity and understand each other. The legal analyst tends to treat the difference question as one of discovery rather than of choice. The judge asks: "Into what category does a given person or feature belong?" The categories then determine the significance of the persons or features situated within them. The distinguishing features behind critical perceptions and behind the categories themselves appear natural rather than chosen. It is hard, if not impossible, to find commonalities across differences and to argue for the same treatment across difference. Responsibility for the consequences of identifying difference, then, is dispersed through the

process of perception and categorization, even as the process of categorization itself can create new perceptions and realities.

Assumption 2: The Unstated Norm

> Anyone who deviates from the official norm, whatever that is, anyone who fails to bear a likeness to the Standard Product, is simply not viewed as fully human, and then becomes at best invisible, at worst a threat to the national security. (Giles Gunn)[29]

To treat someone as different means to accord them treatment that is different from treatment of someone else; to describe someone as "the same" implies "the same as" someone else. When differences are discussed without explicit reference to the person or trait on the other side of the comparison, an unstated norm remains. Usually, this default reference point is so powerful and well established that it need not be specified.

Some remedial statutes explicitly state the norm: In 42 U.S.C. section 1981, the norm is "white citizens" – with an emphasis on both terms, implicitly establishing the terms of sameness and difference in this very statement of the norm. Claimants invoking the statute must show themselves to be relatively similar to "white citizens." Hence, these cases focus on whether the claimant is a member of a race.

When women argue for rights, the implicit reference point used in discussions of sameness and difference is the privilege accorded some males. This reference point can present powerful arguments for overcoming the exclusion of women from activities and opportunities available to men. For example, reform efforts on behalf of women during both the nineteenth and the twentieth centuries asserted women's fundamental similarities to privileged, white men as a tactic for securing equal treatment. Unfortunately for the reformers, embracing the theory of 'sameness' meant that any sign of difference between women and men could be used to justify treating women differently from men. Men remained the unstated norm.

Jerome Bruner wrote, "There is no seeing without looking, no hearing without listening, and both looking and listening are shaped by expectancy, stance, and intention."[30] Unstated reference points lie hidden in legal discourse, which is full of the language of abstract universalism. Legal language seeks universal applicability, regardless of the particular traits of an individual. Yet abstract universalism often "takes the part for the whole, the particular for the universal and essential, the present for the eternal."[31] Making explicit the unstated points of reference is the first step in addressing this problem; the next is challenging the presumed neutrality of the observer who in fact sees from an unacknowledged perspective.

Assumption 3: The Observer Can See Without a Perspective

> Inevitably, "seeing" entails a form of subjectivity, an act of imagination, a way of looking that is necessarily in part determined by some private perspective. Its results are never simple "facts," amenable to "objective" judgments, but facts or pictures that are dependent on the internal visions that generate them. (Evelyn Fox Keller)[32]

If differences are intrinsic, then anyone can see them; if there is an objective reality, then any impartial observer can make judgments unaffected and untainted by his or her own perspective or experience. Once rules are selected, regardless of disputes over the rules themselves, a distinct aspiration is that they will be applied evenhandedly. This aspiration to impartiality, however, is just that – an aspiration rather than a description – because it may suppress the inevitability of the existence of a perspective and thus make it harder for the observer, or anyone else, to challenge the absence of objectivity.

What interests us, given who we are and where we stand, affects our ability to perceive. Philosophers such as A.J. Ayer and W.V. Quine note that although we can alter the theory we use to frame our perceptions of the world, we cannot see the world unclouded by preconceptions. The impact of the observer's perspective may be crudely oppressive. Yet we continue to believe in neutrality.

Judges often see difference in relation to some unstated norm or point of comparison and fail to acknowledge their own perspective and its influence on the assignment of difference. This failure prevents us from discovering who is doing the labeling, but it does not negate the effect of the labeling of difference itself. Veiling the standpoint of the observer conceals its impact on our perception of the world. This leads to the next unstated assumption: that all other perspectives are either presumptively identical to the observer's own or are irrelevant.

Assumption 4: The Irrelevance of Other Perspectives

> We have seen the blindness and deadness to each other which are our natural inheritance. (William James)[33]

Glimpsing contrasting perspectives helps resolve problems of difference. Several of the justices have tried, on different occasions, to glimpse the point of view of a minority group or a person quite different from themselves; some have articulated eloquently the difficulty or even impossibility of knowing another's perspective and have developed legal positions that take into account this difficulty. Others have rejected as irrelevant or relatively unimportant the experience of "different" people and have denied their own partiality, often by using stereotypes as though they were real.

Thus, some justices, on some occasions, have tried to see beyond the dominant perspective and reach an alternative construction of reality. In many other instances, however, the justices presume that the perspective they adopt is either universal or superior to others. A perspective may go unstated because it is so powerful and pervasive that it may be presumed without defense; it may also go unstated because it is so unknown to those in charge that they do not recognize it as a perspective. Presumptions about whose perspective matters ultimately may be embedded in the final, typically unstated assumption: When in doubt, the status quo is preferred and is indeed presumed natural and free from coercion.

Assumption 5: The Status Quo Is Natural, Uncoerced, and Good

> To settle for the constitutionalization of the status quo is to bequeath a petrified forest. (Aviam Soifer)[34]

Connected with many of the other assumptions is the idea that critical features of the status quo – general social and economic arrangements – are natural and desirable. From this assumption follow three propositions: First, the goal of governmental neutrality demands the status quo because existing societal arrangements are assumed to be neutral. Second, governmental actions that change the status quo have a different status than omissions, or failures to act, that maintain the status quo. Third, prevailing social and political arrangements are not forced on anyone. Individuals are free to make choices and to assume responsibility for those choices. These propositions are rarely stated, both because they are deeply entrenched and because they view the status quo as good, natural, and freely chosen. At times, however, the justices have engaged in debate that exposes the status quo assumption.

For the most part, unstated assumptions work in subtle and complex ways. Assumptions fill the basic human need to simplify and to make our world familiar and unsurprising. Yet, by their very simplification, assumptions exclude contrasting views. Moreover, they contribute to the dilemma of difference by frustrating legislative and constitutional commitments to change the treatment of differences in race, gender, ethnicity, religion, and handicap. Before justice can be done, judges need to hear and understand contrasting points of view about the treatment of difference.

IV Perspectives on Perspectives

The difference dilemma seems paralyzing if framed by the unstated assumptions described in Part 3. Those assumptions so entrench one point of view as natural and orderly that any conscious decision to notice or to ignore difference breaks the illusion of a legal world free of perspective. The assumptions make it seem that departures from unstated norms violate commitments to neutrality. Yet adhering to the unstated norms undermines commitments to neutrality – and to equality. Is it possible to proceed differently, putting these assumptions into question?

I will suggest that it is possible, even if difficult, to move beyond the constricting assumptions. At times in the past term, members of the Court have employed the most powerful device to expose and challenge the unstated assumptions: looking at an issue from another point of view. By asking how a member of a religious group might experience a seemingly neutral rule or how a nonmember might experience the discretion of a religious group, Justices O'Connor, Brennan, and White made an effort in several cases to understand a different perspective.[35] Justice Marshall and the majority in *Cal Fed* tried to assume the perspective of pregnant women by considering how treatment of pregnancy affects women's abilities to work outside the home while having a family. The dissenting justices in *McCleskey* asked how defendants would react to the statistical disparity in capital sentencing by race, breaking out of the tendency to see the challenge only as a threat to the discretion and

manageability of the criminal justice system. In *Saint Francis College, Shaare Tefila*, and *Arline*, members of the Court struggled over whose perspective should count for purposes of defining a race and a handicap, reaching conclusions that refused to take the usual answers for granted.

Efforts to adopt or imagine alternate perspectives are also reflected in opinions from previous terms. For example, Justice Stevens assessed an equal protection challenge to a zoning restriction burdening mentally retarded people by expressing sensitivity to a point of view other than his own: "I cannot believe that a rational member of this disadvantaged class could ever approve of the discriminatory application of the city's ordinance in this case."[36] Still earlier, Justice Douglas invited inquiry into the experience of non-English-speaking students sitting in a public school classroom conducted entirely in English.[37] Similarly, litigants have sometimes tried to convince the Court to adopt their perspective, Justice Harlan's dissent in *Plessy v. Ferguson*[38] may have been assisted by Homer Plessy's attorney, who had urged the justices to imagine themselves in the shoes of a black person:

> Suppose a member of this court, nay, suppose every member of it, by some mysterious dispensation of providence should wake tomorrow with a black skin and curly hair…and in traveling through that portion of the country where the "Jim Crow Car" abounds, should be ordered into it by the conductor. It is easy to imagine what would be the result…What humiliation, what rage would then fill the judicial mind![39]

It may be ultimately impossible to take the perspective of another completely, but the effort to do so may help us recognize that our perspective is partial and that the status quo is not inevitable or ideal. After shaking free of these unstated assumptions and developing a sense of alternative perspectives, judges must then choose. The process of looking through other perspectives does not itself yield an answer, but it may lead to an answer different from the one that the judge would otherwise have reached. Seen in this light, the difference dilemma is hard but not impossible.

Historians have described how a conception of reality, when it triumphs, convinces even those injured by it of its actuality. Accordingly, political and cultural success itself submerges the fact that conceptions of reality represent a perspective of some groups, not a picture of reality free from any perspective. At the turn of the century, for example, a new middle class justified industrialism and the control of immigrants by spreading understandings of science, technology, and bureaucracy as neutral and progressive.[40] Similarly, studies have shown how groups with relatively little social and economic power internalize the views of those with more power – often at the cost of personal conflict and damaged self-respect.[41] Taking minority perspectives seriously calls for a process of dialogue in which the listener actually tries to reach beyond the assumption of one reality, one version of the truth. There is no neutrality, no escape from choice. But it is possible to develop better abilities to name and grasp competing perspectives and to make more knowing choices thereafter. In the next section, I suggest that efforts along these lines are central to the challenge of engendering justice.

V Engendering Justice

> The problem of freedom is the problem of how to divest our categories of their halo of external truth. (Mary Douglas)[42]
>
> The truth is that we are all responsible, even if we are not to blame. (Sarah Burns)[43]

The nineteenth-century American legal system recognized only three races: "white," "Negro," and "Indian." Californian authorities faced an influx of Chinese and Mexicans and were forced to confront the now complicated question of racial categorization. They solved the problem of categorizing Mexicans by defining them as "whites" and by according them the rights of free white persons. Chinese, however, were labeled "Indian" and denied the political and legal rights of white persons. Similarly, in 1922, a unanimous Supreme Court concluded that Japanese persons were not covered by a federal naturalization statute applicable to "free white persons," "aliens of African nativity," and "persons of African descent."[44]

In retrospect, these results seem arbitrary. The legal authorities betrayed a striking inability to reshape their own categories for people who did not fit. Of course, it is impossible to know what might have happened if some piece of history had been otherwise. Still, it is tempting to wonder: What if the California legal authorities had changed their racial scheme, rather than forcing the Chinese and Mexican applicants into it? The officials

then might have noticed that nationality, not race, distinguished these groups. What if these officials and the justices in 1922 had tried to take the point of view of the people they were labeling? Perhaps, from this vantage point, the justices would have realized the need for reasons – beyond racial classification – for granting or withholding legal rights and privileges.

In this chapter, I have argued that trying to take seriously the point of view of people labeled *different* is a way to move beyond current difficulties in the treatment of differences in our society. This last statement, like much of the chapter, is addressed to people in positions of sufficient power to label others *different* and to make choices about how to treat difference. If you have such power, you may realize the dilemma of difference: By taking another person's difference into account in awarding goods or distributing burdens, you risk reiterating the significance of that difference and, potentially, its stigma and stereotyping consequences. But if you do not take another person's difference into account – in a world that has made that difference matter – you may also recreate and reestablish both the difference and its negative implications. If you draft or enforce laws, you may worry that the effects of the laws will not be neutral whether you take difference into account or you ignore it. If you employ people, judge guilt or innocence, or make other decisions affecting lives, you may want and need the discretion to make an individualized assessment, free from any focus on categorical differences. But if that discretion is exercised without constraint, difference may be taken into account in a way that does not treat that person as an individual – and in a way that disguises this fact from view.

These dilemmas, I have argued, become less paralyzing if you try to break out of unstated assumptions and take the perspective of the person you have called *different*. Once you do that, you may glimpse that your patterns for organizing the world are both arbitrary and foreclose their own reconsideration. You may find that the categories you take for granted do not well serve features you had not focused upon in the past. You may see an injury that you had not noticed or take more seriously a harm that you had otherwise discounted. If you try to take the view of the other person, you will find that the "difference" you notice is part of the relationship or comparison you draw between that person and someone else, with reference to a norm, and you will then get the chance to examine the reference point you usually take for granted. Maybe you will conclude that the reference point itself should change. Employers do not have to treat pregnancy and parenthood as a disability, but instead as a part of the lives of valued workers. You may find that you had so much ignored the point of view of others that you did not realize that you were mistaking your point of view for reality. Perhaps you will find that the way things are is not the only way things could be – that changing the way you classify, evaluate, reward, and punish may make the differences you had noticed less significant, or even irrelevant, to the way you run your life.

I have also argued, however, that we often forget how to take the perspective of another. We forget even that our point of view is not reality and that our conceptual schemes are simplifications, serving some interests and uses rather than others. We forget because our minds – and probably our hearts – cannot contain the whole world, and so we reduce the world to shorthand that we can handle. Our shorthand – because it is our shorthand – reflects what we thought we needed, where we stood, and who we are. We treat our divisions of the world as though they were real and universal. We do not see that they embody our early experiences of discovering how we are both the same as and different from our parents. We forget how we learned from them to encode the world into the same classifications they used to serve their own needs. We forget that things may appear frightful only because they are unfamiliar. We look at people we do not know and think they are different from us in important ways. We forget that even if they are different, in a way that matters to them, too, they also have a view of reality, and ours is as different from theirs as theirs is from ours.

We think we know what is real, what differences are real, and what really matters, even though sometimes we realize that our perceptions and desires are influenced by others. Sometimes we realize that television, radio, classes we had in school, or the attitudes of people who matter to us, affect our inclinations. Every time we wear an item of clothing that we now think is fashionable but used to think was ugly, we brush up against the outside influences on what we think inside. Yet we think that we think independently. We forget that widely held beliefs may be the ones most influenced from the outside.

The more powerful we are, the less we may be able to see that the world coincides with our view precisely because we shaped it in accordance with those views. That is just one of our privileges. Another is that we are able to put and hear questions in ways that do not question ourselves. In contrast, the more marginal we feel from the world, from the groups we know, the more

likely we are to glimpse a contrast between some people's perceptions of reality and our own. Yet we still may slip into the world view of the more powerful, because it is more likely to be validated. We prefer to have our perceptions validated; we need to feel acknowledged and confirmed. But when we fail to take the perspective of another, we deny that very acknowledgment and confirmation in return.

If we want to preserve justice, we need to develop a practice for more knowing judgments about problems of difference. We must stop seeking to get close to the "truth" and instead seek to get close to other people's truths. The question is, how do we do this? In this section, I argue that we must persuade others as much as they must persuade us about the reality we should construct. Justice can be impartial only if judges acknowledge their own partiality. Justice depends on the possibility of conflicts among the values and perspectives that justice pursues. Courts, and especially the Supreme Court, provide a place for the contest over realities that govern us – if we open ourselves to the chance that a reality other than our own may matter. Justice can be engendered when we overcome our pretended indifference to difference and instead people our world with individuals who surprise one another about difference.

(a) *Impartiality and Partial Truths*

It is a paradox. Only by admitting our partiality can we strive for impartiality. Impartiality is the guise partiality takes to seal bias against exposure. It looks neutral to apply a rule denying unemployment benefits to anyone who cannot fulfill the work schedule, but it is not neutral if the work schedule was devised with one religious Sabbath, and not another, in mind. The idea of impartiality implies human access to a view beyond human experience, a "God's eye" point of view. Not only do humans lack this inhuman perspective, but humans who claim it are untruthful, trying to exercise power to cut off conversation and debate. Doris Lessing argues that a single absolute truth would mean the end of human discourse but that we are happily saved from that end because any truth, once uttered, becomes immediately one truth among many, subject to more discourse and dispute. If we treat other points of view as irritants in the way of our own vision, we are still hanging on to faulty certainty. Even if we admit the limits of our view, while treating those limits as gaps and leaving the rest in place, we preserve the pretense that our view is sufficiently rooted in reality to resist any real change prompted by another.

Acknowledging partiality may cure the pretense of impartiality. But unless we have less capacity to step outside our own skins than I think we do, we then have a choice of which partial view to advance or accept. Whose partial view should resolve conflicts over how to treat assertions of difference, whether assigned or claimed? Preferring the standpoint of an historically denigrated group can reveal truths obscured by the dominant view, but it can also reconfirm the underlying conceptual scheme of the dominant view by focusing on it. Similarly, the perspective of those who are labeled *different* may offer an important challenge to the view of those who imposed the label, but it is a corrective lens, another partial view, not absolute truth.[45] We then fight over whether to prefer it. "Standpoint theories" may also deny the multiple experiences of members of the denigrated group and create a new claim of essentialism.

Instead of an impartial view, we should strive for the standpoint of someone who is committed to the moral relevance of contingent particulars.[46] Put in personal terms, if I pretend to be impartial, I hide my partiality; however, if I embrace partiality, I risk ignoring you, your needs, and your alternative reality – or, conversely, embracing and appropriating your view into yet another rigid, partial view. I conclude that I must acknowledge and struggle against my partiality by making an effort to understand your reality and what it means for my own. I need to stop seeking certainty and acknowledge the complexity of our shared and colliding realities, as well as the tragic impossibility of all prevailing at once. It is this complexity that constitutes our reciprocal realities, and it is the conflict between our realities that constitutes us, whether we engage in it overtly or submerge it under a dominant view.

Moral action, then, takes place in a field of complexity, and we act ethically when we recognize what we give up as well as what we embrace. The solution is not to adopt and cling to some new standpoint but, instead, to strive to become and remain open to perspectives and claims that challenge our own. Justice, like philosophy, ought

> to trust rather to the multitude and variety of its arguments than to the conclusiveness of any one. Its reasoning should not form a chain which is no stronger than its weakest link, but a cable whose fibers may be ever so slender, provided they are sufficiently numerous and intimately connected.[47]

We who judge should remove the removal of ourselves when we either ignore or notice a difference. We can and should confront our involvement in and responsibility for what happens when we act in a reality we did not invent but still have latitude to discredit or affirm. We should have the humility and the courage to act in each situation anew, rather than applying what we presume to know already, as though each case were merely a repetition of an episode from the past.

Two exercises can help those who judge to glimpse the perspectives of others and to avoid a false impartiality. The first is to explore our own stereotypes, our own attitudes toward people we treat as different – and, indeed, our own categories for organizing the world. Audre Lorde put it powerfully: "I urge each one of us here to reach down into that deep place of knowledge inside herself and touch that terror and loathing of any difference that lives there. See whose face it wears. Then the personal as the political can begin to illuminate all our choices."[48] This is a call for applying "strict scrutiny" not just to a defendant's reasons for burdening a protected minority group but also to ourselves when we judge those reasons. It is a process that even we who see ourselves as victims of oppression need to undertake, for devices of oppression are buried within us. We must also examine and retool our methods of classification and consider how they save us from questioning our instincts, ourselves, and our existing social arrangements. Putting ourselves in the place of those who look different can push us to challenge our ignorance and fear and to investigate our usual categories for making sense of the world. This is an opportunity to enlarge judges' understanding and abilities to become better practitioners in the business of solving problems.

The second exercise is to search out differences and celebrate them by constructing new bases for connection. We can pursue the possibilities of difference behind seeming commonalities and seek out commonalities across difference, thereby confronting the ready association of sameness with equality and difference with inferiority. One route is to emphasize our common humanity, despite our different traits. Another tack is to disentangle difference from the allocation of benefits and burdens in society – a tack that may well require looking at difference to alter how people use it. The Court's effort to ensure equality for women and men in the conjunction of work and family life in *Cal Fed* represents such an effort to disentangle institutional arrangements from the difference they create. A third approach is to cherish difference and welcome anomaly. Still another is to understand that which initially seems strange and to learn about sense and reason from this exercise – just as philosophers, anthropologists and psychologists have urged us to take seriously the self-conceptions and perceptions of others. In the process of trying to understand how another person understands, we may even remake our categories of understanding. Other persons may not even define "self" the same way we do, and glimpsing their "self-concepts" thus challenges us to step beyond our operating assumptions. A further skill to practice is to recognize commonality in difference itself: in the relationships within which we construct difference and connect and distinguish ourselves from one another.

These exercises in taking the perspective of the other will deepen and broaden anyone's perspective. For judges, who debate the use of the coercive forces of the law in relation to issues of difference, these exercises are critical. Judges can and should act as representatives, standing in for others and symbolizing society itself. Judicial acts of representation must also be responsive to the demands of the people they govern, in order to secure apparent legitimacy and, ultimately, to remain effective. One judge explained that law's coercive power must be applied to ensure "the viability of a pluralistic democracy," which "depends upon the willingness to accept all of the 'thems' as 'us.'" Whether the motives of the framers be considered moralistic or pragmatic, the structure of the Constitution rests on the foundational principle that successful self-governance can be achieved only through public institutions following egalitarian policies.[49]

This exhortation – that we must take the perspective of another while remembering that we cannot really know what another sees and must put our own categories up for challenge, without ceding the definition of reality over the others – sounds quite complicated. What do we do with the sense of complexity?

(b) *Complexity, Passivity, and the Status Quo: The Problem of Deference*

We are mistaken when we hold onto simple certainties. Yet complexity seems both overwhelming and incapacitating. By bearing into complexity rather than turning away from it, by listening to the variety of voices implicated in our problems, we may lose a sense of ready solutions and steady certainties. But clear answers have been false gods, paid homage to in the coinage of other people's opportunities, and also at cost to our own character. We harden ourselves when we treat our categories as though they were real, closing off responses to new

facts and to challenges to how we live and think. Our certainties also leave unresolved conflicts among incompatible but deeply held values. In the face of complexity, "the politics of difference can all too easily degenerate into the politics of 'mutual indifference'"[50] If we care about justice, the biggest mistake would be to respond to complexity with passivity. That response is not impartial; it favors the status quo, those benefited by it, and the conception of reality it fosters.

1. Forms of passivity. Four forms of judicial passivity may be tempting in the face of complexity: deference, intent requirements, reliance on apparent choices or concessions of the parties, and reliance on doctrine. I will consider each in turn.

Respect for other institutions and persons is a critical part of judging, but there are particular risks when the Court, while acknowledging the complexity of a problem of difference, defers to other branches or levels of government, to private actors, or even to the parties before the Court. One risk is that the Court will pretend that it has no power over or responsibility for what results. When the Court defers to Congress, the executive, a state government, or a private actor, the justices are saying, Let's not make a decision, let's leave it to others, or let's endorse the freedom or respect the power of others. It is surely important for the justices to understand their relationship with other people or institutions with interests in a matter, but such understanding is quite different from ceding responsibility for what ensues. This principle is important for everybody, but especially for a judicial body, which has parties with genuine conflicts before it. As Frank Michelman put it, "Attention [to other branches of government] cannot mean deference, or talismanic invocation of authority. The norm of justice to parties itself commands that no other norm should ever take a form that preempts questions or exempts from reason-giving."[51]

Problems also arise when the Court takes on the second form of passivity: focusing on the intentions of the parties before it. When the Court demands evidence of intentional discrimination before upholding a plaintiff's charges, the justices are deferring to and thereby entrenching the perspective of the defendant, thus rejecting the perspective of the plaintiff-victim. Asking only about the sincerity of the motive behind a statute whose effect is challenged is also an act that takes sides, defines which reality will govern, and avoids the real challenge of responding to the perspective of the plaintiff.

It is equally problematic for the Court, in a third form of passivity, to point to apparent choices made by plaintiffs, victims, or members of minority groups, as Justice Scalia did in *Johnson*[52] as a justification for holding against them. The Court may presume incorrectly that the choices are free and uncoerced, or the Court may wrongly attribute certain meanings to a choice. Similarly, judicial references to litigants' concessions during litigation, including during oral argument, are not without risk. Although the Court may be trying to take the perspective of others seriously, its reliance on litigants' concessions as the peg for a judicial decision may also be the Court's way of reducing the task of deciding on its own. Reliance on concessions of the lawyer may be especially troubling in cases involving the rights of minorities, because it is unclear for whom the lawyer speaks at that moment: the client, the cause, or others unrepresented there who will be affected in the future by the Court's ruling.

The fourth form of passivity is perhaps one of the most effective circumventions of responsibility: the Court's reliance on its own doctrinal boundaries and categories to resolve the cases before it. This chapter has demonstrated that the difference dilemma poses similar problems in a wide variety of contexts, including cases involving religion, gender, race, and sexual preference. Yet when the Court takes the boundaries between doctrines as given, filling the doctrines with operative tests and lines of precedent, it obscures these potential similarities across contexts. By the time a case reaches an appellate court, the adversary process has so focused on specific issues of doctrinal disagreement that the competing arguments have come under one framework, not under competing theories. Legal analogy is typically inseparable from precedential reasoning, telescoping the creative potential of a search for surprising similarities into a narrow focus on prior rulings that could "control" the instant case. The Court's practice vividly demonstrates how fabricated categories can assume the status of immutable reality. Of course, law would be overwhelming without doctrinal categories and separate lines of precedent. Yet by holding to rigid categories, the Court denies the existence of tensions and portrays a false simplicity amid a rabbit warren of complexity. The Court's strict segregation of doctrine also cloisters lines of thought and insights, thereby restricting the Court's ability to use larger frames of judgment.

2. Avoiding passivity. Besides resisting tempting forms of passivity – which do not lessen judicial responsibility – the Court can and should challenge rigid patterns of thought. What if litigants argued more emphatically across contexts

and reminded members of the Court, "You have seen something like this before?" Litigants can help the Court to avoid the dangers of complacency and complexity by searching out analogies and developing unfamiliar perspectives. At the same time, litigants may gain a tactical advantage, because they may persuade a member of the Court of their point of view by analogizing to something the justice has glimpsed elsewhere. This practice also has some support in epistemology. The difficulties each of us has in seeing around the bend of our own thought can be eased with the help of insights from others who are positioned differently. Given the relationship between knowledge and power, those with less privilege may well see better than those with more.

Surprisingly, traditional legal techniques actually provide fruitful starting points for avoiding passivity. One noted feature of the legal system that can be used to mount this challenge is analogical reasoning.[53] The existence of encrusted practices and categories however, frustrates the full use of these tools. Litigants and judges should search out unexpected analogies to scrape off barnacles of thought and to challenge views so settled that they are not thought to be views. This process may persuade particular judges, in particular cases, to see a different angle on a problem. It also holds promise as a method for finding surprising commonalities that can nudge us all to reassess well-established categories of thought.

The promise of reasoning by analogy is lost if it becomes an arid conceptualist enterprise. Yet when immersed in the particulars of a problem, we sometimes are able to think up analogies that break out of ill-fitting conceptual schemes. As one observer of creative processes in art, science, and philosophy has commented, "In the history of human thinking the most fruitful developments frequently take place at those points where two different lines of thought meet."[54] By seeing something in a new light, seeing its similarity to something else once thought quite different, we are able to attribute different meanings and consequences to what we see. A glimpse of difference in one context may enable litigants and judges better to appreciate it in another context.

The adversarial process is another feature of the legal system that, with some modification, can be used to challenge judicial complacency. In fact, the values of thinking through analogies bear a striking similarity to the virtues of reasoning in dialogue. The dialogue form puts the student in a position to follow the connections and divergences in argument and invent for herself ways to think anew, rather than simply internalizing the monologue of inherited knowledge. Barbara Johnson notes that "learning seems to take place most rapidly when the student must respond to the contradiction between *two* teachers. And what the student learns in the process is both the power of ambiguity and the non-innocence of ignorance."[55] Similarly, dialogue in legal briefs and courtroom arguments can stretch the minds of listeners, especially if they are actively forming their own position and not simply picking between the ones before them.

The introduction of additional voices may enable adversary dialogue to expand beyond a stylized, either/or mode, prompting new and creative insights. Consequently, the Court can, and should seek out alternative views in *amicus* briefs. Inventive approaches can bring the voices of those who are not present before the Court, as in the recent brief filed with the Court that collected the autobiographical accounts of men and women who believed their lives had been changed by the availability of legalized abortion.[56] Similarly, the famous "Brandeis brief" in *Muller v. Oregon*[57] marked a creative shift for the Court, introducing the use of vivid, factual detail as a way to break out of the formalist categories dominating the analysis. Seeking unusual perspectives enables justices to avail themselves of the "partial superiority" of other people's views and to reach for what is unfamiliar and perhaps suppressed under the dominant ways of seeing. Bringing in a wider variety of views can also make the so-called countermajoritarian Court more "democratic."

Besides seeking out unfamiliar perspectives and analogies new to the law, all judges should also consider the human consequences of their decisions in difference cases, rather than insulating themselves in abstractions. Such engagement encourages the judge to fill in textual gaps based on his or her own experiences. It may seem paradoxical to urge those who judge to bring their own experiences to the problems before them, after identifying the dangerous ways in which we all confuse our own perceptions and interests for reality. In the process of personal reflection, however, the judge may stretch faculties for connection while engaging in dialogue with the parties over their legal arguments and analogies. I petition all judges to open up to the chance that someone may move them – the experience will not tell them what to do, but it may give them a way outside routinized categories to forge new approaches to the problem at hand.

This call to be open, to canvas personal experience, applies to all legal controversies, but it is especially important in the context of cases that present the dilemma of difference. Here the judicial mainstays of neutrality and distance prove most risky, for they blind judges to their own involvement in recreating the negative meanings of difference. Yet the dangers of making

differences matter also argue against categorical solutions. By struggling to respond humanly to the dilemma in each particular context, the judge can supply the possibility of connection otherwise missing in the categorical treatments of difference.

(c) *Choosing Among Divergent Demands*

Urging judges to allow themselves to be moved by the arguments may seem misguided. A judge who identifies with every perspective may simply feel indecisive and overburdened. Would feeling the tugs in all directions render us powerless to choose? It may be just this fear that explains our attachment to simplifying categories, stereotypes, and fixed ways of thought. Some of us may fear being overwhelmed by the world, others fear being too moved by it, others fear being powerless before it. Challenging familiar categories and styles of reasoning may threaten the search for order, decisiveness, and manageability that maintain the predictability in our lives. But there are other ways to hold things together than the methods we have used in the past.

Some may aspire to a jurisprudence of individualism, never treating any individual as a member of a group. Yet, resonant as it is with many American traditions, individualization is a myth: Because our language is shared and our categories communally invented, any word I use to describe your uniqueness draws you into the classes of people sharing your traits. Even if ultimately I produce enough words so that the intersection of all classes you belong in contains only one member – you – we understand this through a language of comparison with others. This language, however, seems to embroil us in the dilemma of difference.

What could we do instead? I believe we should welcome complexity and challenge complacency – and stop fearing that we will be unable to make judgments. We can and do make judgments all the time, in a way committed to making meaning, rather than recreating or ignoring difference. We make commitments when we make decisions; we reconfirm or remake current understandings by reflecting so deeply and particularly about a new situation that we challenge presumptive solutions. Instead of trying continually to fit people into categories, and to enforce or deny rights on that basis, we can and do make decisions by immersing in particulars to renew commitments to a fair world.

Thus, one reason we can still decide, amid powerfully competing claims, is that immersion in particulars does not require the relinquishment of general commitments. The struggle is not over the validity of principles and generalizations – it is over which ones should prevail in a given context. The choice from among principles, in turn, implicates choices about which differences, and which similarities, should matter. These are moral choices, choices about which voices should persuade those who judge.

Even when we understand them, some voices will lose. The fundamentalist Christians who supported the Balanced Treatment Act in Louisiana deserve respect and understanding: Their view of the world may well be threatened by the curriculum taught to their children in the public schools. However, this is what the fight is about. Whose view of reality should prevail in public institutions? This deep conundrum involves the conflicts between the worldview animating any rule for the entire society, and the worldviews of subgroups who will never share the dominant views. I am tempted to propose a seemingly "neutral" rule, such as a rule that judges interpreting the commitment to respect difference should make the choice that allows difference to flourish without imposing it on others. If exclusion of their worldview from the biology curriculum creates an intolerable choice for the fundamentalists, they do and they must have the choice to establish their own educational institutions, and their own separate community. Yet this seemingly "neutral" position is a comfortable view for a nonfundamentalist like myself, who cannot appreciate the full impact of the evolution science curriculum as experienced by at least some fundamentalists. Rather than pretending to secure a permanent solution through a "neutral" rule, I must acknowledge the tragedy of nonneutrality – and admit that our very commitment to tolerance yields intolerance toward some views. If the fundamentalists lose in this case, they can continue to struggle to challenge the meaning of the commitment to separate church and state, and they may convince the rest of us in the next round. Although it may be little solace for the minority group, its challenge achieves something even when it loses, by reminding the nation of our commitment to diversity, and our inability, thus far, to achieve it fully.

Thus, choices from among competing commitments do not end after the Court announces its judgment. Continuing skepticism about the reality endorsed by the Court – or any source of governmental power – is the only guard against tyranny.

The continuing process of debate over deeply held but conflicting commitments is both the mechanism and the promise of our governmental system. Within that system, the Supreme Court's power depends upon

persuasion. As Hannah Arendt wrote: "The thinking process which is active in judging something is not, like the thought process of pure reasoning, a dialogue between me and myself, but finds itself always and primarily, even if I am quite alone in making up my mind, in an anticipated communication with others with whom I know I must finally come to some agreement."[58] The important question is, with whom must you come to agreement? In a society of diversity with legacies of discrimination, within a polity committed to self-governance, the judiciary becomes a critical arena for demands of inclusion. I see the judicial arena as a forum for contests over competing realities. The question remains, however, whose definitions of realities will govern in a given case and over time.

Court judgments endow some perspectives, rather than others, with power. Judicial power is least accountable when judges leave unstated – and treat as a given – the perspective they select. Litigation before the Supreme Court sometimes highlights individuals who otherwise seldom imprint their perspective on the polity. In eliciting these perspectives and accepting their challenge to the version of reality the justices otherwise would take for granted, the Court advances the fundamental constitutional commitment to require reasons before exercises of power, whether public or private. Growing from our history, wrought from many struggles, is the tradition we have invented, and it is a tradition that declares that the status quo cannot be immune from demands for justification. Litigation over the meanings of difference represents demands for such accountability. By asking how power influences knowledge, the Court can address whether a "difference" has been assigned through past domination or as a remedy for past domination. In this way, the Court can solicit information about contrasting views of reality without casting off the moorings of historical experience, and in this inquiry, the Court can assess the risk of creating new patterns of domination while remedying inequalities of the past. As we compete for power to give reality to our visions, we confront tragic limits in our abilities to make meaning together. Yet we must continue to seek a language to speak across conflicting affiliations.

We need settings in which to engage in the clash of realities that breaks us out of settled and complacent meanings and creates opportunities for insight and growth. This is the special burden and opportunity for the Court: to enact and preside over the dialogue through which we remake the normative endowment that shapes current understandings.

When the Court performs these roles, it engenders justice. Justice is engendered when judges admit the limitations of their own viewpoints, when judges reach beyond those limits by trying to see from contrasting perspectives, and when people seek to exercise power to nurture differences, not to assign and control them. Rather than securing an illusory universality and objectivity, law is a medium through which particular people can engage in the continuous work of making justice. The law "is part of a distinctive manner of imagining the real."[59] Legal decisions engrave upon our culture the stories we tell to and about ourselves, the meanings that constitute the traditions we invent. Searching for words to describe realities too multiple and complex to be contained by their language, litigants and judges struggle over what will be revealed and what will be concealed in the inevitable partiality of human judgment. Through deliberate attention to our own partiality, we can begin to acknowledge the dangers of pretended impartiality. By taking difference into account, we can overcome our pretended indifference to difference, and people our worlds with those who can surprise and enrich one another. As we make audible, in official arenas, the struggles over which version of reality will secure power, we disrupt the silence of one perspective, imposed as if universal. Admitting the partiality of the perspective that temporarily gains official endorsement may embolden resistance to announced rules. But only by admitting that rules are resistible – and by justifying to the governed their calls for adherence – can justice be done in a democracy. "It is only through the variety of relations constructed by the plurality of beings that truth can be known and community constructed."[60] Then we constitute ourselves as members of conflicting communities with enough reciprocal regard to talk across differences. We engender mutual regard for pain we know and pain we do not understand.

Notes

1 107 S. Ct. 683 (1987).

2 California Fair Employment and Housing Act, *Cal. Gov't Code Ann.* § 12945(b)(2) (West 1980).

3 See 107 S. Ct. at 691. In the Pregnancy Discrimination Act of 1978 (PDA), Pub. L. No. 95–555, 92 Stat. 2076 (1978) (codified at 42 U.S.C. § 2000e(k) (1978)), Congress amended

Title VII to include discrimination on the basis of pregnancy, rejecting the Supreme Court's contrary ruling in *General Electric Co. v. Gilbert*. 429 US 125 (1976).

4 107 S. Ct. at 692 (quoting *Cal Fed*, 758 F.2d 390, 396 (9th Cir. 1985)).

5 *Id*. at 691, n. 17. In *Cal Fed*, the Court tried to avoid the problems of stereotyping by characterizing pregnancy solely as a physical disability – ignoring alternative characterizations that analogize women's role in pregnancy to veterans' role in national defense – a role justifying preferential treatment in employment. See Littleton, *Reconstructing Sexual Equality*, 75 *Calif. L. Rev*. 201 (1987), 1279–337.

6 See 107 S. Ct. at 694.

7 107 S. Ct. at 698 (White, J., dissenting). The dissent rejected the claim that employers could comply with both statutes by providing benefits to both women and men in comparable situations, because that approach would extend the scope of the state statute beyond its express language and because the federal statute did not require programs where none currently existed. See *id*. at 701.

8 *Id*. at 700. See 107 S. Ct. at 694 (opinion of the Court).

9 107 S. Ct. 2022 (1987).

10 107 S. Ct. 2019 (1987).

11 785 F.2d 523, 527 (4th Cir. 1986).

12 *Id*. at 529 (Wilkinson, J., concurring in part and dissenting in part). Judge Wilkinson explained: "It is an understatement to note that attempts to place individuals in distinct racial groups frequently serve only to facilitate continued discrimination and postpone the day when all individuals will be addressed as such" (*id*. at 533).

13 107 S. Ct. 2573 (1987).

14 See 107 S. Ct. at 2576; *id*. at 2600–5 (Scalia, J., dissenting).

15 *Id*. at 2582; *accord id*. at 2587 (Powell, J., concurring).

16 107 S. Ct. 1046 (1987).

17 *Id*. at 1048 (quoting *Fla. Stat*. § 443.021 (1985)).

18 See 107 S. Ct. at 1051 and n. 11.

19 107 S. Ct. 821 (1987).

20 26 U.S.C. § 3304(a)(12)(1982).

21 107 S. Ct. at 825.

22 107 S. Ct. 1756 (1987).

23 107 S. Ct. at 1778, n. 37.

24 *Id*. at 1791; *accord id*. at 1806 (Stevens, J., dissenting); *id*. at 1805 (Blackmun, J., dissenting) ("If a grant of relief to [McCleskey] were to lead to a closer examination of the effects of racial considerations throughout the criminal-justice system, the system, and hence society, might benefit.").

25 *Id*. at 1806 (Stevens, J., dissenting).

26 107 S. Ct. 2862 (1987).

27 107 S. Ct. at 2874 (O'Connor, J., concurring in the judgment).

28 Christian, The Race for Theory, *Cultural Critique*, Spring 1987, at 51, 54.

29 G. Gunn, *The Interpretation of Otherness: Literature, Religion, and the American Imagination* 177 (1979).

30 J. Bruner, *Actual Minds, Possible Worlds* 110 (1986) (paraphrasing Robert Woodworth). Similarly, Albert Einstein said. "It is the theory which decides what we can observe." D. Bell, *The Coming of Post-Industrial Society* 9 (1973) (quoting Einstein).

31 Gould, The Woman Question: Philosophy of Liberation and the Liberation of Philosophy, in *Women and Philosophy: Toward a Theory of Liberation* 21 (C. Gould and M. Wartofsky eds. 1976).

32 E. Keller, *A Feeling for the Organism: The Life and Work of Barbara McClintock* 150 (1983).

33 W. James, What Makes a Life Significant, in *On Some of Life's Ideals*, at 49, 81.

34 Soifer, at 409.

35 It is not clear whether Justice Scalia looked at the Balanced Treatment Act in *Edwards* from the vantage point of fundamentalist parents, or instead from the vantage point of state legislators.

36 *City of Cleburne v. Cleburne Living Center*, 473 US 432, 455 (1985) (Stevens, J., concurring).

37 See *Lau v. Nichols*, 414 US 563, 566 (1974).

38 163 US 537, 552 (1896) (Harlan, J., dissenting).

39 Brief for the Plaintiff, *Plessy v. Ferguson*, reprinted in *Civil Rights and the American Negro* 298, 303–4 (A. Blaustein and R. Zangrando eds. 1968).

40 See R. Wiebe, *The Search for Order, 1877–1920*, at 111–13 (1967).

41 See, e.g., *Castaneda v. Partida*, 430 US 482, 503 (1977) (Marshall, J., concurring).

42 M. Douglas, *Implicit Meanings: Essays in Anthropology* 224 (1975).

43 Burns, *Apologia for the Status Quo* (Book Review), 74 *Geo*. L.J. 1791, 1819 (1986).

44 See *Ozawa v. United States*, 260 US 178 (1922).

45 See, e.g., C. Gilligan, *In a Different Voice* (1982), at 151–74 (linking a vision of maturity to a complementary and productive tension between (feminine) ethos of care and a (masculine) ethic of rights).

46 See M. Nussbaum, *The Fragility of Goodness* (1986), at 314. Nussbaum adds that the someone should be committed to "the value of the passions, and the incommensurability of the values that will tend to approve of this particular sort of judge as a guide" (*id*. at 311). The point is that a judge must have a plurality of attachments and do justice in the tension among them (*id*. at 314).

47 5 C.S. Peirce, Some Consequences of Four Incapacities, in *Collected Papers* at 157 (C. Hartshorne and P. Weiss eds. 1931).

48 Lorde, The Master's Tools Will Never Dismantle the Master's House, in *This Bridge Called My Back: Writings by Radical Women of Color* 98 (C. Moraga and G. Anzaldua eds. 1981). This is not sympathy, tolerance, or even compassion, each of which leaves the viewer's understanding fundamentally unchanged.

49 *Keyes v. School Dist. No. 1*, 576 F. Supp. 1503, 1520 (D. Colo. 1983) (Matsch. J.).

50 Cornell, The Poststructuralist Challenge to the Ideal of Community, 8 *Cardozo L.R*. 989–90 (1987).

51 Michelman, The Supreme Court, 1985 Term – Forward, 100 Harv. L.R. 1, at 76 (1986).

52 *Johnson v. Transportation Agency* 107 S. Ct. 1442 (1987). In *Hobbie v. Unemployment Appeals Commission*, 107 S. Ct. 1046, 1051 (1987), however, the Court's majority was sympathetic about constraints on choice, arguing that it is unlawful coercion to force an employee to choose between fidelity to religious beliefs and continued employment.

53 See E. Levi, *An Introduction to Legal Reasoning* (1972), at 8.

54 F. Capra, *The Tao of Physics* xii (1984) (quoting Werner Weisenberg); *cf.* S. Harding, at 235: "Analogies are not aids to the establishment of theories; they are an utterly essential part of theories, without which theories, without which theories would be completely valueless and unworthy of the name" (quoting N. Campbell, *Physics, the Elements* (1920)).

55 B. Johnson, *A World of Difference* (1987) at 83 (emphasis in original).

56 See Brief Amici Curiae, of National Abortion Rights Action League et al., *Thornburgh v. American College of Obstetricians & Gynecologists*, 476 US 747 (1986) (no. 84–495 and 84–1379).

57 208 US 412 (1908).

58 H. Arendt, *Between Past and Future* 220 (1961).

59 C. Geertz, *Local Knowledge* (1983), at 184.

60 N. Hartsock, at 254 (describing the view of Hannah Arendt), *Money, Sex, & Power: Toward a Feminist Historical Materialism* (1983).

18

Political Responsibility and Structural Injustice

Iris Marion Young

The central city apartment building where Sandy, a white single mother, has been living with her two children, has been bought by a developer who plans to convert it into condominiums. The building was falling apart and poorly maintained, and she thought the rent was too high anyway, so she seizes the opportunity to locate a better place. She works as a sales clerk in a suburban mall, to which she has had to take two buses from her current residence, for a total of more than three hours commuting time each day. So she decides to look for an apartment closer to where she works, but she still needs to be on a bus line.

She begins looking in the newspaper and on line for apartment rental advertisements, and she is shocked at the rents for one and two bedroom apartments. One of the agents at an apartment finding service listens to her situation and preferences, diligently looks through listings, and goes out of his way to arrange meetings with Sandy.

Sandy learns that there are few rental apartments close to her workplace – most of the residential properties near the mall are single family houses. The few apartments nearby are very expensive. Most suburban apartments in her price range are located on the other side of the city from her job; there are also some in the city but few which she judges decent that she can afford and in a neighborhood where she feels her children will be safe. In either case, the bus transportation to work is long and arduous, so she decides that she must devote some of the money she hoped would pay the rent to make car payments. She applies for a housing subsidy program, and is told that the waiting time is about two years.

With the deadline for eviction looming, Sandy searches for two months. Finally she settles for a one-bedroom apartment forty-five minutes' drive from her job – except when traffic is heavy. The apartment is smaller than she hoped she would have to settle for; the two children will sleep together in the bedroom and she will sleep on a fold-out bed in the bring room. There are no amenities such as a washer and dryer in the building or an outdoor play area for the children. Sandy sees no other option but to take the apartment, and then faces one final hurdle: she needs to deposit three months' rent to secure the apartment. She has used all her savings as down payment on the car, however. So she cannot rent the apartment, and having learned that this is a typical landlord policy, she now faces the prospect of homelessness.

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This mundane story can be repeated with minor variations for hundreds of thousands of people across the United States. There is serious shortage of decent affordable housing here; while many European countries have more active policies to mitigate market failures, there are nevertheless many people like Sandy in many advanced industrial societies. Insufficient access to decent, affordable housing is, of course, an acute problem in most less developed countries. For the purposes of this essay, however, I will assume the housing situation typical of major metropolitan areas in the United States.

Presumably most of us would agree that Sandy and her children lack a basic element of minimal well-being. Many will agree with me, further, that Sandy suffers an *injustice* in the fact that access to decent affordable housing is so difficult for her. What are the grounds of that judgment? Sandy's misfortune is not due to any personal or moral failing on her part. She plays by the socially accepted rules. She has a steady job and is a dutiful employee, swallowing a good deal of pettiness and complaint about her working conditions and interactions with people in the company. She does her best as a parent, spending most of her non-job time with her children, helping them with their homework, participating in school events, and taking them to doctor appointments.

Nor is Sandy's situation a matter of sheer bad luck, like being struck by lightning. On the contrary, it is predictable that there will be an insufficient supply of decent affordable housing in an urban area with a generally healthy capitalist economy and where large scale non-profit housing investment is absent. The major causes of Sandy's misfortune lie in the normal operations of markets and institutions of planning, building, land use regulation, investment, finance and exchange in the American city where she lives. The grounds for claiming that Sandy and those in a similar situation suffer injustice, that is, lie in the fact that her difficulties are socially caused.[1]

Some people might wish to contest one or both of these claims, but for the remainder of this essay I will assume that the condition of many Sandys describes an injustice. While socially caused, moreover, a scarcity of decent affordable housing does not result from the actions of one or a few specifiable perpetrators. Instead, this circumstance which affects many people is the outcome of the normal actions of a large number of agents – renters, home buyers, mortgage lenders, real estate brokers, developers, land use regulators, transport planners, and so on. The injustice Sandy and others suffer is *structural* or systemic.[2]

How should moral agents, both individual and collective, think about their responsibilities in relation to such structural social injustices? This essay takes some small steps toward answering this large question. First I will elaborate more precisely the claim that judgments of injustice often concern structure. Then I will answer the above question by articulating a conception of political responsibility that is different from a more common conception of responsibility as liability. Individual agents might think of their own action in relation to structural injustice, I suggest, according to parameters of connection, power, privilege, and interest.

Structural Injustice

In *A Theory of Justice*, John Rawls famously says that the subject of justice is the basic structure of society, which concerns "the way in which the major social institutions distribute fundamental rights and duties and determine the division of advantages from social cooperation."[3] Major institutions include, he says, the legal system's definition of basic rights and duties, market relations, the system of property in the means of production, and family organization. To these I would add the basic kinds of positions in the social division of labor.

Rawls says little more about what the concept of structure refers to, however. As I understand the concept, structure denotes a confluence of institutional rules and interactive routines, mobilization of resources, and physical structures; these constitute the historical givens in relation to which individuals act, and which are relatively stable over time.[4] The term structure also refers to wider social outcomes that result from the confluence of many individual actions within given institutional relations, whose collective consequences often do not bear the mark of any person or group's intention. For the purposes of using concepts of structure for thinking about justice and responsibility, I am particularly concerned with large scale or "macro" structures. If we wish to understand and criticize the way that many individuals and groups face too limited and unsavory sets of options, then we need an account of large-scale systemic outcomes of the operations of many institutions and practices that constrain some people at the same time that they enable others.

I will build up an account of structure and structural processes using elements derived from several theorists. Peter Blau offers the following definition: "A social structure can be defined as a multidimensional space of differentiated social positions among which a population is distributed. The social associations of people provide both

the criterion for distinguishing social positions and the connections among them that make them elements of a single social structure."[5] In Blau's spatial metaphor, individual people occupy varying *positions* in the social space, and their positions stand in determinate relation to other positions. The social structure consists in the connections among the positions and their relationships, and the way the attributes of positions internally constitute one another through those relationships. In my example, the apartment hunter stands in a particular position in relation to other positions in the structural processes that produce, set prices for, and market housing units. She mostly experiences effects of those processes as constraints on her options. Her position is very different from that of the owner of apartment complexes or the head of a municipal zoning board, though persons in these more powerful positions also experience structural constraints.

It is misleading, however, to reify the metaphor of structure; that is, we should not think of social structures as entities independent of social actors, lying passively around them easing or inhibiting their movement. On the contrary, social structures exist only in the action and interaction of persons; they exist not as states, but as processes. Thus Anthony Giddens defines social structures in terms of "rules and resources, recursively implicated in the reproduction of social systems."[6] In the idea of the duality of structure, Giddens theorizes how people act on the basis of their knowledge of pre-existing structures and in so acting reproduce those structures. We do so because we act according to rules and expectations and because our relationally constituted positions make or do not make certain resources available to us. Our apartment hunter Sandy, for example, has decided she wishes to live in the suburbs not only because her job is there, but also because widespread social norms and behavior identify a suburban space and lifestyle as more comfortable in many ways than that of city centers. That people act on this assumption in fact helps produce more amenities in suburbs, such as better schools and shopping centers. At the same time, action based on these assumptions helps depopulate some city neighborhoods and reduce their resource base, thus fulfilling the prophecy that they are less safe and comfortable. These judgments mediated through market processes then contribute to the situation in which Sandy finds herself, namely that she cannot afford the apartments in the neighborhoods she follows others in defining as desirable.

Defining structures in terms of the rules and resources brought to actions and interactions, however, makes the reproduction of structures sound too much like the product of individual and intentional action. The concept of social structure must also include conditions under which actors act, which are often a collective outcome of action impressed onto the physical environment. Jean-Paul Sartre calls this aspect of social structuration the *practico-inert*.[7] Most of the conditions under which people act are socio-historical: they are the products of previous actions, usually products of many coordinated and uncoordinated but mutually influenced actions over them. Those collective actions have produced determinate effects on the physical and cultural environment which condition future actions in specific ways. Housing options certainly are constrained by the practico-inert in this way. Past planning decisions have put highways and rapid transit rail lines in particular places, for example, and these are now part of the physical environment with significant influence on the housing market as well as home to work quality of life issues.

Reference to such physical manifestations of social structures leads us to a final aspect of the concept. The actions and interactions among persons differently situated in social structures using rules and resources occur not only on the basis of past actions whose collective effects mark the physical conditions of action. They also often have future effects beyond the immediate purposes and intentions of the actors. Structured social actions and interactions often have collective results that no one intends and which may even be counter to the best intentions of the actors. Sartre calls such effects counter-finalities.[8] Even though no one intends them, they become given circumstances that help structure future actions. Presumably no one intends that a significant number of people in a metropolitan area will be forced to scrimp on food and dental care to pay the rent, or to live in substandard apartments, or seek shelter in a community center.

To summarize, structures refer to the relation of social positions that condition the opportunities and life prospects of the persons located in those positions. This positioning occurs because of the way that actions and interactions reinforce the rules and resources available for other actions and interactions involving people in other structural positions. The unintended consequences of the confluence of many actions often produce and reinforce opportunities and constraints, and these often make their mark on the physical conditions of future actions, as well as on the habits and expectations of actors. This mutually reinforcing process means that the positional relations and the way they condition individual lives are difficult to change.

This, then, is what it means to me to say that structures are the subject of justice. Justice and injustice concern primarily an evaluation of how the institutions of a society work together to produce outcomes that support or minimize the threat of domination, and support or minimize everyone's opportunities to develop and exercise capacities for living a good life as they define it Social justice concerns the actions of particular individuals on the policies of particular institutions only secondarily, as these contribute to constituting structures that enable and constrain persons.

Structural injustices are harms that come to people as a result of structural processes in which many people participate. These participants may well be aware that their actions contribute to the processes that produce the outcomes, but for many it is not possible to trace the specific causal relation between their particular actions and some particular part of the outcome. Some upper income urban dwellers, for example, may be aware that their decisions to buy condominiums in renovated center city buildings contributes to processes that displace lower income renters like Sandy. No one can say, however, that their decisions and actions have directly caused Sandy's landlord to sell the building to a condo developer, thus necessitating Sandy's apartment search.

Political Responsibility

Thus I come to the main question of this essay: How should moral agents – both individual and organizational – think about their responsibilities in relation to structural social injustice? This question presents a puzzle for two reasons that I referred to in my account of social structure and structural injustice. First, although structures are produced by actions, in most cases it is not possible to trace which specific actions of which specific agents cause which specific parts of the structural processes or their outcomes. The effects of particular actions often influence one another in ways beyond the control and intention of any of the actors. Second, because it is therefore difficult for individuals to see a relationship between their own actions and structural outcomes, we have a tendency to distance ourselves from any responsibility for them. The dominant concept of responsibility, I suggest, operates on a liability model that seeks causally to connect an agent to a harm in order to assign the agent responsibility for it. Because the relation of any actions to structural outcomes cannot be assigned in that direct way, we have a tendency to conclude that those structural processes and outcomes are misfortunes rather than injustices, circumstances we must live with rather than try to change.[9]

Samuel Scheffler argues that moral sensibility and moral theory lag behind massive changes in the relationships and structures the condition of people's lives. Many of the problems we collectively face are large scale structural problems, some of which cross national boundaries – global warming, volatility of financial systems, unemployment, and countless other issues. Yet the concepts of responsibility we operate with derive from and are most suited to issues of smaller scale interaction. We continue to rely on a phenomenology of agency that gives primacy to near effects over remote effects, to individual effects over group effects, and to people's positive actions more than what they have failed to do. This traditional notion of agency and the concept of responsibility derived from it, however, is not well suited to understanding and taking responsibility for the large scale social structural processes that are sources of many social and natural problems.

> What we appear to lack is a set of clear, action-guiding, and psychologically feasible principles which would enable individuals to orient themselves in relation to the larger processes, and general conformity to which would serve to regulate those processes and their effects in a morally satisfactory way.[10]

While I think that Scheffler's account of this practical and theoretical problem is sound, I doubt that what we need to solve it is a new set of principles. Instead, or at least beforehand, we need a plausible way of conceiving responsibility that connects individual agency to structural processes. I aim to offer some elements of such a conception, which I call political responsibility.

I find it helpful to contrast the model of political responsibility with a more common model of assigning responsibility which derives from legal and moral reasoning to find guilt or fault for a harm. Under this liability model, we assign responsibility to particular agents when we show that their actions are as causally connected to the outcome for which we seek to assign responsibility. This agent can be a collective entity, such as a corporation or a government, but when it is, that entity can be treated as a single agent for the purposes of assigning responsibility.[11] The actions found causally connected to the circumstances are shown to be voluntary and performed with adequate knowledge of the situation. If a candidate for responsibility in this sense can

successfully show that their action was not voluntary or that they were excusably ignorant, then their responsibility is usually mitigated if not dissolved. When these conditions do exist, however, it is appropriate to blame the agents for the harmful outcomes.[12]

A concept of strict liability departs from a fault or blame model in that it holds a person liable for an action that caused a harm even if they did not intend or were unable to control the outcome, or holds a person or institution liable for a harm caused by someone under their command.[13] I include both fault liability and strict liability in the liability model of responsibility, because they share two other features that I will use to distinguish this model from the model of political responsibility. The liability model is primarily backward looking in its purpose; it reviews the history of events in order to assign responsibility, often for the sake of exacting punishment or compensation. Assigning responsibility to some agents, on this model, finally usually also has the function of absolving other agents who might have been candidates for fault. To find this person or group of persons guilty of a crime usually implies that others who were suspect are not guilty.

I am not objecting to a concept of responsibility as blame or liability. It is indispensable for a legal system and sense of moral right that respects agents as individuals and expects them to behave in respectful ways toward others. When applying this concept of responsibility, there must be clear rules of evidence, not only for demonstrating the causal connection between this agent and a harm, but also for evaluating the intents, motives and consequences of the actions. By proposing a model of political responsibility, I do not aim to replace or reject the liability model of responsibility. My claim is, rather, that this model of responsibility is either insufficient or inappropriate for assigning responsibility in relation to structural injustice.

Let me illustrate how by referring again to the example of insufficient availability of affordable housing. Does it make sense to blame anyone or hold them strictly liable in a legal sense for Sandy's situation? One might argue that the landlord who has sold the building to a condominium developer is to blame. He didn't have to sell the building, or he might have done something to ensure that Sandy would nevertheless have a decent apartment that she could afford in reasonable proximity to her job. Current legal and social norms expect nothing of the sort from landlords such as this; indeed, expecting such action would itself involve structural changes that give building owners more influence over processes of housing allocation than they currently have. More generally, even though it may be appropriate to blame or hold liable particular agents at least for an aspect of the housing problems of particular persons – when they have discriminated against them, for example – there is no one in particular to blame for the general structural injustice of inadequate access to decent affordable housing for all. Vast numbers of actors contribute to the processes that produce this outcome, many of them with little awareness of how their actions contribute. The desire of young affluent professionals to move back to center cities from outlying suburbs, for example, gives incentives to investors to finance developers to convert old buildings into luxury condominiums. Each agent moves on their own interests within the existing legal and social norms, and their actions together contribute to the outcome that some people are displaced and have difficulty finding decent affordable housing. None ought to be *blamed* for that outcome. I am suggesting, because the specific actions of each cannot be causally disentangled from the structural processes to trace a specific aspect of the outcome.

The assignment of responsibility as liability is an indispensable aspect of moral judgment. People do all sorts of irresponsible and harmful things, out of indifference, sloppiness, malice, selfishness or self-righteousness. A complete account of what happens to poor working people seeking housing should include many specific wrongs perpetrated by isolatable agents, though many of them would be within legal bounds. The liability model of responsibility, however, is inadequate for understanding and evaluating much about the relationship of individual actors to large scale social processes and structural injustices. It needs to be supplemented with a notion of responsibility that implicates persons in the effects of structural processes because they participate in the production and reproduction of those structures. Thousands of actors in a metropolitan area and outside it contribute to the market, policy, and symbolic processes that produce the predictable outcome of a shortage of decent affordable housing in easy commuting distance from jobs. Most of these actors feel constrained by structures in their own decisions and outcomes. While together they produce the outcomes, they do not intend the consequence that denies some people a decent apartment, and many in fact condemn or regret such outcomes. A concept of political responsibility says that we who are part of these processes should be held responsible for the structural injustice, as members of the collective that produces it, even though we cannot

trace the outcome we regret to our own particular actions in a direct causal chain. A concept of political responsibility fills this role without attributing blame.

When I designate this concept "political responsibility," the term "political" refers to something wider than what state institutions do. I use the term more in a sense like Hannah Arendt. For her, the political refers to phenomena and movements of collective action, where people work together to form public works and institutions. The making of state institutions, and using them to enact collective goals, is often an important means of enacting political responsibility, but do not exhaust the concept or its organizational possibilities.

I have five features that distinguish the concept of political responsibility from a liability model: (1) political responsibility does not isolate some responsible parties in order to absolve others; (2) whereas blame or liability seeks remedy for deviation from an acceptable norm, political responsibility concerns structural causes of injustice that are normal and ongoing; (3) political responsibility is more forward looking than backward looking; (4) what it means to take up or assign political responsibility is more open and discretionary than what it means to judge an agent blameworthy or liable: (5) an agent shares political responsibility with others whose actions contribute to the structural processes that produce injustice.

(1) Unlike a blame model, political responsibility does not seek to mark out and isolate those to be held responsible, thereby distinguishing them from others, who by implication then are not responsible. Such isolation of the one or ones liable from the others who are not is an important aspect of legal responsibility, both in criminal and in tort law. Because they argue that organizations or collectives, as well as individuals, can be blamed for harms, as well as individual persons, most accounts of collective responsibility aim to distinguish those who have done the harm from those who have not.

When harms or injustices have no isolatable perpetrator, but rather result from the participation of thousands or millions of people in institutions and practices that result in harms, such an isolating concept of responsibility is inadequate. Where there are structural injustices, finding that some people are guilty of perpetrating specific wrongful actions does not absolve others whose actions contribute to the outcomes from bearing responsibility.

(2) In a liability concept of responsibility, what counts as a wrong for which a perpetrator is sought and for which he or she might be required to compensate, is generally conceived as a deviation from a baseline norm. Implicitly we assume a normal background situation that is morally acceptable, if not ideal. A crime or an actionable harm consists in a morally and often legally unacceptable deviation from this background structure.[14] The process that brought about the harm is conceived as a discrete, bounded event that breaks away from the ongoing normal flow. Punishment, redress, or compensation aims to restore normality or to "make whole" in relation to the baseline circumstance.

A concept of political responsibility in relation to structural injustices, on the other hand, evaluates not a harm that deviates from the normal and acceptable, but rather often brings into question precisely the background conditions that ascriptions of blame or fault assume as normal. When we judge that structural injustice exists, we are saying precisely that at least some of the normal and accepted background conditions of action are not morally acceptable. Most of us contribute to a greater or lesser degree to the production and reproduction of structural injustice precisely because we follow the accepted and expected rules and conventions of the communities and institution in which we act Often we enact these conventions and practices in a habitual way, without explicit reflection and deliberation on what we are doing, having in the foreground of our consciousness and intention immediate goals we want to achieve and the particular people we need to interact with to achieve them.

(3) Political responsibility differs from a liability model of responsibility in being more forward looking. Blame and praise are primarily backward looking judgments. They refer back to an action or event assumed to have reached its terminus. Most often the purpose of assigning responsibility as fault or liability is to sanction, punish or exact compensation from those liable. To be sure, such backward looking condemnation and sanction may have a forward looking purpose; we may wish to deter others from similar action in the future, or to identify weak points in an institutional system that allows or encourages such blameworthy actions, in order to reform the institutions. Once we take this latter step, however, we have left a liability model and are moving toward a conception of political responsibility. The reform project likely involves responsibility of many people to take actions directed at those reforms, even though they are not to blame for past problems.

Political responsibility seeks less to reckon debts than to bring about results, and thus depends on the actions of everyone who is in a position to contribute to the results.[15] Taking political responsibility in respect to social

structures emphasizes the future more than the past. Because the particular causal relationship of the actions of particular individuals or even organizations to the structural outcomes is often not possible to trace, there is no point in seeking to exact compensation or redress only from those who have contributed to that outcome. The injustices produced through structures have not reached a terminus, but rather are ongoing. The point is not to look back at who did it, but rather to look forward to an intervention in the process that will change it.

There is an important sense, then, however, in which political responsibility must be backward looking. An understanding of how structural processes produce and reproduce injustice requires understanding the history of those processes, often looking far into the past. The purpose of this analysis of past events is not to find perpetrators, however, but rather to understand how actions and policies have long term effects and how the effects can solidify into structures that conditions new actions.

(4) Political responsibility is relatively open with regard to the actions that count as taking up the responsibility. It is distinct from duty in this sense. Like duties, responsibilities carry a burden and an obligation; carrying out responsibilities is not a matter of mere beneficence. Unlike duties, however, responsibility carries considerable discretion; one *must* carry out one's responsibilities, but *how* one does so is a matter for judgment according to what the responsibilities are for, the capabilities of agents, and the content of action.[16] As Henry Richardson observes, the relatively open and discretionary character of some responsibilities follow from their forward looking character; the future is unpredictable enough that one must be prepared to change a course of action because of unanticipated consequences.[17] Similarly, Robert Goodin argues that responsibility differs from duty in being more outcome oriented. A duty specifies a rule that an agent should follow. One has fulfilled the duty if one has performed the required actions. Carrying out a responsibility, on the other hand, consists in seeking to bring about a specified outcome. It is possible to act in accord with rules of morality and yet not have discharged one's responsibilities, because one has not achieved the required outcomes even though it is feasible to do so.[18]

(5) Political responsibility, finally, is responsibility shared in specific ways. As Larry May theorizes, the concept of shared responsibility is distinct from the concept of collective responsibility in that the former is a distributed responsibility whereas the latter is not. A collective of persons, such as a corporation, might be said to be responsible for a state of affairs without any of its constituent individuals being responsible as such. Shared responsibility, on the other hand, is a personal responsibility for outcomes or the risks of harmful outcomes, produced by a group of persons. As May sees it each is personally responsible for the outcome in a partial way, since he or she alone does not produce the outcomes; the specific part that each plays in producing the outcome cannot be isolated and identified, however, and thus the responsibility is essentially shared.[19]

May's treatment of shared responsibility is largely backward looking. He reflects on how persons who have not themselves been directly guilty of a harm such as a hate crime, may nevertheless contribute by their attitudes and actions to fostering a social environment in which such harms appear more acceptable than they might otherwise. If we follow my claim that political responsibility is more forward looking than backward looking, then the shared nature of the political responsibility refers primarily to the relationships with others that the responsibility involves. Taking political responsibility means acknowledging that one participates in social processes that have some unjust outcomes, and one participates with many others. Discharging the responsibility entails enjoining collective action with at least some of these others. We share responsibility to organize means of changing how the processes work so they will issue in less injustice. State institutions are often a most effective means of taking collective action to change structural processes, but government policy usually requires the active support of communities to be effective in its aims. The form of responsibility, then, is political in these senses that acting on my responsibilities involves joining with others in a public discourse in which we try to persuade one another about courses of collective action that will contribute to ameliorating the problem.

An important corollary of this feature of political responsibility is that many of those properly thought to be victims of harm or injustice may nevertheless have political responsibility in relation to it. In a fault model of responsibility, blaming those who claim to be victims of injustice functions to absolve others of responsibility for their plight. In a conception of political responsibility, however, those who can properly be argued to be victims of structural injustice can be called to a responsibility that they share with others in the structures to engage in actions directed at transforming the structures. Indeed, on many issues those who might be argued to be in less advantaged positions in the structures ought to take the

lead in organizing and proposing remedies for injustice, because their interests might be argued as the most acutely at stake and their social position offers them a unique understanding of the likely effects of policies and actions proposed by others situated in more powerful and privileged positions. In the next section I will elaborate this distinction of kinds of responsibility based on social position.

Conceptualizing political responsibility as distinct from blame is important not only philosophically, but also for the sake of motivating political action. Frequently the reaction of people being blamed for a wrong is defensive – to look for other agents who should be blamed instead of them, or to find excuses that mitigate their liability in those cases where they must agree that their actions do causally contribute to the harm. Such practices of accusation and defense have an important place in morality and law. In many contexts where the issue is how to mobilize collective action for the sake of social change and greater justice, however, such rhetorics of blame and finger-pointing displacement lead more to resentment and refusal to take responsibility than to useful basis of action. Banks that engage in redlining practices or landlords that fail to maintain the buildings they own should certainly be blamed for the effects their actions have on housing markets or living conditions, and should be punished in some way. Efforts to level blame for a generally tight market in affordable housing in a given metropolitan area, however, are more likely to create divisions among the agents that must work together toward remedies. Public discourse in our society is altogether too full of accusations of fault and the defensiveness and resentment such accusations usually produce.[20]

Kinds and Degrees of Responsibility

Some people might object to the conception of political responsibility I have outlined on the grounds that it seems to make nearly everyone responsible for nearly everything. Most of us participate in a number of structural processes that arguably have disadvantaging, harmful or unjust consequences for some people in virtue of our jobs, the market choices we make, or other activities. Surely it is asking too much, the objection runs, for each of us to worry about all these modes of participating in structures and how we might adjust our lives and relation to others so as to reduce their unjust effects. Our relation to many of these structural processes is so diffuse, and the possibility that our own action can effect a change in outcomes is often so remote, that it is more reasonable to limit our moral concern to matters where we stand in direct relation to others and can see clearly the effect of our action on them.

One parameter of thinking here refers to the degree of injustice. Where basic rights are violated in a widespread fashion over a long term, moral agents have greater responsibility to take action directed at redress than for lesser injustices.

Approaching such structural injustice, we can appeal not to pre-assigned tasks that people have, but rather to their institutional or social *position*. What might be required from one's position is doing something different from or additional to the tasks normally assigned to that position, but different persons nevertheless stand in differing positions in structures that produce unjust outcomes, which afford them different opportunities and capacities for influencing those outcomes. I suggest that persons can reason about their action in relation to structural injustice along parameters of *connection*, *power*, *privilege*, and *interest*.

Connection – The theory of political responsibility argues that agents have forward looking responsibilities to take action to help undermine structural injustices not on the general grounds that right thinking people should be concerned about harm and suffering wherever it occurs, but on the more specific grounds that we are connected by our own actions to the processes that cause injustice for others. It is not obvious to the individual home buyer or renter that his or her location preferences and income allocation decisions may contribute to limiting the housing options of others, but in aggregate they often do, and home buyers and renters can become and often are aware of this. Faced with such an understanding of the outcomes of housing market processes, some people claim that these are matters of fate, or that the market will produce the best outcome for housing consumers in the long run. Certainly there is room for disagreement about just what are the structural causes of a lack of access to affordable, decent housing for significant numbers of people, and about what kinds of actions would best remedy such injustice. Political responsibility at this reflective moment of recognizing the connection of actions to outcomes, however, requires at least that the collective discuss these issues with an eye to collective action to improve the situation.

Power – A person's position in structural processes usually carries different degrees of potential or actual power or influence over the processes that produce the

outcomes. Organizations and institutions, moreover, vary in their power and ability to influence structural processes. In structural processes producing and reproducing housing options, for example, certain government officials, corporate executives, property owners, all holding positions in particular types of institutions, have more power to influence these processes and influence their transformation than others. The power and influence parameter for reasoning suggests that where individuals and organizations do not have sufficient energy and resources to respond to all structural injustices to which they are connected, they should focus on those where they have more capacity to influence structural processes. More powerful individuals and institutions, of course, often have more interest in maintaining the status quo than changing the processes and their outcomes. For this reason individuals and organizations with relatively less power but some ability to influence the powerful individuals and institutions need to take responsibility actively to pressure the more powerful to take responsibility for change.

Privilege – Where there are structural injustices, these usually produce not only victims of injustice, but persons who acquire relative privileges by virtue of the structures. Most who occupy positions of power with respect to the structures also derive privileges from this power. In most situations of structural injustice, however, there are relatively privileged persons who have relatively little power as individuals or in their institutional positions. Affluent home buyers or renters, for example, stand in a relatively privileged position in housing markets, especially compared with persons unable to locate decent affordable housing in reasonable distance from their workplaces. As housing consumers, however, they have less power than government officials, or financial officers, or heads of major real estate broker firms to influence and thus contribute to the transformation of structures. Persons who benefit relatively from structural inequalities have special moral responsibilities to contribute to organized efforts to correct them, not because they are to blame, but because they are able to adapt to changed circumstances without suffering serious deprivation.

Interest – People and organizations usually have different interests in the maintenance or transformation of structural injustices. Ironically, often those with the greatest interest in reproducing the structures are also those with greatest power to influence their transformation. Those who are victims of structural injustice have a great interest in structural transformation. Earlier I said that one of the distinctive things about a concept of political responsibility is that victims of injustice may nevertheless have political responsibility in relation to it. Those who suffer injustice have the greatest interest in its elimination, and often have unique insights into its social sources and the probable effects of proposals for change. To the extent that those with significant interests in transformation and those who are harmed through structural injustices have more insight and determination in such transformative projects, their voices should have particular influence in organizations and movements that aim to change the structures.

In this essay I have distinguished two conceptions of responsibility, a liability model and political responsibility. Each is an important conception and has different purposes. A concept of political responsibility is particularly relevant for holding ourselves and others accountable for structural injustice, because such injustice is usually the product of many actions whose consequences are unintended and whose exact authors are difficult to trace. Political responsibility is a shared responsibility, which can best be discharged through collective action. It is nevertheless individually distributed: transformation in structures that produce or perpetuate injustice can occur only when many individuals take responsibility for making such transformation.

Notes

1 In this account of the grounds of the claim that this person's misfortune is an injustice I have appealed in part to the sorts of reasons offered by many egalitarian theorists. Ronald Dworkin, Richard Arneson, John Roemer, Gerald Cohen, and other "luck egalitarians" argue that persons suffer injustice to the extent that their unfortunate circumstances are not their fault. To the extent that they are victims of bad luck, they argue, society in general has the obligation to compensate for their well-being deficits in the form of redistributive policies and other welfare measures. In the above account of why Sandy suffers injustice I have distinguished between situations that are socially caused and those that are a matter of sheer bad luck. I do not have space in this essay to defend this distinction, but I think is it very important to a theory of structural injustice.

2 Note on terms. Some writers, such as Niklaus Luhman and Anthony Giddens, use the term "system" to denote social processes that produce and reproduce relations of

inequality and hierarchy over time. Readers who wish to substitute my use of the term structural with systemic are welcome to do so if this will help follow my argument, whose focus is on the implications of this concept for a conception of responsibility. I choose not to call the social relations that result in a lack of decent affordable housing a "system" because this connotes more bounded unity than I believe corresponds to the social reality we are trying to describe. Hence my preference for referring to the causes of these circumstances as "structural processes."

3 *A Theory of Justice* (Cambridge, MA: Harvard University Press, 1971), p. 7.

4 I have elaborated a concept of structural processes usable for theorizing injustice in some previous writing. See *Inclusion and Democracy* (Oxford: Oxford University Press, 2000), especially Chapter 3; "Equality of Whom? Social Groups and Judgments of Injustice," *Journal of Political Philosophy*, Vol. 9, no. 1, March 2001, pp. 1–18; "Lived Body vs. Gender: Reflections on Social Structure and Subjectivity," *Ratio: An International Journal of Analytic Philosophy*, Vol. XV, no. 4, December 2002, pp. 411–28.

5 Peter Blau, *Inequality and Heterogeneity* (New York: Free Press, 1977), p. 4.

6 Anthony Giddens, *The Constitution of Society* (Berkeley: University of California Press, 1984), p. 25.

7 Jean-Paul Sartre, *Critique of Dialectical Reason*, trans. Alan Sheeridan-Smith (London: New Left Books, 1976), Bk. 1, ch. 3.

8 Ibid, pp. 277–92.

9 In some theories of justice, such as that of Ronald Dworkin, the society as a whole has an obligation to compensate for deprivations that do not derive from the choices of the individuals who suffer them.

10 Samuel Scheffler, "Individual Responsibility in a Global Age," in *Boundaries and Allegiances: Problems of Responsibility and Justice in Liberal Thought* (Oxford: Oxford University Press, 2001) p. 39.

11 Peter French, *Collective and Corporate Responsibility* (New York: Columbia University Press, 1984).

12 See George Fletcher, *Basic Concepts of Criminal Law* (Oxford: Oxford University Press, 1998), for a clear statement of this model of responsibility.

13 See, for example, Tony Honore, "Responsibility and Luck: The Moral Basis of Strict Liability," in *Responsibility and Fault* (Oxford: Oxford University Press, 1999), pp. 14–40.

14 See George Fletcher's discussion of the way that the assignment of criminal liability must distinguish between foregrounded deviations from background conditions assumed as normal.

15 Hans Jonas, *The Imperative of Responsibility* (Chicago: University of Chicago Press, 1984), pp. 90–120.

16 Joel Feinberg. "Duties, Rights and Claims," in *Rights, Justice and the Bounds of Liberty* (Princeton: Princeton University Press, 1980), p. 137.

17 Henry S. Richardson, "Institutionally Divided Moral Responsibility," in Ellen Frankel Paul, Fred D. Miller, Jr., and Jeffrey Paul, *Responsibility* (Cambridge: Cambridge University Press, 1999), pp. 218–49.

18 Robert Goodin, "Responsibilities," in *Utilitarianism as a Public Philosophy* (Cambridge: Cambridge University Press, 1995), pp. 81–7.

19 Larry May, *Sharing Responsibility* (Chicago: University of Chicago Press, 1993), Chapter 2.

20 William Connolly appeals to an idea of responsibility as a corrective to a resentment politics that seeks to blame some agents for social harms. See Connolly, *Identity/Difference* (Ithaca: Cornell University Press, 1993), especially Chapter 4. Melissa Orlie also distinguishes between a sentiment of resentment exhibited in blaming, on the one hand, and holding oneself and others politically responsible. See Orlie, *Living Ethically, Acting Politically* (Ithaca: Cornell University Press, 1997), pp. 169–73.

19

Superseding Historic Injustice

Jeremy Waldron

I Injustice and History

The history of white settlers' dealings with the aboriginal peoples of Australia, New Zealand, and North America is largely a history of injustice. People, or whole peoples, were attacked, defrauded, and expropriated; their lands were stolen and their lives were ruined. What are we to do about these injustices? We know what we should think about them: they are to be studied and condemned, remembered and lamented. But morality is a practical matter, and judgments of "just" and "unjust" like all moral judgments have implications for action. To say that a future act open to us now would be unjust is to commit ourselves to avoiding it. But what of past injustice? What is the practical importance now of a judgment that injustice occurred in the past?

In the first instance the question is one of metaethics. Moral judgments are prescriptive in their illocutionary force; they purport to guide choices.[1] But since the only choices we can guide are choices in front of us, judgments about the past must look beyond the particular events that are their ostensible subject matter. The best explanation of this relies on universalizability. When I make a moral judgment about an event *E*, I do so not in terms of the irreducible particularity of *E* but on the basis of some feature of *E* that other events might share. In saying, for example, "*E* was unjust," I am saying, "There is something about *E* and the circumstances in which it is performed, such that any act of that kind performed in such circumstances would be unjust." I am not so much prescribing the avoidance of *E* itself (a prescription that makes no sense if *E* is in the past), but prescribing the avoidance of *E*-type events. If *E* involved breaking a promise, or taking advantage of someone's credulity, then our condemnation of it commits us to a similar condemnation of breaches of faith or exploitation in the present. Though *E* occurred 150 years ago, to condemn it is to express a determination now that in the choices we face, we will avoid actions of this kind.[2]

The point of doing this is not that we learn new and better standards for our lives from the judgments we make about the past. Unless we had those standards already, we would not make those judgments. But our moral understanding of the past is often a way of bringing to imaginative life the full implications of principles to which we are already in theory committed. To be disposed to act morally, it is not enough to be equipped with a list of appropriate principles. One also needs a sense of the type of situation in which these things may suddenly be at stake, the temptations that might lead one

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to betray them, and the circumstances and entanglements that make otherwise virtuous people start acting viciously. That is what history provides: a lesson about what it is like for people just like us – human, all too human – to face real moral danger.

Beyond that, there is an importance to the historical recollection of injustice that has to do with identity and contingency. It is a well-known characteristic of great injustice that those who suffer it go to their deaths with the conviction that these things must not be forgotten. It is easy to misread that as vain desire for vindication, a futile threat of infamy upon the perpetrators of an atrocity. But perhaps the determination to remember is bound up with the desire to sustain a specific character as a person or community against a background of infinite possibility. That *this* happened rather that *that* – that people were massacred (though they need not have been), that lands were taken (though they might have been bought fairly), that promises were broken (though they might have been kept) – the historic record has a fragility that consists, for large part, in the sheer contingency of what happened in the past. What happened might have been otherwise, and, just because of that, it is not something one can reason back to if what actually took place has been forgotten or concealed.[3]

Each person establishes a sense of herself in terms of her ability to identify the subject or agency of her present thinking with that of certain acts and events that took place in the past, and in terms of her ability to hold fast to a distinction between memory so understood and wishes, fantasies, or various other ideas of things that might have happened but did not.[4] But remembrance in this sense is equally important to communities – families, tribes, nations, parties – that is, to human entities that exist often for much longer than individual men and women. To neglect the historical record is to do violence to this identity and thus to the community that it sustains. And since communities help generate a deeper sense of identity for the individuals they comprise, neglecting or expunging the historical record is a way of undermining and insulting individuals as well.

When we are told to let bygones be bygones, we need to bear in mind also that the forgetfulness being urged on us is seldom the blank slate of historical oblivion. Thinking quickly fills up the vacuum with plausible tales of self-satisfaction, on the one side, and self-deprecation on the other. Those who as a matter of fact benefited from their ancestors' injustice will persuade themselves readily enough that their good fortune is due to the virtue of their race, while the descendants of their victims may too easily accept the story that they and their kind were always good for nothing. In the face of all this, only the deliberate enterprise of recollection (the enterprise we call "history"), coupled with the most determined sense that there is a difference between what happened and what we would like to think happened, can sustain the moral and cultural reality of self and community.

The topic of this article is reparation. But before I embark on my main discussion, I want to mention the role that the payment of money (or the return of lands or artifacts) may play in the embodiment of communal remembrance. Quite apart from any attempt genuinely to compensate victims or offset their losses, reparations may symbolize a society's undertaking not to forget or deny that a particular injustice took place, and to respect and help sustain a dignified sense of identity-in-memory for the people affected. A prominent recent example of this is the payment of token sums of compensation by the American government to the survivors of Japanese-American families uprooted, interned, and concentrated in 1942. The point of these payments was not to make up for the loss of home, business, opportunity, and standing in the community which these people suffered at the hands of their fellow citizens, nor was it to make up for the discomfort and degradation of their internment. If that were the aim, much more would be necessary. The point was to mark – with something that counts in the United States – a clear public recognition that this injustice did happen, that it was the American people and their government that inflicted it, and that these people were among its victims. The payments give an earnest of good faith and sincerity to that acknowledgment. Like the gift I buy for someone I have stood up, the payment is a method of putting oneself out, or going out of one's way, to apologize. It is no objection to this that the payments are purely symbolic. Since identity is bound up with symbolism, a symbolic gesture may be as important to people as any material compensation.

II The Counterfactual Approach to Reparation

I turn now to the view that a judgment about past injustice generates a demand for full and not merely symbolic reparation – a demand not just for remembrance but for substantial transfers of land, wealth, and resources in an effort actually to rectify past wrongs. I want to examine the difficulties that these demands give rise to, particularly when they conflict with other claims that may be

made in the name of justice on the land, wealth, and resources in question.

It may seem as though the demand is hopeless from the start. What is it to correct an injustice? How can we reverse the past? If we are talking about injustice that took place several generations ago, surely there is nothing we can do now to heal the lives of the actual victims, to make them less miserable or to reduce their suffering. The only experiences we can affect are those of people living now and those who will live in the future.

But though these are obvious truths, we may miss something if we repeat them too often. To stand on the premise that the past cannot be changed is to ignore the fact that people and communities live whole lives, not just series of momentary events, and that an injustice may blight, not just hurt, such a life. Individuals make plans and they see themselves as living partly for the sake of their posterity; they build not only for themselves but for future generations. Whole communities may subsist for periods much longer than individual lifetimes. How they fare at a given stage and what they can offer in the way of culture, aspiration, and morale may depend very much on the present effect of events that took place several generations earlier. Thus, part of the moral significance of a past event has to do with the difference it makes to the present.

But then there is a sense in which we can affect the moral significance of past action. Even if we cannot alter the action itself we may be able to interfere with the normal course of its consequences. The present surely looks different now from the way the present would look if a given injustice of the past had not occurred. Why not therefore change the present so that it looks more like the present that would have obtained in the absence of the injustice? Why not make it now as though the injustice had not happened, for all that its occurrence in the past is immutable and undeniable?

This is the approach taken by Robert Nozick in his account of the role played by a principle of rectification in a theory of historic entitlement:

> This principle uses historical information about previous situations and injustices done in them (as defined by the first two principles of justice [namely, justice in acquisition and justice in transfer] and rights against interference), and information about the actual course of events that flowed from these injustices, until the present, and it yields a description (or descriptions) of holdings in the society. The principle of rectification presumably will make use of its best estimate of subjunctive information about what would have occurred (or a probability distribution over what might have occurred, using the expected value) if the injustice had not taken place. If the actual description of holdings turns out to be one of the descriptions yielded by the principle, then one of the descriptions yielded must be realized.[5]

The trouble with this approach is the difficulty we have in saying what would have happened if some event (which did occur) had not taken place. To a certain extent we can appeal to causal laws or, more crudely, the normal course of events. We take a description of the actual world, with its history and natural laws intact, up until the problematic event of injustice (which we shall call event "*E*"). In the actual course of events, what followed *E* (events *F*, *G*, and *H*) is simply what results from applying natural laws to *E* as an initial condition. For example, if *E* was your seizure of the only water hole in the desert just as I was about to slake my thirst, then *F* – the event that follows *E* – would be what happens normally when one person is deprived of water and another is not: you live and I die. So, in our counterfactual reasoning, we replace *E* with its closest just counterpart, *E*+ (say, we share the water hole), and we apply the laws of nature to that to see what would have happened next. Presumably what would have happened next is that we both slake our thirst and both survive. The same laws of nature that yield *F* given *E*, yield a different sequel *F*+ given the just alternative *E*+ and further sequels *G*+ and *H*+ on the basis of that.[6] The task of rectification then is to take some present event or situation over which we do have control (e.g., *H*, a distribution of resources obtaining now) and alter it so that it conforms as closely as possible to its counterpart *H*+ – the situation that would obtain now if *E*+ rather than *E* had occurred.

But what if some of the events in the sequel to *E*+ are exercises of human choice rather than the inexorable working out of natural laws? Is it possible to say counterfactually how choices subsequent to *E*+ would have been made, so that we can determine what state of affairs (*H*+) would obtain now in a society of autonomous choosers, but for the problematic injustice? Suppose that if *E* had not occurred, you would have made me a fair offer to form a partnership to cultivate land near the oasis? How are we to know whether I would have accepted the offer? Had I accepted it, I might have acquired wealth that I would not otherwise have had and with it the opportunity to engage in other transactions. How are we to know which transactions I would have chosen to engage in? The problem quickly becomes

intractable particularly where the counterfactual sequence {*E*+, *F*+, *G*+, *H*+} is imagined to extend over several generations, and where the range of choices available at a given stage depends on the choices that would have been taken at some earlier stage.

This is not a mere academic difficulty. Suppose (counterfactually) that a certain piece of land had not been wrongfully appropriated from some Maori group in New Zealand in 1865. Then we must ask ourselves: What would the tribal owners of that land have done with it, if wrongful appropriation had not taken place? To ask this question is to ask how people would have exercised their freedom if they had had a real choice. Would they have hung on to the land and passed it on to future generations of the tribe? Or would they have sold it – but this time for a fair price – to the first honest settler who came along?[7] And, if the latter, what would he have done with it? Sold it again? Passed it on to his children? Lost it in a poker game?

Part of our difficulty in answering these questions is our uncertainty about what we are doing when we try to make guesses about the way in which free will would have been exercised. The status of counterfactual reasoning about the exercise of human freedom is unclear. I do not mean that the exercise of human choice is necessarily unpredictable. We make predictions all the time about how people will exercise their freedom. But it is not clear why our best prediction on such a matter should have moral authority in the sort of speculations we are considering.

Suppose that I am attempting to predict how my aunt will dispose of her estate. My best guess, based on all the evidence, is that having no dependents she will leave it to Amnesty International, well known as her one cherished cause. In fact, my aunt surprises everyone by leaving everything to an obscure home for stray dogs that she has only just heard of. My prediction is confounded. But the important point is the following. Even though my prediction was reasonable, even though it was based on the best available evidence, it is her whimsical decision that carries the day. My guess has no normative authority whatever with regard to the disposition of her estate. All that matters is what she eventually chooses.

If this is true of decision making in the real world, then I think it plays havoc with the idea that, normatively, the appropriate thing to do in the rectification of injustice is to make rational and informed guesses about how people would have exercised their freedom in a hypothetical world. For if such guesses carry no moral weight in the real world, why should any moral weight be associated with their use in counterfactual speculation?

This is not an epistemic difficulty. It is not that there is some fact of the matter (what this person would have chosen to do with her goods if things had been different) and our difficulty lies in discovering what that is. The thing about freedom is that there is no fact of the matter anywhere until the choice has been made. It is the act of choosing that has authority, not the existence as such of the chosen option.

Of course there are situations in which we do think it acceptable to substitute our best guess about what a person would have done for that person's actual choice. If my aunt's investments have been entrusted to me, and there is a crisis in the stock market while she is abroad and incommunicado, I must do what I figure she would have done: hold the stocks in the companies to which she has a sentimental attachment and sell the rest. Maybe she would have acted whimsically and done the opposite, but as her trustee this is morally the best I can do. By doing this I adopt in effect a rational choice approach to the decision: given what I know about her preferences, I act in a way that will maximize her utility. She might have acted perversely or she might not. But given that her hypothetical consent is my only warrant to act in this matter at all, I can do nothing except choose rationally to give content to the hypothesis.

Now we are unlikely to be able to reach conclusions this determinate in applying the rational choice approach to aboriginal land claims. We will probably not be in a position to say that selling to Q rather than to R would have been the rational thing for P to do if he had not been forcibly dispossessed, and that selling to S rather than T would have been the rational thing for Q to do if P had sold the land to him rather than to R, and so on down a reconstructed chain of entitlement. But broader conclusions may be available. Suppose P enjoyed a certain level of utility derived from his holdings, U_E, just before the events complained of took place. Then any rational choice reconstruction about what would have happened but for the injustice will maintain P's utility at that level at least. No rational chooser enters a voluntary transaction to make himself worse off. So any account of what would have happened had all transactions been voluntary will require P to emerge at least as well off as he was at the beginning of the story. If in actual reality he is worse off, the counterfactual approach will require that he be restored to a level at or above U_E. By making our rational choice assumptions airy enough, we can reach similar conclusions about the well-being of P's descendants and the well-being of the person who dispossessed P and of his descendants as well. And these conclusions

are likely to match our intuitions: if the injustice had not taken place, the descendants of those who suffered it would be better off than they are and descendants of those who perpetrated it would be somewhat worse off than they are. So a transfer from the latter to the former seems justified.

However, several difficulties remain. One concerns what might be called the contagion of injustice. Suppose I possess a piece of land which I inherited from my father who bought it from his sister-in-law who bought it from a settler who obtained it in the mid-nineteenth century from a fraudulent transaction with a member of the Maori tribe. The counterfactual approach to reparation suggests that some transfer from me to the surviving members of the tribe may be required in order to bring the present state of affairs closer to the state of affairs that would have obtained if the fraud had not been perpetrated. Unfortunately we cannot leave the matter there. My neighbor may be in possession of a similar piece of land whose pedigree, considered in itself, is impeccable: there is no fraud, no coercion, no expropriation in the history of her holding. Still the price my neighbor (and her predecessors in title) paid for her land is likely to have been affected by the low price that was paid for my land (on account of the original fraud). Thus, rectification of the injustice will involve an adjustment of her holding as well. We cannot assume that rectificatory transfers will be confined to those who have had dealings with tainted holdings. All present holdings are called in question by this business of winding the film back to the injustice, changing that frame (from E to $E+$), and then winding the film forward to see what results. If one person behaves unjustly, particularly in the context of a market, the injustice will have an effect not only on her immediate victim, but – via the price mechanism – on all those who trade in the market in question. Some will gain and some will lose as a result of the injustice, and any attempt at rectification – any attempt to implement the state of affairs that would have obtained but for the injustice – will involve interfering with those holdings as well.

Worse still, the events of justice and injustice may make a considerable difference in who exists at a later time. We cannot simply hold the dramatis personae constant in our speculations. Children may be conceived and born, and leave descendants, who would not have existed if the injustice had not occurred. Short of putting them to death for their repugnancy to our counterfactuals, the present approach offers no guidance at all as to how their claims are to be dealt with.

A more general difficulty has to do with our application of rational choice in counterfactual reconstruction. People can and often do act freely to their own disadvantage, and usually when they do, they are held to the result. A man who actually loses his land in a reckless though voluntary wager and who accepts the justice of the outcome may be entitled to wonder why, in the attention we pay to aboriginal reparations, we insulate people from the possibility of similar vicissitudes. He may say, "If we are going to reconstruct a history of rational choice, let us do so for all holdings, giving everyone what they would have had if they had never acted voluntarily to their own disadvantage. Maybe that will lead to a more just world. But if we are not prepared to do that, if we insist that it is alright, from the point of view of justice, to leave a person like me stuck with the results of his actual choices, it may be more consistent to admit that we simply can't say what (by the same token) justice now requires in the case of those whose ancestors were wrongfully dispossessed."

The dilemma is a difficult one. On the one hand, there is nothing normatively conclusive about rational choice predictions. Why should the exaction of specific reparation in the real world be oriented to what the idealized agents of rational choice would have secured for themselves in a hypothetical world? On the other hand, hypothetical rational choice is essential to our normative thinking about justice. Modern contractarian theories consist almost entirely of asking what the people of a society would have agreed to in the way of institutions governing the distribution of resources, had they been consulted.[8] But it is characteristic of such approaches that they are holistic, systemic, and structural rather than local and specific in their conclusions and recommendations. We deploy the counterfactuals of modern contractarianism to evaluate the entire basic structure of a society, not to evaluate some particular distribution among a subset of its members.[9]

The issue is particularly acute because the reparations that these counterfactuals support are likely to have a wide effect on holdings across the board. The case is quite different from the simple situation of my aunt's investments, where I ask only what she would have done with her capital and do not attempt to redistribute a whole array of different people's holdings. Reparation of historic injustice really is redistributive: it moves resources from one person to another. It seems unfair to do this on a basis that reconstructs a profile of holdings by attributing rational choice motivations to only some, and not all, of the parties who are affected.

Ultimately, what is raised here is the question of whether it is possible to rectify particular injustices without undertaking a comprehensive redistribution that addresses all claims of justice that may be made. The counterfactual approach aims to bring the present state of affairs as close as possible to the state of affairs that would have obtained if some specifically identified injustice had not occurred. But why stop there? Why be content merely to bring about the state of affairs that would have ensued if this injustice had not occurred? Why not try to make things even better than they would have been if that particular unjust transaction, or any unjust transaction, had not taken place? Are we so sure that a smooth transition, untainted by particular injustice, from some early nineteenth-century status quo ante would leave us now where we actually want to be? Quite apart from particular frauds and expropriations, things were not marvelous in the nineteenth century. Many people lacked access to any significant resources, and many people had much more than what one might regard as a fair share. Why take all that as the baseline for our present reconstruction?

III The Perpetuation and Remission of Injustice

So far we have focused on the effects of isolated acts of injustice like event *E*, events that took place firmly in the past. But we are seldom so fortunate as to confront injustice in discrete doses. The world we know is characterized by patterns of injustice, by standing arrangements – rules, laws, regimes, and other institutions – that operate unjustly day after day. Though the establishment of such an arrangement was an unjust event when it took place in the past, its injustice then consisted primarily in the injustice it promised for the future. To judge that establishment unjust is to commit oneself to putting a stop to the ongoing situation; it is a commitment to prevent the perpetuation of the injustice that the law or the institution embodies; it is to commit oneself to its remission.

Suppose someone stole my car yesterday. That is an unjust act that took place at a certain place and at a certain time: at 9:30 a.m. on September 5, my car was stolen from the parking lot. Clearly anyone committed to the prevention of injustice should have tried to stop the theft taking place. But once the car has been driven nefariously out of the parking lot, the matter does not end there. For now there is a continuing injustice: I lack possession of an automobile to which I am entitled, and the thief possesses an automobile to which she is not entitled. Taking the car away from the thief and returning it to me, the rightful owner, is not a way of compensating me for an injustice that took place in the past; it is a way of remitting an injustice that is ongoing into the present. Phrases like "Let bygones be bygones" are inappropriate here. The loss of my car is not a bygone: it is a continuing state of affairs.

The implications of this example are clear for the historic cases we are considering. Instead of regarding the expropriation of aboriginal lands as an isolated act of injustice that took place at a certain time now relegated firmly to the past, we may think of it as a persisting injustice. The injustice persists, and it is perpetuated by the legal system as long as the land that was expropriated is not returned to those from whom it was taken. On this model, the rectification of injustice is a much simpler matter than the approach we discussed in the previous section. We do not have to engage in any counterfactual speculation. We simply give the property back to the person or group from whom it was taken and thus put an end to what would otherwise be its continued expropriation.

Difficulties arise of course if the original owner has died, for then there is no one to whom the property can be restored. We could give it to her heirs and successors, but in doing so we are already setting off down the counterfactual road, reckoning that this is what the proprietor's wish would have been had she had control of her property. Fortunately, that difficulty is obviated in the case of many aboriginal claims: usually the property is owned by a tribe, a nation, or a community – some entity that endures over time in spite of mortality of its individual members. It is this enduring entity that has been dispossessed, and the same entity is on hand now more than a hundred years later to claim its heritage.

What, if any, are the difficulties with this approach? It does not involve any of the problems of counterfactual reasoning that we identified earlier, but does it face any other problems? As I see it, the main difficulty is the following. Are we sure that the entitlement that was originally violated all those years ago is an entitlement that survives into the present? The approach we are considering depends on the claim that the right that was violated when white settlers first seized the land can be identified as a right that is still being violated today by settlers' successors in title. Their possession of the land today is said to be as wrongful vis-à-vis the present tribal owners as the original expropriation. Can this view be justified?

It is widely believed that some rights are capable of "fading" in their moral importance by virtue of the

passage of time and by the sheer persistence of what was originally a wrongful infringement. In the law of property, we recognize doctrines of prescription and adverse possession. In criminal procedure and in torts, we think it important to have statutes of limitations. The familiarity of these doctrines no doubt contributes to the widespread belief that, after several generations have passed, certain wrongs are simply not worth correcting. Think of the earlier example of the theft of my automobile. Certainly, the car should be returned if the thief is discovered within weeks or months of the incident. But what if she is never caught? What if the stolen car remains in her family for decades and is eventually passed down as an heirloom to her children and grandchildren? Are we so sure that when the circumstances of its acquisition eventually come to light, it should be returned without further ado to me or my estate?

The view that a violated entitlement can "fade" with time may seem unfair. The injustice complained of is precisely that the rightful owner has been dispossessed. It seems harsh if the fact of her dispossession is used as a way of weakening her claim. It may also seem to involve some moral hazard by providing an incentive for wrongdoers to cling to their ill-gotten gains, in the hope that the entitlement they violated will fade away because of their adverse possession.

Still, the view that certain rights are prescriptable has a number of things to be said in its favor. Some are simply pragmatic. Statutes of limitations are inspired as much by procedural difficulties about evidence and memory, as by any doctrine about rights. It is hard to establish what happened if we are enquiring into the events that occurred decades or generations ago. There are nonprocedural pragmatic arguments also. For better or worse, people build up structures of expectation around the resources that are actually under their control. If a person controls a resource over a long enough period, then she and others may organize their lives and their economic activity around the premise that that resource is "hers," without much regard to the distant provenance of her entitlement. Upsetting these expectations in the name of restitutive justice is bound to be costly and disruptive.[10]

There may be reasons of principle as well. One set of reasons has to do with changes in background social and economic circumstances. If the requirements of justice are sensitive to circumstances such as the size of the population or the incidence of scarcity, then there is no guarantee that those requirements (and the rights that they constitute) will remain constant in relation to a given resource or piece of land as the decades and generations go by. I shall deal with this in detail in the next section of this article.

The other reason entitlements may fade has to do with the basis of the rights themselves. Theories of historic entitlement, like the theory of John Locke or the theory sketched more recently by Robert Nozick, focus on the establishment of an intimate relation between a person and a resource as the basis of property rights.[11] A person works with an object, shaping and modifying it, so that it becomes imbued with part of her personality; it comes to contain a part of herself. But if the right is taken out of her hands for a long period, the intimacy of that relation may evaporate.

Whether this happens depends partly on what we take to be the morally important relation between the person and the thing. In John Locke's theory, the relation is described as mixing one's labor.[12] A person mixes her labor with a piece of land, and the land comes to embody her efforts; that labor is now like a jewel embedded in the land for all time. So anyone who takes hold of the land is necessarily taking hold of the jewel. And no one can doubt that the jewel – the labor – continues to belong to the original person who invested it. So even if a hundred years of adverse possession go by, the land still contains the labor – and thus part of the personality – of that individual. The labor is intrinsically and essentially hers, though embedded in an object that has been out of her possession for all that time. As long as the personality of this individual commands our moral respect, she is always entitled to demand this part of it back.[13]

Unfortunately, as I have argued elsewhere, the Lockean image of labor (whether it is individual or cooperative) being literally embedded or mixed in an object is incoherent.[14] Even if it did make sense, the idea would be far too strong to do the work its proponents want it to do. For it would it be impossible to explain how property rights thus acquired could be alienable – how they could be transferred, through sale or gift, from one person to another – without offense to the personality of the original acquirer. If a resource, once labored on, contains for all time a fragment of the laborer's personality, how can that same resource be held legitimately by someone to whom that laborer has chosen to transfer it? Not only that, but how can that second entitlement (the entitlement of the transferee) have anything like the moral force of the original entitlement?[15] Does a fragment of the transferee's personality replace the original nugget of labor in the object? If it does (and if we can make sense of the idea that this is possible), then surely we cannot

dismiss out of hand the possibility that an expropriator may also in time replace the original embedded labor of the person she expropriated with something of her own.

In recent years, historical entitlement has been found its most able and consistent defender in Robert Nozick, and some reliance on Nozick's approach is almost inevitable for any defender of historic reparations.[16] But Nozick also dismissed the conundrums of Locke's theory about the "mixing of labor." He retained the form of a Lockean approach – insisting that an adequate theory of justice must be founded on some principle of unilateral acquisition – without telling us much about the content of that principle or how it might be justified.[17] However, the task of filling in the content cannot be indefinitely postponed because the substance and justification of a principle of acquisition will partly determine what we can do with it. Do entitlements based on acquisition fade over time, or can we appeal to them generations later as a basis for reparation? We cannot answer this question until we know what the entitlement theorist proposes to put in the place of the incoherent Lockean idea.

If we abandon Locke's image of the mixing of labor, the most plausible account of initial acquisition goes like this. An individual, P, who takes possession of an object or a piece of land and who works on it, alters it, and uses it, makes it in effect a part of her life, a pivotal point in her thinking, planning, and action. She shapes it in a certain way – ploughing it, for example, or practicing good husbandry in her hunting over it – so as to allow it to perform a certain role in her life and activity not only now but in the future. If someone else, Q, comes along and seizes the land, taking it from P without her consent, then the whole structure of action is disrupted. P's planning and the structure of P's action are destroyed and replaced by that of Q. Moreover, P did not have to do anything equivalent to this disruption in order to establish the resource as the center of her life. Before P took it, shaped it, and soon, the resource was the center of nobody's life. But when Q took it, it was already the center of P's. This asymmetry between the first and subsequent appropriator is the basis of P's historical entitlement and the basis of its moral priority. It is the reason why we say that Q's taking is wrong in a way that P's original appropriation was not, despite the fact that both parties are seeking to realize their autonomous purposes in the resource.

If any defense of historical entitlement is possible, it is going to be something along those lines. But – unfortunately – if this sort of line is taken, then we have a justification for historical entitlement that is vulnerable to prescription, a justification that is weakened by the historic persistence of dispossession, a justification that does fade over time. If something was taken from me decades ago, the claim that it now forms the center of my life and that it is still indispensable to the exercise of my autonomy is much less credible. For I must have developed some structure of subsistence. And that will be where my efforts have gone and where my planning and my practical thinking have been focused. I may of course yearn for the lost resource and spend a lot of time wishing that I had it back. I may even organize my life around the campaign for its restoration. But that is not the same thing as the basis of the original claim. The original entitlement is based on the idea that I have organized my life around the use of this object, not that I have organized my life around the specific project of hanging on to it or getting it back.

It may be objected that this argument furnishes an incentive to anyone who is inclined to violate another's rights. She knows that if she steals resources and hangs on to the proceeds, her victim will have to reorder his life and, once he does, he will no longer be in a position to claim that the stolen resources should be restored because of their centrality to his plans. But I do not see how this difficulty can be avoided, unless we introduce a different theory of the basis of property entitlements. We cannot pretend that a long-stolen resource continues to play a part in the original owner's life when in fact it does not, merely in order to avoid the moral hazard of this incentive effect. What the objection shows, I think, is that the normal line of argument for property entitlements based on autonomy is simply insufficient to establish imprescriptible rights. And what the failure of Locke's argument shows is that any case for making property rights fully imprescriptible is likely to run into other serious difficulties.

Historical entitlement theories are most impressive when moral entitlement is conjoined with present possession. Then it seems plausible to suggest that continued possession of the object might be indispensable to the possessor's autonomy and that an attack on possession is an attack on autonomy. But when the conjunction is disrupted, particularly when, as in the cases we are considering, it is disrupted for a considerable period of time, the claim looks much shakier.

I think this argument is important, by the way, but not always conclusive. It may not apply so clearly to cases where the dispossessed subject is a tribe or community, rather than an individual, and where the holding of which it has been dispossessed is particularly important

for its sense of identity as a community. Many of the aboriginal claims, in New Zealand, Australia, and North America, have to do with burial grounds or lands which have some other symbolic or religious significance. Religions and cultural traditions we know are very resilient, and the claim that the lost lands form the center of a present way of life – and remain sacred objects despite their loss – may be as credible a hundred years on as it was at the time of the dispossession. In this regard, claims that land of religious significance should be returned to its original owners may have an edge over claims for the return of lands whose significance for them is mainly material or economic. Over the decades people are likely to have developed new modes of subsistence, making the claim that the land is crucial to their present way of life less credible in the economic case than in the religious case.

IV Circumstances and Supersession

I mentioned two ways in which an entitlement might be vulnerable to the passage of time. As well as the one we have just considered, there is also an important point to be made about changes in background circumstances that occur in the period after the original violation. I have in mind changes in population, changes in resource availability, occurrence of famine or ecological disaster, and so on. To assess these cases we have to ask questions about the relation between justice and background circumstances. Is justice relative to circumstances? Do entitlements change as circumstances change? If so, does the significance of past injustice change also? Or should we simply say that once something becomes mine it remains mine (and so it remains wrong for you to keep it), no matter what else happens in the world?

It is difficult to resist the conclusion that entitlements are sensitive to circumstances. Certainly, the level of our concern for various human predicaments is sensitive to the circumstances that constitute those predicaments. One's concern about poverty, for example, varies depending on the extent of the opportunities available to the poor: to be poor but to have some opportunity for amelioration is to be in a better predicament than to be poor with no opportunities at all. Similarly, our concern for the homeless may vary with the season of the year or the climate of the state in which they live. And these are not just fluctuations in subjective response: they are circumstantially sensitive variations in what we would take to be the appropriate level of concern. Now, the (appropriate) level of our concern about such predicaments is directly related to the burden of justification that must be shouldered by those who defend property rights. If an individual makes a claim to the exclusive use or possession of some resources in our territory, then the difficulty of sustaining that claim will clearly have some relation to the level of our concern about the plight of other persons who will have to be excluded from the resources if the claim is recognized. The only theory of property entitlement that would be totally immune to variations in background circumstances would be one that did not accept any burden of justification in relation to our real concerns.

We can express this claim about sensitivity to circumstances as follows. In the case of almost every putative entitlement, it is possible to imagine a pair of different circumstances, C_1 and C_2, such that the entitlement can only barely be justified in C_1 and cannot be justified at all in C_2. The shift from C_1 to C_2 represents a tipping point so far as the justification of the entitlement is concerned.

If this is accepted it clearly makes a difference to the original acquisition of property rights. A scale of acquisition that might be appropriate in a plentiful environment with a small population may be quite inappropriate in the same environment with a large population, or with the same population once natural resources have become depleted. In a plentiful environment with a small population, an individual appropriation of land makes no one worse off. As John Locke put it, "He that leaves as much as another can make use of, does as good as take nothing at all. No Body could think himself injur'd by the drinking of another Man, though he took a good Draught, who had a whole River of the same Water left him to quench his thirst. And the case of Land and Water, where there is enough of both, is perfectly the same."[18] But as Locke also recognized, the picture changed once the population increased to the point where scarcity was felt. If one person's appropriation cast a shadow on the survival prospects of others, then it evidently raised questions of a moral character that were not raised when resources were as plentiful as water in a river.[19] One does not need the exact formulation of a "Lockean proviso" to see this. It is simply that there are real and felt moral concerns in the one case that have to be addressed which are not present in the other.

The same point is recognized by Robert Nozick. The principle of acquisition that forms the linchpin of his theory depends for its acceptability on the claim that individual appropriations of previously unowned goods do not worsen anybody's situation.[20] (Nozick wishes, as

far as possible, to present initial acquisition in the same light of Pareto improvement as consensual transfer.) We need not worry about the exact details of this proviso or of the various Lockean and Nozickian formulations of it.[21] What is clear is that in any plausible theory of historic entitlement, there is some spectrum of social circumstances, relating to the effect a putative acquisition would have on the prospects and life chances of other people, such that the further one goes along this spectrum the less inclined we are to say that the acquisition in question generates legitimate rights.

So far I have talked about one acquisitive act, A_1, taking place in one set of circumstances, C_1, and another acquisitive act, A_2, taking place in different circumstances, C_2. I have said that circumstances may make a difference so that the conditions for the moral legitimacy of A_2 may be different from the conditions for the moral legitimacy of A_1 (even though, considered in themselves, A_1 and A_2 are the same type of act). However, we know that acquisition is not an isolated act. By laboring on a resource, the would-be acquirer not only takes it now but also purports to appropriate it permanently. The effect of her acquisition continues to be felt long after the acquisitive action has taken place. What happens, then, if circumstances change after the moment of the acquisitive act but during the time that the act has effect, that is, during the period of ownership to which the acquisitive action gives rise? A person performs acquisitive act A_1, in circumstances C_1 that make it legitimate. She establishes a title for herself (and her successors) that endures through time. During that time circumstances change, so that conditions C_2 now obtain, and conditions C_2 are such that an equivalent act of appropriation would not be legitimate. What effect does this change have on the legitimacy of the title founded by action A_1?

The answer has to be that it calls the legitimacy of that title into question. We can reach this conclusion by two routes.

The first and most straightforward argument is that property entitlements constrain us over a period of time, and they do so continually in the sense that they constantly call for action in support of them or they constantly involve action undertaken in their exercise. Day after day, an owner performs acts whose legitimacy is based on her entitlement; if she did not have the entitlement, she would have no right to perform these acts. Also, day after day, the owner faces explicit or implicit challenges from others, wanting to use her resource; if she did not have the entitlement to rely on she would not be in a moral position to rebut or resist these challenges. So each time she exercises her right and each time she resists an encroachment, she relies on the entitlement founded by A_1. At each of those times, the legitimacy of what she does depends on the appropriateness of her entitlement as a moral right at that time. So long as circumstances remain unchanged or so long as any changes are broadly consonant with the necessary conditions for the legitimacy of her entitlement, the fact that her claim is, so to speak, renewed day after day is not a worry. Its renewal is automatic. But if circumstances change radically in the way we have been envisaging, the continued application of her entitlement cannot be taken for granted.

The second line of argument is a response to an objection that might be made. Someone might object as follows:

> Surely if the original appropriation were legitimate, the conditions of its legitimacy would take into account the normal vicissitudes of human life including the prospect that things might change, goods become scarce, etc. To say that P acquires an entitlement by A_1 is surely to say that she acquires an entitlement that endures even in the face of changing circumstances. That is why we subject A_1 to such strict scrutiny, for its purports to found an enduring entitlement, not a temporary and circumstantially vulnerable one. The test for initial appropriation should be severe and morally rigorous, but if A_1 passes this test, it should not have to face further scrutiny later simply because conditions are not the same.

Here is the response to this objection. Maybe it is a good thing for the test of the initial acquisition, A_1, to take into account the possibility that conditions may change and therefore only to certify entitlements that survive that consideration. But it surely cannot be the upshot of this that, in circumstances C_1, only those acquisitions are certified that would be valid in all circumstances including C_2. That would be wasteful and pointless: why shouldn't people act as though goods are plentiful, at least when they are plentiful?

No. If a rigorous test of initial acquisition does take future vicissitudes into account, it will do so in a more subtle way. What it will do is provide abinitio, in the terms of the entitlement, that the exact array of rights, liberties, and powers is to be circumstantially sensitive. Thus, what P acquires through A_1, are rights that entitle her to do one set of things in C_1, and another, perhaps

more restricted, set of things in C_2. So, as before, the net effect of P's entitlement does vary, depending on the circumstances. If, for example, P acquires an oasis in conditions of plenty, she acquires (i) a right to use it freely and exclude others from its use so long as water remains plentiful in the territory, and (ii) a duty to share it with others on some fair basis if ever water becomes scarce. The right that is (permanently) acquired through A_1 is thus circumstantially sensitive in the actions it licenses.

If all this is accepted so far as justice in acquisition is concerned, it must also apply to issues and allegations of injustice. Suppose a person has legitimately acquired an object in circumstances of plenty, C_1, and another person comes along and snatches it from her. That act of snatching, we may say, is an injustice. But the very same action of snatching an already appropriated object may not be wrong in a different set of circumstances, C_2, where desperate scarcity has set in and the snatcher has no other means of staying alive. One and the same type of action may be injustice in one set of circumstances and not injustice in another.[22]

I hope it is clear where the argument is going. I said that the burden of justifying an exclusive entitlement depends (in part) on the impact of others' interests of being excluded from the resources in question and that that impact is likely to vary as circumstances change. Similarly an acquisition which is legitimate in one set of circumstances may not be legitimate in another set of circumstances. From this I inferred that an initially legitimate acquisition may become illegitimate or have its legitimacy restricted (as the basis of an ongoing entitlement) at a later time on account of a change in circumstances. By exactly similar reasoning, it seems possible that an act which counted as an injustice when it was committed in circumstances C_1 may be transformed, so far as its ongoing effect is concerned, into a just situation if circumstances change in the meantime from C_1 to C_2. When this happens, I shall say the injustice has been *superseded*.

Consider the following example.[23] On the savanna, a number of groups appropriate water holes, in conditions where it is known that there are enough water holes for each group. So long as these conditions obtain, it seems reasonable for the members of given group, P, to use the water hole they have appropriated without asking permission of other groups with whom they share the plains; and it may even seem reasonable for them to exclude members of other groups from the casual use of their water holes, saying to them, "You have your own water hole. Go off and use that, and leave ours alone." But suppose there is an ecological disaster, and all the water holes dry up except the one that the members of P are using. Then in these changed circumstances, notwithstanding the legitimacy of their original appropriation, it is no longer in order for P to exclude others from their water hole. Indeed it may no longer be in order for members of P to casually use "their own" water hole in the way they did before. In the new circumstances, it may be incumbent on them to draw up a rationing scheme that allows for the needs of everyone in the territory to be satisfied from this one resource. Changing circumstances can have an effect on ownership rights notwithstanding the moral legitimacy of the original appropriation.

Next, suppose as before that in circumstances of plenty various groups on the savanna are legitimately in possession of their respective water holes. One day, motivated purely by greed, members of group Q descend on the water hole possessed by group P and insist on sharing that with them. (What's more they do not allow reciprocity; they do not allow members of P to share any water hole that was legitimately in the possession of Q.) That is an injustice. But then circumstances change, and all the water holes of the territory dry up except the one that originally belonged to P. The members of group Q are already sharing that water hole on the basis of their earlier incursion. But now that circumstances have changed, they are entitled to share that water hole; it no longer counts as an injustice. It is in fact part of what justice now requires. The initial injustice by Q against P has been superseded by circumstances.

Once again, it may be objected that this reasoning generates a moral hazard – an incentive for wrongdoers to seize others' lands confident in the knowledge that if they hang on to them wrongfully for long enough their possession may eventually become rightful.[24] But the argument of this section is not that the passage of time per se supersedes all claims of injustice. Rather, the argument is that claims about justice and injustice must be responsive to changes in circumstances. Suppose there had been no injustice: still, a change in circumstances (such as a great increase in world population) might justify our forcing the aboriginal inhabitants of some territory to share their land with others. If this is so, then the same change in circumstances in the real world can justify our saying that the others' occupation of some of their lands, which was previously wrongful, may become morally permissible. There is no moral hazard in this supersession because the aboriginal inhabitants would have had to share their lands, whether the original injustice had taken place or not.

I do not think this possibility – of the supersession of past injustice – can be denied, except at the cost of making one's theory of historical entitlement utterly impervious to variations in the circumstance in which holdings are acquired and withheld from others. If circumstances make a difference to what counts as a just acquisition, then they must make a difference also to what counts as an unjust incursion. And if they make a difference to that, then in principle we must concede that a change in circumstances can affect whether a particular continuation if adverse possession remains an injustice or not.

Of course, from the fact that supersession is a possibility, it does not follow that it always happens. Everything depends on which circumstances are taken to be morally significant and how as matter of fact circumstances have changed. It may be that some of the historic injustices that concern us have not been superseded and that, even under modern circumstances, the possession of certain aboriginal lands by the descendants of those who expropriated their original owners remains a crying injustice. My argument is not intended to rule that out. But there have been huge changes since North America and Australasia were settled by white colonists. The population has increased manyfold, and most of the descendants of the colonists, unlike their ancestors, have nowhere else to go. We cannot be sure that these changes in circumstances supersede the injustice of their continued possession of aboriginal lands, but it would not be surprising if they did. The facts that have changed are exactly the sort of facts one would expect to make a difference to the justice of a set of entitlements over resources.

V Conclusion

It is important that defenders of aboriginal claims face up to the possibility of the supersession of historic injustice. Even if this particular thesis about supersession is mistaken, some account has to be given of the impact on aboriginal claims and on the reparation of generations-old injustices of the demographic and ecological changes that have taken place.

Apart from anything else, the changes that have taken place over the past two hundred years mean that the costs of respecting primeval entitlements are much greater now than they were in 1800. Two hundred years ago, a small aboriginal group could have exclusive domination of "a large and fruitful Territory"[25] without much prejudice to the needs and interests of very many other human beings. Today, such exclusive rights would mean many people going hungry who might otherwise be fed and many people living in poverty who might otherwise have an opportunity to make a decent life. Irrespective of the occurrence of past injustice, this imbalance would have to be rectified sooner or later. That is the basis for my argument that claims about historic injustice predicated on the status quo ante may be superseded by our determination to distribute the resources of the world in a way that is fair to all of its existing inhabitants.

Behind the thesis of supersession lies a determination to focus upon present and prospective costs – the suffering and the deprivation over which we still have some control. The idea is that any conception of justice which is to be made practically relevant for the way we act now must be a scheme that takes into account modern circumstances and the way those affect the conditions under which people presently live their lives. Arguments for reparation take as conclusive claims of entitlement oriented toward circumstances that are radically different from those we actually face: claims of entitlement based on the habitation of a territory by a small fraction of its present population, and claims of entitlement based on the determination to ignore the present dispersal of persons and peoples on the face of the earth, simply because the historic mechanisms of such dispersal were savagely implicated in injustice. And yet, here we all are. The present circumstances are the ones that are real: it is in the actual world that people starve or are hurt or degraded if the demands of justice in relation to their circumstances are not met. Justice, we say, is a matter of the greatest importance. But the importance to be accorded it is relative to what may actually happen if justice is not done, not to what might have happened if injustice in the past had been avoided.

I want to end by emphasizing two points that qualify or clarify this thesis of the supersession of historic injustice. First, what I have said applies only if an honest attempt is being made to arrange things justly for the future. If no such attempt is being made, there is nothing to overwhelm or supersede the enterprise of reparation. My thesis is not intended as a defense of complacency or inactivity, and to the extent that opponents of reparation are complacent about the injustice of the status quo, their resistance is rightly condemned. Repairing historic injustice is, as we have seen, a difficult business and, as a matter of fact, it is almost always undertaken by people of good will. The only thing that can trump that enterprise is an honest and committed resolve to do justice for the future, a resolve to address

present circumstances in a way that respects the claims and needs of everyone.

Second, my thesis is not that such resolve has priority over all rectificatory actions. I claim only that it has priority over reparation which might carry us in a direction contrary to that which is indicated by a prospective theory of justice. Often and understandably, claims based on reparation and claims based on forward-looking principles will coincide, for, as we saw in Section III above, past injustice is not without its present effects. It is a fact that many of the descendants of those who were defrauded and expropriated live demoralized in lives of relative poverty – relative, that is, to the descendants of those who defrauded them. If the relief of poverty and the more equal distribution of resources is the aim of a prospective theory of justice, it is likely that the effect of rectifying past wrongs will carry us some distance in this direction. All the same, it is worth stressing that it is the impulse to justice now that should lead the way in this process, not the reparation of something whose wrongness is understood primarily in relation to conditions that no longer obtain.

Entitlements that fade with time, counterfactuals that are impossible to verify, injustices that are overtaken by circumstances – all this is a bit distant, I am afraid, from the simple conviction that, if something was wrongly taken, it must be right to give it back. The arguments I have made may seem to deflate a lot of the honest enthusiasm that surrounds aboriginal claims and the hope that now for the first time in centuries we may be ready to do justice to people and peoples whom we have perennially maltreated. The arguments may also seem to compromise justice unnecessarily, as they shift from the straightforward logic of compensation to an arcane and calculative casuistry that tries to balance incommensurable claims.

But societies are not simple circumstances, and it does not detract one bit from the importance of justice nor from the force of the duties it generates to insist that its requirements are complex and that they may be sensitive to differences in circumstance. Even the members of a modern society not afflicted by a history like ours would find the demands of justice difficult to discern and hard to weigh: the modern discussion of the subject, with the utopian cast of its "perfect compliance" assumptions, has made that at least clear.[26] It is true that in many cases the complexity of these issues does not diminish our ability to recognize acts of injustice – stark and awful – like direct expropriation and genocide. The fallacy lies in thinking that the directness of such perception and the outrage that attends it translate into simple and straightforward certainty about what is to be done once such injustices have occurred.

"First come, first served." "We were here first." These simplicities have always been unpleasant ways of denying present aspirations or resisting current claims of need. They become no more pleasant, and in the end no more persuasive, by being associated with respect for aboriginal peoples or revulsion from the violence and expropriation that have disfigured our history.

Notes

1 Opinions differ in metaethics about whether this illocutionary function provides a complete explanation of the distinctively moral meaning of the words "right," "wrong," "unjust," etc. For the view that it does, see R.M. Hare, *The Language of Morals* (Oxford: Clarendon, 1952). But most moral philosophers concede that even if it is not the whole story, still it is an essential part of the explanation of the meaning of such words that they have this prescriptive function. The few philosophers who deny this do so purely because of the embarrassment it poses for their realist claims that moral judgments are nothing but judgments about matters of fact. For examples, see Michael Moore, "Moral Reality" (*Wisconsin Law Review* 1982, pp. 1061–156); and David Brink, *Moral Realism and the Foundations of Ethics* (Cambridge: Cambridge University Press, 1989), ch. 3.

2 For this understanding of moral judgments made about the past, and for the assumed interaction between prescriptivity and universalizability, see R.M. Hare, *Freedom and Reason* (Oxford: Clarendon, 1963).

3 For a moving discussion, see Hannah Arendt, "Truth and Politics," in her collection *Between Past and Future: Six Exercises in Political Thought* (New York: Viking, 1968).

4 John Locke, *An Essay Concerning Human Understanding*, bk. 2, ch. 27, secs. 9–10, ed. John Yolton (London: Everyman's Library, 1965), vol. 1, pp. 280 ff.; see also Stuart Hampshire, *Thought and Action* (London: Chatto & Windus, 1970).

5 Robert Nozick, *Anarchy, State, and Utopia* (Oxford: Blackwell, 1974), pp. 152–3. To this passage, Nozick appends the following footnote: "If the principle of recodification of violations of the first two principles yields more than one description of holdings, then some choice must be made as to which of these is to be realized. Perhaps the sort of considerations about distributive justice and equality that I argue against play a legimate role in this subsidiary choice" (p. 153n.).

6 We could of course imagine a world in which not only *E*+ occurs instead of *E* but also in which the laws of nature are different (e.g., living beings can survive and flourish without water). But those worlds are of limited practical interest. The reason why we choose (in David Lewis's terminology) the closest possible world in which *E*+ occurs, and why "closest" includes "same laws of nature" is that that is the world which ought to have been in the contemplation of the agent who faced the choice between *E* and *E*+. See David Lewis, *Counterfactuals* (Cambridge, MA: Harvard University Press, 1973).

7 Often the injustice complained of is that some renegade member of the tribe disposed of tribal land as though it were his own private property. So if a piece of land is indeed tribally owned and its alienation prohibited by tribal custom, is there any point in asking how it would have been disposed of if the injustice of this individual's alienation of it had not occurred? Surely we ought to assume that, if the land had not been wrongfully disposed of, it would have remained the property of the tribe. So, it might be thought, there should be no difficulty in showing that the counterfactual approach requires its present restoration to the tribe. Unfortunately, things are more complicated than that. There are two other things that might have happened if the injustice had not taken place. The members of the tribe might have decided, in the exercise of their powers as communal owners, to sell some of the land. Or the members of the tribe might have decided, in an exercise of sovereignty over their own laws and customs, to abrogate the system of communal property. Both possibilities need to be taken into account in any realistic reconstruction of what would have happened if the injustice had not taken place. The second is particularly important. All societies change their customs and laws, including their property laws, from time to time, and there is every reason to imagine such change as a probable and reasonable response to new circumstances and conditions on the part of such flexible and resourceful polities as Maori tribes, for example. If we are honestly inquiring into what would have happened in a just world, we have to take at least the possibility of such adaptive exercises of sovereignty into account.

8 See John Rawls, *A Theory of Justice* (Oxford: Oxford University Press, 1971); and T.M. Scanlon, "Contractualism and Utilitarianism" in *Utilitarianism and Beyond*, eds. Amartya Sen and Bernard Williams (Cambridge: Cambridge University Press, 1986).

9 See Rawls, p. 7. For the distinction between holistic and piecemeal uses of contractarian models, see Kim Scheppele and Jeremy Waldron, "Contractarian Methods in Political and Legal Evaluation," *Yale Journal of Law and Humanities* 3 (1991): 206–10.

10 Hence the insistence of Jeremy Bentham on absolute security of expectations as the proper basis of a utilitarian theory of property. See the extract from Jeremy Bentham, *Principles of the Civil Code*, in *Property: Mainstream and Critical Positions*, ed. C.B. MacPherson (Oxford: Blackwell, 1978), pp. 42–58.

11 John Locke, *Two Treatises of Government* (1689), ed. Peter Laslett (Cambridge: Cambridge University Press, 1988), bk. 2, ch. 5; Nozick, ch. 7. There is a comprehensive discussion of this approach in Jeremy Waldron, *The Right to Private Property* (Oxford: Clarendon, 1988), chs. 6, 7.

12 Locke, *Two Treatises*, bk. 2, ch. 5, sec. 27.

13 It is not hard to see how this could be adapted to express a conclusion about the labor and the identity or personality of a whole community. A community takes possession of a resource by investing the labor of its members. The resource now contains something of the community's spirit and personality. And this is what the community is claiming back when it demands the restoration of stolen lands.

14 See Jeremy Waldron, "Two Worries about Mixing One's Labor," *Philosophical Quarterly* 33 (1983): 37–44; and Waldron, *Right to Private Property*, pp. 171–94. See also the criticisms of Locke's idea in Nozick, pp. 174–5.

15 For a full elaboration of this problem, see Waldron, *Right to Private Property*, pp. 259–62.

16 Nozick, ch. 7.

17 There were good reasons for this reticence: it was worth focusing for a while on the question of what the basic shape of a theory of justice should be. As Nozick put it, "I am as well aware as anyone of how sketchy my discussion of the entitlement theory has been. But I no more believe that we need to have formulated a complete alternative theory in order to reject Rawls's undeniably great advance over utilitarianism, than Rawls needed a complete alternative theory before he could reject utilitarianism. What more does one need or can one have, than a sketch of a plausible alternative view, which from its very different perspective highlights the inadequacies of the best existing well-worked-out theory?" (Nozick, p. 230).

18 Locke, *Two Treatises*, bk. 2, sec. 33.

19 Ibid., bk. 2, secs. 36 ff.

20 Nozick, pp. 174 ff.

21 But see the discussion in Jeremy Waldron, "Enough and as Good Left for Others," *Philosophical Quarterly* 29 (1979): 319–28.

22 The point can be borne out by comparing the following passages from Locke's *Two Treatises*. The first follows on from the statement about conditions of plenty that was quoted a page or two earlier: "He that has as good left for his Improvement, as was already taken up, needed not complain, ought not to meddle with what was already improved by another's Labour: If he did, 'tis plain he desired the benefit of another's Pains, which he had no right to, and not the Ground which God had given him in common with others to labour on, and whereof there was good left, as that already possessed." But the second passage raises the specter of scarcity: "God…has given no one of his Children such a Property, in his peculiar Portion of

the things of this World, but that he has given his needy Brother a Right to the Surplusage of his Goods; so that it cannot justly be denyed him, when his pressing Wants call for it." An action which may be condemned in one set of circumstances as the covetous meddling of someone too lazy to fend for herself, becomes in another set of circumstances the exercise of a right, which may not be resisted by the initial appropriator.

23 The example is suggested by David Lyons, "The New Indian Claims and Original Rights to Land," in *Reading Nozick*, ed. J. Paul (Oxford: Blackwell, 1982), p. 371.

24 I am grateful to Carol Sanger for this formulation of the objection.

25 The phrase is from Locke, *Two Treatises*, bk. 2, sec. 41.

26 For the assumption of "perfect compliance," see Rawls, pp. 8–9.

PART V

Rights

20

Are There Any Natural Rights?

H. L. A. Hart

I shall advance the thesis that if there are any moral rights at all, it follows that there is at least one natural right, the equal right of all men to be free.[1] By saying that there is this right, I mean that in the absence of certain special conditions which are consistent with the right being an equal right, any adult human being capable of choice (1) has the right to forbearance on the part of all others from the use of coercion or restraint against him save to hinder coercion or restraint and (2) is at liberty to do (i.e., is under no obligation to abstain from) any action which is not one coercing or restraining or designed to injure other persons.[2]

I have two reasons for describing the equal right of all men to be free as a *natural* right; both of them were always emphasized by the classical theorists of natural rights. (1) This right is one which all men have if they are capable of choice; they have it *qua* men and not only if they are members of some society or stand in some special relation to each other. (2) This right is not created or conferred by men's voluntary action; other moral rights are.[3] Of course, it is quite obvious that my thesis is not as ambitious as the traditional theories of natural rights; for although on my view all men are *equally* entitled to be free in the sense explained, no man has an absolute or unconditional right to do or not to do any particular thing or to be treated in any particular way; coercion or restraint of any action may be justified in special conditions consistently with the general principle. So my argument will not show that men have any right (save the equal right of all to be free) which is "absolute," "indefeasible," or "imprescriptible." This may for many reduce the importance of my contention, but I think that the principle that all men have an equal right to be free, meager as it may seem, is probably all that the political philosophers of the liberal tradition need have claimed to support any program of action even if they have claimed more. But my contention that there is this one natural right may appear unsatisfying in another respect; it is only the conditional assertion that *if* there are any moral rights then there must be this one natural right. Perhaps few would now deny, as some have, that there are moral rights; for the point of that denial was usually to object to some philosophical claim as to the "ontological status" of rights, and this objection is now expressed not as a denial that there are any moral rights but as a denial of some assumed logical similarity between sentences used to assert the existence of rights and other kinds of sentences. But it is still important to remember that there may be codes of conduct quite properly termed moral moral codes (though we can of course say they are "imperfect") which do not employ the notion of *a* right, and there is nothing contradictory

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or otherwise absurd in a code or morality consisting wholly of prescriptions or in a code which prescribed only what should be done for the realization of happiness or some ideal of personal perfection.[4] Human actions in such systems would be evaluated or criticized as compliances with prescriptions or as *good* or *bad, right* or *wrong, wise* or *foolish, fitting* or *unfitting*, but no one in such a system would have, exercise, or claim rights, or violate or infringe them. So those who lived by such systems could not of course be committed to the recognition of the equal right of all to be free; nor, I think (and this is one respect in which the notion of a right differs from other moral notions), could any parallel argument be constructed to show that, from the bare fact that actions were recognized as ones which ought or ought not to be done, as right, wrong, good or bad, it followed that some specific kind of conduct fell under these categories.

I

(a) Lawyers have for their own purposes carried the dissection of the notion of a legal right some distance, and some of their results[5] are of value in the elucidation of statements of the form "X has a right to …" outside legal contexts. There is of course no simple identification to be made between moral and legal rights, but there is an intimate connection between the two, and this itself is one feature which distinguishes a moral right from other fundamental moral concepts. It is not merely that as a matter of fact men speak of their moral rights mainly when advocating their incorporation in a legal system, but that the concept of a right belongs to that branch of morality which is specifically concerned to determine when one person's freedom may be limited by another's[6] and so to determine what actions may appropriately be made the subject of coercive legal rules. The words "*droit*," "*diritto*," and "*Recht*," used by continental jurists, have no simple English translation and seem to English jurists to hover uncertainly between law and morals, but they do in fact mark off an area of morality (the morality of law) which has special characteristics. It is occupied by the concepts of justice, fairness, rights, and obligation (if this last is not used as it is by many moral philosophers as an obscuring general label to cover every action that morally we ought to do or forbear from doing). The most important common characteristic of this group of moral concepts is that there is no incongruity, but a special congruity in the use of force or the threat of force to secure that what is just or fair or someone's right to have done shall in fact be done; for it is in just these circumstances that coercion of another human being is legitimate. Kant, in the *Rechtslehre*, discusses the obligations which arise in this branch of morality under the title of *officia juris*, "which do not require that respect for duty shall be of itself the determining principle of the will," and contrasts them with *officia virtutis*, which have no moral worth unless done for the sake of the moral principle. His point is, I think, that we must distinguish from the rest of morality those principles regulating the proper distribution of human freedom which alone make it morally legitimate for one human being to determine by his choice how another should act; and a certain specific moral value is secured (to be distinguished from moral virtue in which the good will is manifested) if human relationships are conducted in accordance with these principles even though coercion has to be used to secure this, for only if these principles are regarded will freedom be distributed among human beings as it should be. And it is I think a very important feature of a moral right that the possessor of it is conceived as having a moral justification for limiting the freedom of another and that he has this justification not because the action he is entitled to require of another has some moral quality but simply because in the circumstances a certain distribution of human freedom will be maintained if he by his choice is allowed to determine how that other shall act.

(b) I can best exhibit this feature of a moral right by reconsidering the question whether moral rights and "duties"[7] are correlative. The contention that they are means, presumably, that every statement of the form "X has a right to …" entails and is entailed by "Y has a duty (not) to …," and at this stage we must not assume that the values of the name-variables "X" and "Y" must be different persons. Now there is certainly one sense of "a right" (which I have already mentioned) such that it does not follow from X's having a right that X or someone else has any duty. Jurists have isolated rights in this sense and have referred to them as "liberties" just to distinguish them from rights in the centrally important sense of "right" which has "duty" as a correlative. The former sense of "right" is needed to describe those areas of social life where competition is at least morally unobjectionable. Two people walking along both see a ten-dollar bill in the road twenty yards away, and there is no clue as to the owner. Neither of the two are under a "duty" to allow the other to pick it up; each has in this sense a right to pick it up. Of course there may be many things which each has a "duty" not to do in the course of

the race to the spot – neither may kill or wound the other – and corresponding to these "duties" there are rights to forbearances. The moral propriety of all economic competition implies this minimum sense of "a right" in which to say that "X has a right to" means merely that X is under no "duty" not to. Hobbes saw that the expression "a right" could have this sense but he was wrong if he thought that there is no sense in which it does follow from X's having a right that Y has a duty or at any rate an obligation.

(c) More important for our purpose is the question whether for all moral "duties" there are correlative moral rights, because those who have given an affirmative answer to this question have usually assumed without adequate scrutiny that to have a right is simply to be capable of benefiting by the performance of a "duty"; whereas in fact this is not a sufficient condition (and probably not a necessary condition) of having a right. Thus animals and babies who stand to benefit by our performance of our "duty" not to ill-treat them are said *therefore* to have rights to proper treatment. The full consequence of this reasoning is not usually followed out; most have shrunk from saying that we have rights against ourselves because we stand to benefit from our performance of our "duty" to keep ourselves alive or develop our talents. But the moral situation which arises from a promise (where the legal-sounding terminology of rights and obligations is most appropriate) illustrates most clearly that the notion of having a right and that of benefiting by the performance of a "duty" are not identical. X promises Y in return for some favor that he will look after Y's aged mother in his absence. Rights arise out of this transaction, but it is surely Y to whom the promise has been made and not his mother who *has* or *possesses* these rights. Certainly Y's mother is a person concerning whom X has an obligation and a person who will benefit by its performance, but the person *to whom* he has an obligation to look after her is Y. This is something *due to* or *owed to* Y, so it is Y, not his mother, whose right X will disregard and to whom X will have done *wrong* if he fails to keep his promise, though the mother may be physically injured. And it is Y who has a moral *claim* upon X, is *entitled* to have his mother looked after, and who can *waive* the claim and *release* Y from the obligation. Y is, in other words, morally in a position to determine by his choice how X shall act and in this way to limit X's freedom of choice; and it is this fact, not the fact that he stands to benefit, that makes it appropriate to say that he has *a right*. Of course often the person to whom a promise has been made will be the only person who stands to benefit by its performance, but this does not justify the identification of "having a right" with "benefiting by the performance of a duty." It is important for the whole logic of rights that, while the person who stands to benefit by the performance of a duty is discovered by considering what will happen if the duty is not performed, the person who has a right (to whom performance is *owed* or *due*) is discovered by examining the transaction or antecedent situation or relations of the parties out of which the "duty" arises. These considerations should incline us not to extend to animals and babies whom it is wrong to ill-treat the notion of a right to proper treatment, for the moral situation can be simply and adequately described here by saying that it is wrong or that we ought not to ill-treat them or, in the philosopher's generalized sense of "duty," that we have a duty not to ill-treat them.[8] If common usage sanctions talk of the rights of animals or babies it makes an idle use of the expression "a right," which will confuse the situation with other different moral situations where the expression "a right" has a specific force and cannot be replaced by the other moral expressions which I have mentioned. Perhaps some clarity on this matter is to be gained by considering the force of the preposition "to" in the expression "having a duty to Y" or "being under an obligation to Y" (where "Y" is the name of a person); for it is significantly different from the meaning of "to" in "doing something to Y" or "doing harm to Y," where it indicates the person affected by some action. In the first pair of expressions, "to" obviously does not have this force, but indicates the person to whom the person morally bound is bound. This is an intelligible development of the figure of a bond (*vinculum juris: obligare*); the precise figure is not that of two persons bound by a chain, but of *one* person bound, the other end of the chain lying in the hands of another to use if he chooses.[9] So it appears absurd to speak of having "duties" or owing obligations to ourselves – of course we may have "duties" not to do harm to ourselves, but what could be meant (once the distinction between these different meanings of "to" has been grasped) by insisting that we have duties or obligations *to* ourselves not to do harm to ourselves?

(d) The essential connection between the notion of a right and the justified limitation of one person's freedom by another may be thrown into relief if we consider codes of behavior which do not purport to confer rights but only to prescribe what shall be done. Most natural law thinkers down to Hooker conceived of natural law in this way: there were natural duties compliance with

which would certainly benefit man – things to be done to achieve man's natural end – but not natural rights. And there are of course many types of codes of behavior which only prescribe what is to be done, e.g., those regulating certain ceremonies. It would be absurd to regard these codes as conferring rights, but illuminating to contrast them with rules of games, which often create rights, though not, of course, moral rights. But even a code which is plainly a moral code need not establish rights; the Decalogue is perhaps the most important example. Of course, quite apart from heavenly rewards human beings stand to benefit by general obedience to the Ten Commandments: disobedience is wrong and will certainly harm individuals. But it would be a surprising interpretation of them that treated them as conferring rights. In such an interpretation obedience to the Ten Commandments would have to be conceived as due to or owed to individuals, not merely to God, and disobedience not merely as wrong but as *a wrong to* (as well as harm to) individuals. The Commandments would cease to read like penal statutes designed only to rule out certain types of behavior and would have to be thought of as rules placed at the disposal of individuals and regulating the extent to which *they* may demand certain behavior from others. Rights are typically conceived of as *possessed* or *owned by* or *belonging to* individuals, and these expressions reflect the conception of moral rules as not only prescribing conduct but as forming a kind of moral property of individuals to which they are as individuals entitled; only when rules are conceived in this way can we speak of *rights* and *wrongs* as well as right and wrong actions.[10]

II

So far I have sought to establish that to have a right entails having a moral justification for limiting the freedom of another person and for determining how he should act; it is now important to see that the moral justification must be of a special kind if it is to constitute a right, and this will emerge most clearly from an examination of the circumstances in which rights are asserted with the typical expression "I have a right to…." It is I think the case that this form of words is used in two main types of situations: (a) when the claimant has some special justification for interference with another's freedom which other persons do not have ("*I* have a right to be paid what you promised for my services"); (b) when the claimant is concerned to resist or object to some interference by another person as having no justification ("*I* have a right to say what I think").

(a) *Special Rights*

When rights arise out of special transactions between individuals or out of some special relationship in which they stand to each other, both the persons who have the right and those who have the corresponding obligation are limited to the parties to the special transaction or relationship. I call such rights special rights to distinguish them from those moral rights which are thought of as rights against (i.e., as imposing obligations upon)[11] everyone, such as those that are asserted when some unjustified interference is made or threatened as in (b) above.

(i) The most obvious cases of special rights are those that arise from promises. By promising to do or not to do something, we voluntarily incur obligations and create or confer rights on those to whom we promise; we alter the existing moral independence of the parties' freedom of choice in relation to some action and create a new moral relationship between them, so that it becomes morally legitimate for the person to whom the promise is given to determine how the promisor shall act. The promisee has a temporary authority or sovereignty in relation to some specific matter over the other's will which we express by saying that the promisor is under an obligation *to* the promisee to do what he has promised. To some philosophers the notion that moral phenomena – rights and duties or obligations – can be brought into existence by the voluntary action of individuals has appeared utterly mysterious; but this I think has been so because they have not clearly seen how special the moral notions of a right and an obligation are, nor how peculiarly they are connected with the distribution of freedom of choice; it would indeed be mysterious if we could make actions morally good or bad by voluntary choice. The simplest case of promising illustrates two points characteristic of all special rights: (1) the right and obligation arise not because the promised action has itself any particular moral quality, but just because of the voluntary transaction between the parties; (2) the identity of the parties concerned is vital – only *this* person (the promisee) has the moral justification for determining how the promisor shall act. It is *his* right; only in relation to him is the promisor's freedom of choice diminished, so that if he chooses to release the promisor no one else can complain.

(ii) But a promise is not the only kind of transaction whereby rights are conferred. They may be *accorded* by a

person consenting or authorizing another to interfere in matters which but for this consent or authorization he would be free to determine for himself. If I consent to your taking precautions for my health or happiness or authorize you to look after my interests, then you have a right which others have not, and I cannot complain of your interference if it is within the sphere of your authority. This is what is meant by a person surrendering his rights to another; and again the typical characteristics of a right are present in this situation: the person authorized has the right to interfere not because of its intrinsic character but because *these* persons have stood in *this* relationship. No one else (not similarly authorized) has any *right*[12] to interfere in theory even if the person authorized does not exercise his right.

(iii) Special rights are not only those created by the deliberate choice of the party on whom the obligation falls, as they are when they are accorded or spring from promises, and not all obligations to other persons are deliberately incurred, though I think it is true of all special rights that they arise from previous voluntary actions. A third very important source of special rights and obligations which we recognize in many spheres of life is what may be termed mutuality of restrictions, and I think political obligation is intelligible only if we see what precisely this is and how it differs from the other right-creating transactions (consent, promising) to which philosophers have assimilated it. In its bare schematic outline it is this: when a number of persons conduct any joint enterprise according to rules and thus restrict their liberty, those who have submitted to these restrictions when required have a right to a similar submission from those who have benefited by their submission. The rules may provide that officials should have authority to enforce obedience and make further rules, and this will create a structure of legal rights and duties, but the moral obligation to obey the rules in such circumstances is *due to* the co-operating members of the society, and they have the correlative moral right to obedience. In social situations of this sort (of which political society is the most complex example) the obligation to obey the rules is something distinct from whatever other moral reasons there may be for obedience in terms of good consequences (e.g., the prevention of suffering); the obligation is due to the co-operating members of the society as such and not because they are human beings on whom it would be wrong to inflict suffering. The utilitarian explanation of political obligation fails to take account of this feature of the situation both in its simple version that the obligation exists because and only if the direct consequences of a particular act of disobedience are worse than obedience, and also in its more sophisticated version that the obligation exists even when this is not so, if disobedience increases the probability that the law in question or other laws will be disobeyed on other occasions when the direct consequences of obedience are better than those of disobedience.

Of course to say that there is such a moral obligation upon those who have benefited by the submission of other members of society to restrictive rules to obey these rules in their turn does not entail either that this is the only kind of moral reason for obedience or that there can be no cases where disobedience will be morally justified. There is no contradiction or other impropriety in saying "I have an obligation to do X, someone has a right to ask me to, but I now see I ought not to do it." It will in painful situations sometimes be the lesser of two moral evils to disregard what really are people's rights and not perform our obligations to them. This seems to me particularly obvious from the case of promises: I may promise to do something and thereby incur an obligation just because that is one way in which obligations (to be distinguished from other forms of moral reasons for acting) are created; reflection may show that it would in the circumstances be wrong to keep this promise because of the suffering it might cause, and we can express this by saying "*I ought not* to do it though *I have an obligation to him* to do it" just because the italicized expressions are not synonyms but come from different dimensions of morality. The attempt to explain this situation by saying that our real obligation here is to avoid the suffering and that there is only a prima facie obligation to keep the promise seems to me to confuse two quite different kinds of moral reason, and in practice such a terminology obscures the precise character of what is at stake when "for some greater good" we infringe people's rights or do not perform our obligations to them.

The social-contract theorists rightly fastened on the fact that the obligation to obey the law is not merely a special case of benevolence (direct or indirect), but something which arises between members of a particular political society out of their mutual relationship. Their mistake was to identify *this* right-creating situation of mutual restrictions with the paradigm case of promising; there are of course important similarities, and these are just the points which all special rights have in common, viz., that they arise out of special relationships between human beings and not out of the character of the action to be done or its effects.

(iv) There remains a type of situation which may be thought of as creating rights and obligations: where the parties have a special natural relationship, as in the case of parent and child. The parent's moral right to obedience from his child would I suppose now be thought to terminate when the child reaches the age "of discretion," but the case is worth mentioning because some political philosophies have had recourse to analogies with this case as an explanation of political obligation, and also because even this case has some of the features we have distinguished in special rights, viz., the right arises out of the special relationship of the parties (though it is in this case a natural relationship) and not out of the character of the actions to the performance of which there is a right.

(v) To be distinguished from special rights, of course, are special liberties, where, exceptionally, one person is *exempted* from obligations to which most are subject but does not thereby acquire a *right* to which there is a correlative obligation. If you catch me reading your brother's diary, you say, "You have no right to read it." I say, "I have a right to read it – your brother said I might unless he told me not to, and he has not told me not to." Here I have been specially *licensed* by your brother who had a right to require me not to read his diary, so I am exempted from the moral obligation not to read it, but your brother is under no obligation to let me go on reading it. Cases where *rights*, not liberties, are accorded to manage or interfere with another person's affairs are those where the license is not revocable at will by the person according the right.

(b) *General Rights*

In contrast with special rights, which constitute a justification peculiar to the holder of the right for interfering with another's freedom, are general rights, which are asserted defensively, when some unjustified interference is anticipated or threatened, in order to point out that the interference is unjustified. "I have the right to say what I think."[13] "I have the right to worship as I please." Such rights share two important characteristics with special rights. (1) To have them is to have a moral justification for determining how another shall act, viz., that he shall not interfere.[14] (2) The moral justification does not arise from the character of the particular action to the performance of which the claimant has a right; what justifies the claim is simply – there being no special relation between him and those who are threatening to interfere to justify that interference – that this is a particular exemplification of the equal right to be free. But there are of course striking differences between such defensive general rights and special rights. (1) General rights do not arise out of any special relationship or transaction between men. (2) They are not rights which are peculiar to those who have them but are rights which all men capable of choice have in the absence of those special conditions which give rise to special rights. (3) General rights have as correlatives obligations not to interfere to which everyone else is subject and not merely the parties to some special relationship or transaction, though of course they will often be asserted when some particular persons threaten to interfere as a moral objection to that interference. To assert a general right is to claim in relation to some particular action the equal right of all men to be free in the absence of any of those special conditions which constitute a special right to limit another's freedom; to assert a special right is to assert in relation to some particular action a right constituted by such special conditions to limit another's freedom. The assertion of general rights directly invokes the principle that all men equally have the right to be free; the assertion of a special right (as I attempt to show in Section III) invokes it indirectly.

III

It is, I hope, clear that unless it is recognized that interference with another's freedom requires a moral justification the notion of a right could have no place in morals; for to assert a right is to assert that there is such a justification. The characteristic function in moral discourse of those sentences in which the meaning of the expression "a right" is to be found – "I have a right to …," "You have no right to …," "What right have you to …?" – is to bring to bear on interferences with another's freedom, or on claims to interfere, a type of moral evaluation or criticism specially appropriate to interference with freedom and characteristically different from the moral criticism of actions made with the use of expressions like "right," "wrong," "good," and "bad." And this is only one of many different types of moral ground for saying "You ought …" or "You ought not…." The use of the expression "What right have you to … ?" shows this more clearly, perhaps, than the others; for we use it, just at the point where interference is actual or threatened, to call for the moral *title* of the person addressed to interfere; and we do this often without any suggestion at all that what he proposes to do is otherwise wrong and sometimes with the implication that the same interference on the part of another person would be unobjectionable.

But though our use in moral discourse of "a right" does presuppose the recognition that interference with another's freedom requires a moral justification, this would not itself suffice to establish, except in a sense easily trivialized, that in the recognition of moral rights there is implied the recognition that all men have a right to equal freedom; for unless there is some restriction inherent in the meaning of "a right" on the type of moral justification for interference which can constitute a right, the principle could be made wholly vacuous. It would, for example, be possible to adopt the principle and then assert that some characteristic or behavior of some human beings (that they are improvident, or atheists, or Jews, or Negroes) constitutes a moral justification for interfering with their freedom; *any* differences between men could, so far as my argument has yet gone, be treated as a moral justification for interference and so constitute a right, so that the equal right of all men to be free would be compatible with gross inequality. It may well be that the expression "moral" itself imports some restriction on what can constitute a moral justification for interference which would avoid this consequence, but I cannot myself yet show that this is so. It is, on the other hand, clear to me that the moral justification for interference which is to constitute a *right* to interfere (as distinct from merely making it morally good or desirable to interfere) is restricted to certain special conditions and that this is inherent in the meaning of "a right" (unless this is used so loosely that it could be replaced by the other moral expressions mentioned). Claims to interfere with another's freedom based on the general character of the activities interfered with (e.g., the folly or cruelty of "native" practices) or the general character of the parties ("We are Germans; they are Jews") even when well founded are not matters of moral right or obligation. Submission in such cases even where proper is not *due to* or *owed to* the individuals who interfere; it would be equally proper whoever of the same class of persons interfered. Hence other elements in our moral vocabulary suffice to describe this case, and it is confusing here to talk of rights. We saw in Section II that the types of justification for interference involved in special rights was independent of the character of the action to the performance of which there was a right but depended upon certain previous transactions and relations between individuals (such as promises, consent, authorization, submission to mutual restrictions). Two questions here suggest themselves: (1) On what intelligible principle could these bare forms of promising, consenting, submission to mutual restrictions, be either necessary or sufficient, irrespective of their content, to justify interference with another's freedom? (2) What characteristics have these types of transaction or relationship in common? The answer to both these questions is I think this: If we justify interference on such grounds as we give when we claim a moral right, we are in fact indirectly invoking as our justification the principle that all men have an equal right to be free. For we are in fact saying in the case of promises and consents or authorizations that this claim to interfere with another's freedom is justified because he has, in exercise of his equal right to be free, freely chosen to create this claim; and in the case of mutual restrictions we are in fact saying that this claim to interfere with another's freedom is justified because it is fair; and it is fair because only so will there be an equal distribution of restrictions and so of freedom among this group of men. So in the case of special rights as well as of general rights recognition of them implies the recognition of the equal right of all men to be free.

Notes

1 I was first stimulated to think along these lines by Mr. Stuart Hampshire, and I have reached by different routes a conclusion similar to his.

2 Further explanation of the perplexing terminology of freedom is, I fear, necessary. *Coercion* includes, besides preventing a person from doing what he chooses, making his choice less eligible by threats; *restraint* includes any action designed to make the exercise of choice impossible and so includes killing or enslaving a person. But neither coercion nor restraint includes *competition*. In terms of the distinction between "having a right to" and "being at liberty to" used above and further discussed in Section I (b), all men may have, consistently with the obligation to forbear from coercion, the *liberty* to satisfy if they can such at least of their desires as are not designed to coerce or injure others, even though in fact, owing to scarcity, one man's satisfaction causes another's frustration. In conditions of extreme scarcity this distinction between competition and coercion will not be worth drawing; natural rights are only of importance "where peace is possible" (Locke). Further, freedom (the absence of coercion) can be *valueless* to those victims of unrestricted competition too poor to make use of it; so it will be pedantic to point out to them that though starving they are free. This is the truth exaggerated by the Marxists whose *identification* of poverty with lack of freedom confuses two different evils.

3 Save those general rights (cf. Section II, (b)) which are particular exemplifications of the right of all men to be free.

4 Is the notion of *a* right found in either Plato or Aristotle? There seems to be no Greek word for it as distinct from "right" or "just" (*δικίον*), though expressions like *τὰ ἐμὰ δικαία* are I believe fourth-century legal idioms. The natural expressions in Plato are *τὸ ἐαυτοῦ* (*ἔχειν*) or *τὰ τινὶ ὀφειλόμενα*, but these seem confined to property or debts. There is no place for a moral right unless the moral value of individual freedom is recognized.

5 As W.D. Lamont has seen: cf. his *Principles of Moral Judgment* (Oxford, 1946); for the jurists, cf. Hohfeld's *Fundamental Legal Conceptions* (New Haven, 1923).

6 Here and subsequently I use "interfere with another's freedom," "limit another's freedom," "determine how another shall act," to mean either the use of coercion or demanding that a person shall do or not do some action. The connection between these two types of "interference" is too complex for discussion here; I think it is enough for present purposes to point out that having a justification for demanding that a person shall or shall not do some action is a necessary though not a sufficient condition for justifying coercion.

7 I write "duties" here because one factor obscuring the nature of a right is the philosophical use of "duty" and "obligation" for all cases where there are moral reasons for saying an action ought to be done or not done. In fact "duty," "obligation," "right," and "good" come from different segments of morality, concern different types of conduct, and make different types of moral criticism or evaluation. Most important are the points (1) that obligations may be voluntarily incurred or created, (2) that they are *owed to* special persons (who have rights), (3) that they do not arise out of the character of the actions which are obligatory but out of the relationship of the parties. Language roughly though not consistently confines the use of "having an obligation" to such cases.

8 The use here of the generalized "duty" is apt to prejudice the question whether animals and babies have rights.

9 Cf. A.H. Campbell, *The Structure of Stair's Institutes* (Glasgow, 1954), p. 31.

10 Continental jurists distinguish between "*subjektives*" and "*objektives Recht*," which corresponds very well to the distinction between *a* right, which an individual has, and what it is right to do.

11 Cf. Section (6).

12 Though it may be *better* (the lesser of two evils) that he should: cf. item iii below.

13 In speech the difference between general and special rights is often marked by stressing the pronoun where a special right is claimed or where the special right is denied. "You have no right to stop him reading that book" refers to the reader's general right. "*You* have no right to stop him reading that book" denies that the person addressed has a special right to interfere though others may have.

14 Strictly, in the assertion of a general right both the *right* to forbearance from coercion and the *liberty* to do the specified action are asserted, the first in the face of actual or threatened coercion, the second as an objection to an actual or anticipated demand that the action should not be done. The first has as its correlative an obligation upon everyone to forbear from coercion; the second the absence in any one of a justification for such a demand. Here, in Hohfeld's words, the correlative is not an obligation but a "no-right."

21

Taking Rights Seriously

Ronald M. Dworkin

I The Rights of Citizens

The language of rights now dominates political debate in the United States. Does the Government respect the moral and political rights of its citizens? Or does the Government's war policy, or its race policy, fly in the face of these rights? Do the minorities whose rights have been violated have the right to violate the law in return? Or does the silent majority itself have rights, including the right that those who break the law be punished? It is not surprising that these questions are now prominent. The concept of rights, and particularly the concept of rights against the Government, has its most natural use when a political society is divided, and appeals to co-operation or a common goal are pointless.

The debate does not include the issue of whether citizens have *some* moral rights against their Government. It seems accepted on all sides that they do. Conventional lawyers and politicians take it as a point of pride that our legal system recognizes, for example, individual rights of free speech, equality, and due process. They base their claim that our law deserves respect, at least in part, on that fact, for they would not claim that totalitarian systems deserve the same loyalty.

Some philosophers, of course, reject the idea that citizens have rights apart from what the law happens to give them. Bentham thought that the idea of moral rights was 'nonsense on stilts'. But that view has never been part of our orthodox political theory, and politicians of both parties appeal to the rights of the people to justify a great part of what they want to do. I shall not be concerned, in this essay, to defend the thesis that citizens have moral rights against their governments; I want instead to explore the implications of that thesis for those, including the present [1970] United States Government, who profess to accept it.

It is much in dispute, of course, what *particular* rights citizens have. Does the acknowledged right to free speech, for example, include the right to participate in nuisance demonstrations? In practice the Government will have the last word on what an individual's rights are, because its police will do what its officials and courts say. But that does not mean that the Government's view is necessarily the correct view; anyone who thinks it does must believe that men and women have only such moral rights as Government chooses to grant, which means that they have no moral rights at all.

All this is sometimes obscured in the United States by the constitutional system. The American Constitution

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provides a set of individual *legal* rights in the First Amendment, and in the due process, equal protection, and similar clauses. Under present legal practice the Supreme Court has the power to declare an act of Congress or of a state legislature void if the Court finds that the act offends these provisions. This practice has led some commentators to suppose that individual moral rights are fully protected by this system, but that is hardly so, nor could it be so.

The Constitution fuses legal and moral issues, by making the validity of a law depend on the answer to complex moral problems, like the problem of whether a particular statute respects the inherent equality of all men. This fusion has important consequences for the debates about civil disobedience; I have described these elsewhere[1] and I shall refer to them later. But it leaves open two prominent questions. It does not tell us whether the Constitution, even properly interpreted, recognizes all the moral rights that citizens have, and it does not tell us whether, as many suppose, citizens would have a duty to obey the law even if it did invade their moral rights.

Both questions become crucial when some minority claims moral rights which the law denies, like the right to run its local school system, and which lawyers agree are not protected by the Constitution. The second question becomes crucial when, as now, the majority is sufficiently aroused so that Constitutional amendments to eliminate rights, like the right against self-incrimination, are seriously proposed. It is also crucial in nations, like the United Kingdom, that have no constitution of a comparable nature.

Even if the Constitution were perfect, of course, and the majority left it alone, it would not follow that the Supreme Court could guarantee the individual rights of citizens. A Supreme Court decision is still a legal decision, and it must take into account precedent and institutional considerations like relations between the Court and Congress, as well as morality. And no judicial decision is necessarily the right decision. Judges stand for different positions on controversial issues of law and morals and, as the fights over Nixon's Supreme Court nominations showed, a President is entitled to appoint judges of his own persuasion, provided that they are honest and capable.

So, though the constitutional system adds something to the protection of moral rights against the Government, it falls far short of guaranteeing these rights, or even establishing what they are. It means that, on some occasions, a department other than the legislature has the last word on these issues, which can hardly satisfy someone who thinks such a department profoundly wrong.

It is of course inevitable that some department of government will have the final say on what law will be enforced. When men disagree about moral rights, there will be no way for either side to prove its case, and some decision must stand if there is not to be anarchy. But that piece of orthodox wisdom must be the beginning and not the end of a philosophy of legislation and enforcement. If we cannot insist that the Government reach the right answers about the rights of its citizens, we can insist at least that it try. We can insist that it take rights seriously, follow a coherent theory of what these rights are, and act consistently with its own professions. I shall try to show what that means, and how it bears on the present political debates.

II Rights and the Right to Break the Law

I shall start with the most violently argued issue. Does an American ever have the moral right to break a law? Suppose someone admits a law is valid; does he therefore have a duty to obey it? Those who try to give an answer seem to fall into two camps. The conservatives, as I shall call them, seem to disapprove of any act of disobedience; they appear satisfied when such acts are prosecuted, and disappointed when convictions are reversed. The other group, the liberals, are much more sympathetic to at least some cases of disobedience; they sometimes disapprove of prosecutions and celebrate acquittals. If we look beyond these emotional reactions, however, and pay attention to the arguments the two parties use, we discover an astounding fact. Both groups give essentially the same answer to the question of principle that supposedly divides them.

The answer that both parties give is this. In a democracy, or at least a democracy that in principle respects individual rights, each citizen has a general moral duty to obey all the laws, even though he would like some of them changed. He owes that duty to his fellow citizens, who obey laws that they do not like, to his benefit. But this general duty cannot be an absolute duty, because even a society that is in principle just may produce unjust laws and policies, and a man has duties other than his duties to the State. A man must honour his duties to his God and to his conscience, and if these conflict with his duty to the State, then he is entitled, in the end, to do what he judges to be right. If he decides that he must break the law, however, then he must submit to the judgment and punishment that the State imposes, in recognition of the fact that his duty to his fellow citizens was overwhelmed but not extinguished by his religious or moral obligation.

Of course this common answer can be elaborated in very different ways. Some would describe the duty to the State as fundamental, and picture the dissenter as a religious or moral fanatic. Others would describe the duty to the State in grudging terms, and picture those who oppose it as moral heroes. But these are differences in tone, and the position I described represents, I think, the view of most of those who find themselves arguing either for or against civil disobedience in particular cases.

I do not claim that it is everyone's view. There must be some who put the duty to the State so high that they do not grant that it can ever be overcome. There are certainly some who would deny that a man ever has a moral duty to obey the law, at least in the United States today. But these two extreme positions are the slender tails of a bell curve, and all those who fall in between hold the orthodox position I described – that men have a duty to obey the law but have the right to follow their consciences when it conflicts with that duty.

But if that is so, then we have a paradox in the fact that men who give the same answer to a question of principle should seem to disagree so much, and to divide so fiercely, in particular cases. The paradox goes even deeper, for each party, in at least some cases, takes a position that seems flatly inconsistent with the theoretical position they both accept. This position is tested, for example, when someone evades the draft on grounds of conscience, or encourages others to commit this crime. Conservatives argue that such men must be prosecuted, even though they are sincere. Why must they be prosecuted? Because society cannot tolerate the decline in respect for the law that their act constitutes and encourages. They must be prosecuted, in short, to discourage them and others like them from doing what they have done.

But there seems to be a monstrous contradiction here. If a man has a right to do what his conscience tells him he must, then how can the State be justified in discouraging him from doing it? Is it not wicked for a state to forbid and punish what it acknowledges that men have a right to do?

Moreover, it is not just conservatives who argue that those who break the law out of moral conviction should be prosecuted. The liberal is notoriously opposed to allowing Southern school officials to go slow on desegregation, even though he acknowledges that these school officials think they have a moral right to do what the law forbids. The liberal does not often argue, it is true, that the desegregation laws must be enforced to encourage general respect for law. He argues instead that the desegregation laws must be enforced because they are right. But his position also seems inconsistent: can it be right to prosecute men for doing what their conscience requires, when we acknowledge their right to follow their conscience?

We are therefore left with two puzzles. How can two parties to an issue of principle, each of which thinks it is in profound disagreement with the other, embrace the same position on that issue? How can it be that each side urges solutions to particular problems which seem flatly to contradict the position of principle that both accept? One possible answer is that some or all of those who accept the common position are hypocrites, paying lip service to rights of conscience which in fact they do not grant.

There is some plausibility in this charge. A sort of hypocrisy must be involved when public officials who claim to respect conscience deny Muhammad Ali the right to box in their states. If Ali, in spite of his religious scruples, had joined the Army, he would have been allowed to box even though, on the principles these officials say they honour, he would have been a worse human being for having done so. But there are few cases that seem so straightforward as this one, and even here the officials do not seem to recognize the contradiction between their acts and their principles. So we must search for some explanation beyond the truth that men often do not mean what they say.

The deeper explanation lies in a set of confusions that often embarrass arguments about rights. These confusions have clouded all the issues I mentioned at the outset and have crippled attempts to develop a coherent theory of how a government that respects rights must behave.

In order to explain this, I must call attention to the fact, familiar to philosophers but often ignored in political debate, that the word 'right' has different force in different contexts. In most cases when we say that someone has a 'right' to do something, we imply that it would be wrong to interfere with his doing it, or at least that some special grounds are needed for justifying any interference. I use this strong sense of right when I say that you have the right to spend your money gambling, if you wish, though you ought to spend it in a more worthwhile way. I mean that it would be wrong for anyone to interfere with you even though you propose to spend your money in a way that I think is wrong.

There is a clear difference between saying that someone has a right to do something in this sense and saying that it is the 'right' thing for him to do, or that he does no 'wrong' in doing it. Someone may have the right to do something that is the wrong thing for him to do, as might be the case with gambling. Conversely, something may be the right thing for him to do and yet he may have no right to do it, in the sense that it would not be wrong for

someone to interfere with his trying. If our army captures an enemy soldier, we might say that the right thing for him to do is to try to escape, but it would not follow that it is wrong of us to try to stop him. We might admire him for trying to escape, and perhaps even think less of him if he did not. But there is no suggestion here that it is wrong of us to stand in his way; on the contrary, if we think our cause is just, we think it right for us to do all we can to stop him.

Ordinarily this distinction, between the issues of whether a man has a right to do something and whether it is the right thing for him to do, causes no trouble. But sometimes it does, because sometimes we say that a man has a right to do something when we mean only to deny that it is the wrong thing for him to do. Thus we say that the captured soldier has a 'right' to try to escape when we mean, not that we do wrong to stop him, but that he has no duty not to make the attempt. We use 'right' this way when we speak of someone having the 'right' to act on his own principles, or the 'right' to follow his own conscience. We mean that he does no wrong to proceed on his honest convictions, even though we disagree with these convictions, and even though, for policy or other reasons, we must force him to act contrary to them.

Suppose a man believes that welfare payments to the poor are profoundly wrong, because they sap enterprise, and so declares his full income tax each year but declines to pay half of it. We might say that he has a right to refuse to pay, if he wishes, but that the Government has a right to proceed against him for the full tax, and to fine or jail him for late payment if that is necessary to keep the collection system working efficiently. We do not take this line in most cases; we do not say that the ordinary thief has a right to steal, if he wishes, so long as he pays the penalty. We say a man has the right to break the law, even though the State has a right to punish him, only when we think that, because of his convictions, he does no wrong in doing so.[2]

These distinctions enable us to see an ambiguity in the orthodox question: Does a man ever have a right to break the law? Does that question mean to ask whether he ever has a right to break the law in the strong sense, so that the Government would do wrong to stop him, by arresting and prosecuting him? Or does it mean to ask whether he ever does the right thing to break the law, so that we should all respect him even though the Government should jail him?

If we take the orthodox position to be an answer to the first – and most important – question, then the paradoxes I described arise. But if we take it as an answer to the second, they do not. Conservatives and liberals do agree that sometimes a man does not do the wrong thing to break a law, when his conscience so requires. They disagree, when they do, over the different issue of what the State's response should be. Both parties do think that sometimes the State should prosecute. But this is not inconsistent with the proposition that the man prosecuted did the right thing in breaking the law.

The paradoxes seem genuine because the two questions are not usually distinguished, and the orthodox position is presented as a general solution to the problem of civil disobedience. But once the distinction is made, it is apparent that the position has been so widely accepted only because, when it is applied, it is treated as an answer to the second question but not the first. The crucial distinction is obscured by the troublesome idea of a right to conscience; this idea has been at the centre of most recent discussions of political obligation, but it is a red herring drawing us away from the crucial political questions. The state of a man's conscience may be decisive, or central, when the issue is whether he does something morally wrong in breaking the law; but it need not be decisive or even central when the issue is whether he has a right, in the strong sense of that term, to do so. A man does not have the right, in that sense, to do whatever his conscience demands, but he may have the right, in that sense, to do something even though his conscience does not demand it.

If that is true, then there has been almost no serious attempt to answer the questions that almost everyone means to ask. We can make a fresh start by stating these questions more clearly. Does an American ever have the right, in a strong sense, to do something which is against the law? If so, when? In order to answer these questions put in that way, we must try to become clearer about the implications of the idea, mentioned earlier, that citizens have at least some rights against their government.

I said that in the United States citizens are supposed to have certain fundamental rights against their Government, certain moral rights made into legal rights by the Constitution. If this idea is significant, and worth bragging about, then these rights must be rights in the strong sense I just described. The claim that citizens have a right to free speech must imply that it would be wrong for the Government to stop them from speaking, even when the Government believes that what they will say will cause more harm than good. The claim cannot mean, on the prisoner-of-war analogy, only that citizens do no wrong in speaking their minds, though the Government reserves the right to prevent them from doing so.

This is a crucial point, and I want to labour it. Of course a responsible government must be ready to justify anything it does, particularly when it limits the liberty of its citizens. But normally it is a sufficient justification, even for an act that limits liberty, that the act is calculated to increase what the philosophers call general utility – that it is calculated to produce more overall benefit than harm. So, though the New York City government needs a justification for forbidding motorists to drive up Lexington Avenue, it is sufficient justification if the proper officials believe, on sound evidence, that the gain to the many will outweigh the inconvenience to the few. When individual citizens are said to have rights against the Government, however, like the right of free speech, that must mean that this sort of justification is not enough. Otherwise the claim would not argue that individuals have special protection against the law when their rights are in play, and that is just the point of the claim.

Not all legal rights, or even Constitutional rights, represent moral rights against the Government. I now have the legal right to drive either way on Fifty-seventh Street, but the Government would do no wrong to make that street one-way if it thought it in the general interest to do so. I have a Constitutional right to vote for a congressman every two years, but the national and state governments would do no wrong if, following the amendment procedure, they made a congressman's term four years instead of two, again on the basis of a judgment that this would be for the general good.

But those Constitutional rights that we call fundamental, like the right of free speech, are supposed to represent rights against the Government in the strong sense; that is the point of the boast that our legal system respects the fundamental rights of the citizen. If citizens have a moral right of free speech, then governments would do wrong to repeal the First Amendment that guarantees it, even if they were persuaded that the majority would be better off if speech were curtailed.

I must not overstate the point. Someone who claims that citizens have a right against the Government need not go so far as to say that the State is *never* justified in overriding that right. He might say, for example, that although citizens have a right to free speech, the Government may override that right when necessary to protect the rights of others, or to prevent a catastrophe, or even to obtain a clear and major public benefit (though if he acknowledged this last as a possible justification he would be treating the right in question as not among the most important or fundamental). What he cannot do is to say that the Government is justified in overriding a right on the minimal grounds that would be sufficient if no such right existed. He cannot say that the Government is entitled to act on no more than a judgment that its act is likely to produce, overall, a benefit to the community. That admission would make his claim of a right pointless, and would show him to be using some sense of 'right' other than the strong sense necessary to give his claim the political importance it is normally taken to have.

But then the answers to our two questions about disobedience seem plain, if unorthodox. In our society a man does sometimes have the right, in the strong sense, to disobey a law. He has that right whenever that law wrongly invades his rights against the Government. If he has a moral right to free speech, that is, then he has a moral right to break any law that the Government, by virtue of his right, had no right to adopt. The right to disobey the law is not a separate right, having something to do with conscience, additional to other rights against the Government. It is simply a feature of these rights against the Government, and it cannot be denied in principle without denying that any such rights exist.

These answers seem obvious once we take rights against the Government to be rights in the strong sense I described. If I have a right to speak my mind on political issues, then the Government does wrong to make it illegal for me to do so, even if it thinks this is in the general interest. If, nevertheless, the Government does make my act illegal, then it does a further wrong to enforce that law against me. My right against the Government means that it is wrong for the Government to stop me from speaking; the Government cannot make it right to stop me just by taking the first step.

This does not, of course, tell us exactly what rights men do have against the Government. It does not tell us whether the right of free speech includes the right of demonstration. But it does mean that passing a law cannot affect such rights as men do have, and that is of crucial importance, because it dictates the attitude that an individual is entitled to take toward his personal decision when civil disobedience is in question.

Both conservatives and liberals suppose that in a society which is generally decent everyone has a duty to obey the law, whatever it is. That is the source of the 'general duty' clause in the orthodox position, and though liberals believe that this duty can sometimes be 'overridden', even they suppose, as the orthodox position maintains, that the duty of obedience remains in some submerged form, so that a man does well to accept punishment in recognition of that duty. But this general duty is almost incoherent in a society that recognizes rights. If a man

believes he has a right to demonstrate, then he must believe that it would be wrong for the Government to stop him, with or without benefit of a law. If he is entitled to believe that, then it is silly to speak of a duty to obey the law as such, or of a duty to accept the punishment that the State has no right to give.

Conservatives will object to the short work I have made of their point. They will argue that even if the Government was wrong to adopt some law, like a law limiting speech, there are independent reasons why the Government is justified in enforcing the law once adopted. When the law forbids demonstration, then, so they argue, some principle more important than the individual's right to speak is brought into play, namely the principle of respect for law. If a law, even a bad law, is left unenforced, then respect for law is weakened, and society as a whole suffers. So an individual loses his moral right to speak when speech is made criminal, and the Government must, for the common good and for the general benefit, enforce the law against him.

But this argument, though popular, is plausible only if we forget what it means to say that an individual has a right against the State. It is far from plain that civil disobedience lowers respect for law, but even if we suppose that it does, this fact is irrelevant. The prospect of utilitarian gains cannot justify preventing a man from doing what he has a right to do, and the supposed gains in respect for law are simply utilitarian gains. There would be no point in the boast that we respect individual rights unless that involved some sacrifice, and the sacrifice in question must be that we give up whatever marginal benefits our country would receive from overriding these rights when they prove inconvenient. So the general benefit cannot be a good ground for abridging rights, even when the benefit in question is a heightened respect for law.

But perhaps I do wrong to assume that the argument about respect for law is only an appeal to general utility. I said that a state may be justified in overriding or limiting rights on other grounds, and we must ask, before rejecting the conservative position, whether any of these apply. The most important – and least well understood – of these other grounds invokes the notion of *competing rights* that would be jeopardized if the right in question were not limited. Citizens have personal rights to the State's protection as well as personal rights to be free from the State's interference, and it may be necessary for the Government to choose between these two sorts of rights. The law of defamation, for example, limits the personal right of any man to say what he thinks, because it requires him to have good grounds for what he says. But this law is justified, even for those who think that it does invade a personal right, by the fact that it protects the right of others not to have their reputations ruined by a careless statement.

The individual rights that our society acknowledges often conflict in this way, and when they do it is the job of government to discriminate. If the Government makes the right choice, and protects the more important at the cost of the less, then it has not weakened or cheapened the notion of a right; on the contrary it would have done so had it failed to protect the more important of the two. So we must acknowledge that the Government has a reason for limiting rights if it plausibly believes that a competing right is more important.

May the conservative seize on this fact? He might argue that I did wrong to characterize his argument as one that appeals to the general benefit, because it appeals instead to competing rights, namely the moral right of the majority to have its laws enforced, or the right of society to maintain the degree of order and security it wishes. These are the rights, he would say, that must be weighed against the individual's right to do what the wrongful law prohibits.

But this new argument is confused, because it depends on yet another ambiguity in the language of rights. It is true that we speak of the 'right' of society to do what it wants, but this cannot be a 'competing right' of the sort that may justify the invasion of a right against the Government. The existence of rights against the Government would be jeopardized if the Government were able to defeat such a right by appealing to the right of a democratic majority to work its will. A right against the Government must be a right to do something even when the majority thinks it would be wrong to do it, and even when the majority would be worse off for having it done. If we now say that society has a right to do whatever is in the general benefit, or the right to preserve whatever sort of environment the majority wishes to live in, and we mean that these are the sort of rights that provide justification for overruling any rights against the Government that may conflict, then we have annihilated the latter rights.

In order to save them, we must recognize as competing rights only the rights of other members of the society as individuals. We must distinguish the 'rights' of the majority as such, which cannot count as a justification for overruling individual rights, and the personal rights of members of a majority, which might well count. The test we must use is this. Someone has a competing right to protection, which must be weighed against an

individual right to act, if that person would be entitled to demand that protection from his government on his own title, as an individual, without regard to whether a majority of his fellow citizens joined in the demand.

It cannot be true, on this test, that anyone has a right to have all the laws of the nation enforced. He has a right to have enforced only those criminal laws, for example, that he would have a right to have enacted if they were not already law. The laws against personal assault may well fall into that class. If the physically vulnerable members of the community – those who need police protection against personal violence – were only a small minority, it would still seem plausible to say that they were entitled to that protection. But the laws that provide a certain level of quiet in public places, or that authorize and finance a foreign war, cannot be thought to rest on individual rights. The timid lady on the streets of Chicago is not entitled to just the degree of quiet that now obtains, nor is she entitled to have boys drafted to fight in wars she approves. There are laws – perhaps desirable laws – that provide these advantages for her, but the justification for these laws, if they can be justified at all, is the common desire of a large majority, not her personal right. If, therefore, these laws do abridge someone else's moral right to protest, or his right to personal security, she cannot urge a competing right to justify the abridgement. She has no personal right to have such laws passed, and she has no competing right to have them enforced either.

So the conservative cannot advance his argument much on the ground of competing rights, but he may want to use another ground. A government, he may argue, may be justified in abridging the personal rights of its citizens in an emergency, or when a very great loss may be prevented, or, perhaps, when some major benefit can clearly be secured. If the nation is at war, a policy of censorship may be justified even though it invades the right to say what one thinks on matters of political controversy. But the emergency must be genuine. There must be what Oliver Wendell Holmes described as a clear and present danger, and the danger must be one of magnitude.

Can the conservative argue that when any law is passed, even a wrongful law, this sort of justification is available for enforcing it? His argument might be something of this sort. If the Government once acknowledges that it may be wrong – that the legislature might have adopted, the executive approved, and the courts left standing, a law that in fact abridges important rights – then this admission will lead not simply to a marginal decline in respect for law, but to a crisis of order. Citizens may decide to obey only those laws they personally approve, and that is anarchy. So the Government must insist that whatever a citizen's rights may be before a law is passed and upheld by the courts, his rights thereafter are determined by that law.

But this argument ignores the primitive distinction between what may happen and what will happen. If we allow speculation to support the justification of emergency or decisive benefit, then, again, we have annihilated rights. We must, as Learned Hand said, discount the gravity of the evil threatened by the likelihood of reaching that evil. I know of no genuine evidence to the effect that tolerating some civil disobedience, out of respect for the moral position of its authors, will increase such disobedience, let alone crime in general. The case that it will must be based on vague assumptions about the contagion of ordinary crimes, assumptions that are themselves unproved, and that are in any event largely irrelevant. It seems at least as plausible to argue that tolerance will increase respect for officials and for the bulk of the laws they promulgate, or at least retard the rate of growing disrespect.

If the issue were simply the question whether the community would be marginally better off under strict law enforcement, then the Government would have to decide on the evidence we have, and it might not be unreasonable to decide, on balance, that it would. But since rights are at stake, the issue is the very different one of whether tolerance would destroy the community or threaten it with great harm, and it seems to me simply mindless to suppose that the evidence makes that probable or even conceivable.

The argument from emergency is confused in another way as well. It assumes that the Government must take the position either that a man never has the right to break the law, or that he always does. I said that any society that claims to recognize rights at all must abandon the notion of a general duty to obey the law that holds in all cases. This is important, because it shows that there are no short cuts to meeting a citizen's claim of right. If a citizen argues that he has a moral right not to serve in the Army, or to protest in a way he finds effective, then an official who wants to answer him, and not simply bludgeon him into obedience, must respond to the particular point he makes, and cannot point to the draft law or a Supreme Court decision as having even special, let alone decisive, weight. Sometimes an official who considers the citizen's moral arguments in good faith will be persuaded that the citizen's claim is plausible, or even right. It does not follow, however, that he will always be persuaded or that he always should be.

I must emphasize that all these propositions concern the strong sense of right, and they therefore leave open important questions about the right thing to do. If a man believes he has the right to break the law, he must then ask whether he does the right thing to exercise that right. He must remember that reasonable men can differ about whether he has a right against the Government, and therefore the right to break the law, that he thinks he has; and therefore that reasonable men can oppose him in good faith. He must take into account the various consequences his acts will have, whether they involve violence, and such other considerations as the context makes relevant; he must not go beyond the rights he can in good faith claim, to acts that violate the rights of others.

On the other hand, if some official, like a prosecutor, believes that the citizen does *not* have the right to break the law, then *he* must ask whether he does the right thing to enforce it. In the article I mentioned earlier I argued that certain features of our legal system, and in particular the fusion of legal and moral issues in our Constitution, mean that citizens often do the right thing in exercising what they take to be moral rights to break the law, and that prosecutors often do the right thing in failing to prosecute them for it. I will not repeat those arguments here; instead I want to ask whether the requirement that Government take its citizens' rights seriously has anything to do with the crucial question of what these rights are.

III Controversial Rights

The argument so far has been hypothetical: if a man has a particular moral right against the Government, that right survives contrary legislation or adjudication. But this does not tell us what rights he has, and it is notorious that reasonable men disagree about that. There is wide agreement on certain clear-cut cases; almost everyone who believes in rights at all would admit, for example, that a man has a moral right to speak his mind in a non-provocative way on matters of political concern, and that this is an important right that the State must go to great pains to protect. But there is great controversy as to the limits of such paradigm rights, and the so-called 'anti-riot' law involved in the Chicago Seven trial is a case in point.

The defendants were accused of conspiring to cross state lines with the intention of causing a riot. This charge is vague – perhaps unconstitutionally vague – but the law apparently defines as criminal emotional speeches which argue that violence is justified in order to secure political equality. Does the right of free speech protect this sort of speech? That, of course, is a legal issue, because it invokes the free-speech clause of the First Amendment of the Constitution. But it is also a moral issue, because, as I said, we must treat the First Amendment as an attempt to protect a moral right. It is part of the job of governing to 'define' moral rights through statutes and judicial decisions, that is, to declare officially the extent that moral rights will be taken to have in law. Congress faced this task in voting on the anti-riot bill, and the Supreme Court will face it if the Chicago Seven case goes that far. How should the different departments of government go about defining moral rights?

They should begin with a sense that whatever they decide might be wrong. History and their descendants may judge that they acted unjustly when they thought they were right. If they take their duty seriously, they must try to limit their mistakes, and they must therefore try to discover where the dangers of mistake lie.

They might choose one of two very different models for this purpose. The first model recommends striking a balance between the rights of the individual and the demands of society at large. If the Government *infringes* on a moral right (for example, by defining the right of free speech more narrowly than justice requires), then it has done the individual a wrong. On the other hand, if the Government *inflates* a right (by defining it more broadly than justice requires) then it cheats society of some general benefit, like safe streets, that it is perfectly entitled to have. So a mistake on one side is as serious as a mistake on the other. The course of government is to steer to the middle, to balance the general good and personal rights, giving to each its due.

When the Government, or any of its branches, defines a right, it must bear in mind, according to the first model, the social cost of different proposals and make the necessary adjustments. It must not grant the same freedom to noisy demonstrations as it grants to calm political discussion, for example, because the former causes much more trouble than the latter. Once it decides how much of a right to recognize, it must enforce its decision to the full. That means permitting an individual to act within his rights, as the Government has defined them, but not beyond, so that if anyone breaks the law, even on grounds of conscience, he must be punished. No doubt any government will make mistakes, and will regret decisions once taken. That is inevitable. But this middle policy will ensure that errors on one side will balance out errors on the other over the long run.

The first model, described in this way, has great plausibility, and most laymen and lawyers, I think, would respond to it warmly. The metaphor of balancing the public interest against personal claims is established in our political and judicial rhetoric, and this metaphor gives the model both familiarity and appeal. Nevertheless, the first model is a false one, certainly in the case of rights generally regarded as important, and the metaphor is the heart of its error.

The institution of rights against the Government is not a gift of God, or an ancient ritual, or a national sport. It is a complex and troublesome practice that makes the Government's job of securing the general benefit more difficult and more expensive, and it would be a frivolous and wrongful practice unless it served some point. Anyone who professes to take rights seriously, and who praises our Government for respecting them, must have some sense of what that point is. He must accept, at the minimum, one or both of two important ideas. The first is the vague but powerful idea of human dignity. This idea, associated with Kant, but defended by philosophers of different schools, supposes that there are ways of treating a man that are inconsistent with recognizing him as a full member of the human community, and holds that such treatment is profoundly unjust.

The second is the more familiar idea of political equality. This supposes that the weaker members of a political community are entitled to the same concern and respect of their government as the more powerful members have secured for themselves, so that if some men have freedom of decision whatever the effect on the general good, then all men must have the same freedom. I do not want to defend or elaborate these ideas here, but only to insist that anyone who claims that citizens have rights must accept ideas very close to these.[3]

It makes sense to say that a man has a fundamental right against the Government, in the strong sense, like free speech, if that right is necessary to protect his dignity, or his standing as equally entitled to concern and respect, or some other personal value of like consequence. It does not make sense otherwise.

So if rights make sense at all, then the invasion of a relatively important right must be a very serious matter. It means treating a man as less than a man, or as less worthy of concern than other men. The institution of rights rests on the conviction that this is a grave injustice, and that it is worth paying the incremental cost in social policy or efficiency that is necessary to prevent it. But then it must be wrong to say that inflating rights is an serious as invading them. If the Government errs on the side of the individual, then it simply pays a little more in social efficiency than it has to pay; it pays a little more, that is, of the same coin that it has already decided must be spent. But if it errs against the individual it inflicts an insult upon him that, on its own reckoning, it is worth a great deal of that coin to avoid.

So the first model is indefensible. It rests, in fact, on a mistake I discussed earlier, namely the confusion of society's rights with the rights of members of society. 'Balancing' is appropriate when the Government must choose between competing claims of right – between the Southerner's claim to freedom of association, for example, and the black man's claim to an equal education. Then the Government can do nothing but estimate the merits of the competing claims, and act on its estimate. The first model assumes that the 'right' of the majority is a competing right that must be balanced in this way; but that, as I argued before, is a confusion that threatens to destroy the concept of individual rights. It is worth noticing that the community rejects the first model in that area where the stakes for the individual are highest, the criminal process. We say that it is better that a great many guilty men go free than that one innocent man be punished, and that homily rests on the choice of the second model for government.

The second model treats abridging a right as much more serious than inflating one, and its recommendations follow from that judgment. It stipulates that once a right is recognized in clear-cut cases, then the Government should act to cut off that right only when some compelling reason is presented, some reason that is consistent with the suppositions on which the original right must be based. It cannot be an argument for curtailing a right, once granted, simply that society would pay a further price in extending it. There must be something special about that further cost, or there must be some other feature of the case, that makes it sensible to say that although great social cost is warranted to protect the original right, this particular cost is not necessary. Otherwise, the Government's failure to extend the right will show that its recognition of the right in the original case is a sham, a promise that it intends to keep only until that becomes inconvenient.

How can we show that a particular cost is not worth paying without taking back the initial recognition of a right? I can think of only three sorts of grounds that can consistently be used to limit the definition of a particular right. First, the Government might show that the values protected by the original right are not really at stake in the marginal case, or are at stake only in some attenuated form. Second, it might show that if the right is defined to

include the marginal case, then some competing right, in the strong sense I described earlier, would be abridged. Third, it might show that if the right were so defined, then the cost to society would not be simply incremental, but would be of a degree far beyond the cost paid to grant the original right, a degree great enough to justify whatever assault on dignity or equality might be involved.

It is fairly easy to apply these grounds to one problem the Supreme Court has recently faced, and must face soon again. The draft law provides an exemption for conscientious objectors, but this exemption, as interpreted by the draft boards, has been limited to those who object to *all* wars on *religious* grounds. If we suppose that the exemption is justified on the ground that an individual has a moral right not to kill in violation of his own principles, then the question is raised whether it is proper to exclude those whose morality is not based on religion, or whose morality is sufficiently complex to distinguish among wars. The Court has just held that the draft boards are wrong to exclude the former, and it will soon be asked to decide whether they are wrong to exclude the latter as well.

None of the three grounds I listed can justify either of these exclusions. The invasion of personality in forcing men to kill when they believe killing immoral is just as great when these beliefs are based on secular grounds, or take account of the fact that wars differ in morally relevant ways, and there is no pertinent difference in competing rights or in national emergency. There are differences among the cases, of course, but they are insufficient to justify the distinction. A government that is secular on principle cannot prefer a religious to a non-religious morality as such. There are utilitarian arguments in favour of limiting the exception to religious or universal grounds – an exemption so limited may be less expensive to administer, and may allow easier discrimination between sincere and insincere applicants. But these utilitarian reasons are irrelevant, because they cannot count as grounds for limiting a right.

What about the anti-riot law, as applied in the Chicago trial? Does that law represent an improper limitation of the right to free speech, supposedly protected by the First Amendment? If we were to apply the first model for government to this issue, the argument for the anti-riot law would look strong. But if we set aside talk of balancing as inappropriate, and turn to the proper grounds for limiting a right, then the argument becomes a great deal weaker. The original right of free speech must suppose that it is an assault on human personality to stop a man from expressing what he honestly believes, particularly on issues affecting how he is governed. Surely the assault is greater, and not less, when he is stopped from expressing those principles of political morality that he holds most passionately, in the face of what he takes to be outrageous violations of these principles.

It may be said that the anti-riot law leaves him free to express these principles in a non-provocative way. But that misses the point of the connection between expression and dignity. A man cannot express himself freely when he cannot match his rhetoric to his outrage, or when he must trim his sails to protect values he counts as nothing next to those he is trying to vindicate. It is true that some political dissenters speak in ways that shock the majority, but it is arrogant for the majority to suppose that the orthodox methods of expression are the proper ways to speak, for this is a denial of equal concern and respect. If the point of the right is to protect the dignity of dissenters, then we must make judgments about appropriate speech with the personalities of the dissenters in mind, not the personality of the 'silent' majority for whom the anti-riot law is no restraint at all.

So the argument fails, that the personal values protected by the original right are less at stake in this marginal case. We must consider whether competing rights, or some grave threat to society, nevertheless justify the anti-riot law. We can consider these two grounds together, because the only plausible competing rights are rights to be free from violence, and violence is the only plausible threat to society that the context provides.

I have no right to burn your house, or stone you or your car, or swing a bicycle chain against your skull, even if I find these to be natural means of expression. But the defendants in the Chicago trial were not accused of direct violence; the argument runs that the acts of speech they planned made it likely that others would do acts of violence, either in support of or out of hostility to what they said. Does this provide a justification?

The question would be different if we could say with any confidence how much and what sort of violence the anti-riot law might be expected to prevent. Will it save two lives a year, or two hundred, or two thousand? Two thousand dollars of property, or two hundred thousand, or two million? No one can say, not simply because prediction is next to impossible, but because we have no firm understanding of the process by which demonstration disintegrates into riot, and in particular of the part played by inflammatory speech, as distinct from poverty, police brutality, blood lust, and all the rest of human and economic failure. The Government must try, of course, to reduce the violent waste of lives and property, but it

must recognize that any attempt to locate and remove a cause of riot, short of a reorganization of society, must be an exercise in speculation, trial, and error. It must make its decisions under conditions of high uncertainty, and the institution of rights, taken seriously, limits its freedom to experiment under such conditions.

It forces the Government to bear in mind that preventing a man from speaking or demonstrating offers him a certain and profound insult, in return for a speculative benefit that may in any event be achieved in other if more expensive ways. When lawyers say that rights may be limited to protect other rights, or to prevent catastrophe, they have in mind cases in which cause and effect are relatively clear, like the familiar example of a man falsely crying 'Fire!' in a crowded theatre.

But the Chicago story shows how obscure the causal connections can become. Were the speeches of Hoffman or Rubin necessary conditions of the riot? Or had thousands of people come to Chicago for the purposes of rioting anyway, as the Government also argues? Were they in any case sufficient conditions? Or could the police have contained the violence if they had not been so busy contributing to it, as the staff of the President's Commission on Violence said they were?

These are not easy questions, but if rights mean anything, then the Government cannot simply assume answers that justify its conduct. If a man has a right to speak, if the reasons that support that right extend to provocative political speech, and if the effects of such speech on violence are unclear, then the Government is not entitled to make its first attack on that problem by denying that right. It may be that abridging the right to speak is the least expensive course, or the least damaging to police morale, or the most popular politically. But these are utilitarian arguments in favour of starting one place rather than another, and such arguments are ruled out by the concept of rights.

This point may be obscured by the popular belief that political activists look forward to violence and 'ask for trouble' in what they say. They can hardly complain, in the general view, if they are taken to be the authors of the violence they expect, and treated accordingly. But this repeats the confusion I tried to explain earlier between having a right and doing the right thing. The speaker's motives may be relevant in deciding whether he does the right thing in speaking passionately about issues that may inflame or enrage the audience. But if he has a right to speak, because the danger in allowing him to speak is speculative, his motives cannot count as independent evidence in the argument that justifies stopping him.

But what of the individual rights of those who will be destroyed by a riot, of the passer-by who will be killed by a sniper's bullet or the shopkeeper who will be ruined by looting? To put the issue in this way, as a question of competing rights, suggests a principle that would undercut the effect of uncertainty. Shall we say that some rights to protection are so important that the Government is justified in doing all it can to maintain them? Shall we therefore say that the Government may abridge the rights of others to act when their acts might simply increase the risk, by however slight or speculative a margin, that some person's right to life or property will be violated?

Some such principle is relied on by those who oppose the Supreme Court's recent liberal rulings on police procedure. These rulings increase the chance that a guilty man will go free, and therefore marginally increase the risk that any particular member of the community will be murdered, raped, or robbed. Some critics believe that the Court's decisions must therefore be wrong.

But no society that purports to recognize a variety of rights, on the ground that a man's dignity or equality may be invaded in a variety of ways, can accept such a principle. If forcing a man to testify against himself, or forbidding him to speak, does the damage that the rights against self-incrimination and the right of free speech assume, then it would be contemptuous for the State to tell a man that he must suffer this damage against the possibility that other men's risk of loss may be marginally reduced. If rights make sense, then the degrees of their importance cannot be so different that some count not at all when others are mentioned.

Of course the Government may discriminate and may stop a man from exercising his right to speak when there is a clear and substantial risk that his speech will do great damage to the person or property of others, and no other means of preventing this are at hand, as in the case of the man shouting 'Fire!' in a theatre. But we must reject the suggested principle that the Government can simply ignore rights to speak when life and property are in question. So long as the impact of speech on these other rights remains speculative and marginal, it must look elsewhere for levers to pull.

IV Why Take Rights Seriously?

I said at the beginning of this essay that I wanted to show what a government must do that professes to recognize individual rights. It must dispense with the claim that citizens never have a right to break its law, and it must

not define citizens' rights so that these are cut off for supposed reasons of the general good. The present Government's policy towards civil disobedience, and its campaign against vocal protest, may therefore be thought to count against its sincerity.

One might well ask, however, whether it is wise to take rights all that seriously after all. America's genius, at least in her own legend, lies in not taking any abstract doctrine to its logical extreme. It may be time to ignore abstractions, and concentrate instead on giving the majority of our citizens a new sense of their Government's concern for their welfare, and of their title to rule.

That, in any event, is what Vice-President Agnew seems to believe. In a recent policy statement on the issue of 'weirdos' and social misfits, he said that the liberals' concern for individual rights was a headwind blowing in the face of the ship of state. That is a poor metaphor, but the philosophical point it expresses is very well taken. He recognizes, as many liberals do not, that the majority cannot travel as fast or as far as it would like if it recognizes the rights of individuals to do what, in the majority's terms, is the wrong thing to do.

The Vice-President supposes that rights are divisive, and that national unity and a new respect for law may be developed by taking them more sceptically. But he is wrong. America will continue to be divided by its social and foreign policy, and if the economy grows weaker the divisions will become more bitter. If we want our laws and our legal institutions to provide the ground rules within which these issues will be contested, then these ground rules must not be the conqueror's law that the dominant class imposes on the weaker, as Marx supposed the law of a capitalist society must be. The bulk of the law – that part which defines and implements social, economic, and foreign policy – cannot be neutral. It must state, in its greatest part, the majority's view of the common good. The institution of rights is therefore crucial, because it represents the majority's promise to the minorities that their dignity and equality will be respected. When the divisions among the groups are most violent, then this gesture, if law is to work, must be most sincere.

The institution requires an act of faith on the part of the minorities, because the scope of their rights will be controversial whenever they are important, and because the officers of the majority will act on their own notions of what these rights really are. Of course these officials will disagree with many of the claims that a minority makes. That makes it all the more important that they take their decisions gravely. They must show that they understand what rights are, and they must not cheat on the full implications of the doctrine. The Government will not re-establish respect for law without giving the law some claim to respect. It cannot do that if it neglects the one feature that distinguishes law from ordered brutality. If the Government does not take rights seriously, then it does not take law seriously either.

Notes

1 'On Not Prosecuting Civil Disobedience', *New York Review of Books* (June 1968).

2 It is not surprising that we sometimes use the concept of having a right to say that others must not interfere with an act and sometimes to say that the act is not the wrong thing to do. Often, when someone has *no* right to do something, like attacking another man physically, it is true *both* that it is the wrong thing to do and that others are entitled to stop it, by demand, if not by force. It is therefore natural to say that someone has a right when we mean to deny *either* of these consequences, as well as when we mean to deny both.

3 He need not consider these ideas to be axiomatic. He may, that is, have reasons for insisting that dignity or equality are important values, and these reasons may be utilitarian. He may believe, for example, that the general good will be advanced, *in the long run*, only if we treat indignity or inequality as very great injustices, and never allow our *opinions* about the general good to justify them. I do not know of any good arguments for or against this sort of 'institutional' utilitarianism, but it is consistent with my point, because it argues that we must treat violations of dignity and equality as special moral crimes, beyond the reach of ordinary utilitarian justification.

22

Basic Rights

Henry Shue

"Negative" Rights and "Positive" Rights

Many Americans would probably be initially inclined to think that rights to subsistence are at least slightly less important than rights to physical security, even though subsistence is at least as essential to survival as security is and even though questions of security do not even arise when subsistence fails. Much official US government rhetoric routinely treats all "economic rights," among which basic subsistence rights are buried amidst many non-basic rights, as secondary and deferrable, although the fundamental enunciation of policy concerning human rights by the then Secretary of State did appear to represent an attempt to correct the habitual imbalance.[1] Now that the same argument in favor of basic rights to both aspects of personal survival, subsistence and security, is before us, we can examine critically some of the reasons why it sometimes appears that although people have basic security rights, the right, if any, to even the physical necessities of existence like minimal health care, food, clothing, shelter, unpolluted water, and unpolluted air is somehow less urgent or less basic.

Frequently it is asserted or assumed that a highly significant difference between rights to physical security and rights to subsistence is that they are respectively "negative" rights and "positive" rights.[2] This position, which I will now try to refute, is considerably more complex than it at first appears. I will sometimes refer to it as the position that subsistence rights are *positive* and *therefore secondary*. Obviously taking the position involves holding that subsistence rights are positive in some respect in which security rights are negative and further claiming that this difference concerning positive/negative is a good enough reason to assign priority to negative rights over positive rights. I will turn shortly to the explanation of this assumed positive/negative distinction. But first I want to lay out all the premises actually needed by the position that subsistence rights are positive and therefore secondary, although I need to undercut only some – strictly speaking, only one – of them in order to cast serious doubt upon the position's conclusions.

The alleged lack of priority for subsistence rights compared to security rights assumes:

1. The distinction between subsistence rights and security rights is (a) sharp and (b) significant.[3]
2. The distinction between positive rights and negative rights is (a) sharp and (b) significant.
3. Subsistence rights are positive.
4. Security rights are negative.

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I am not suggesting that anyone has ever laid out this argument in all the steps it actually needs. On the contrary, a full statement of the argument is the beginning of its refutation – this is an example of the philosophical analogue of the principle that sunlight is the best antiseptic.[4]

In this chapter I will concentrate on establishing that premises 3 and 4 are both misleading. Then I will suggest a set of distinctions among duties that accurately transmits the insight distorted by 3 and 4. Insofar as 3 and 4 are inaccurate, considerable doubt is cast upon 2, although it remains possible that someone can specify some sharply contrasting pair of rights that actually are examples of 2.[5] I will not directly attack premise 1.[6]

Now the basic idea behind the general suggestion that there are positive rights and negative rights seems to have been that one kind of rights (the positive ones) require other people to act positively – to "do something" – whereas another kind of rights (the negative ones) require other people merely to refrain from acting in certain ways – to do nothing that violates the rights. For example, according to this picture, a right to subsistence would be positive because it would require other people, in the last resort, to supply food or clean air to those unable to find, produce, or buy their own; a right to security would be negative because it would require other people merely to refrain from murdering or otherwise assaulting those with the right. The underlying distinction, then, is between acting and refraining from acting; and positive rights are those with correlative duties to act in certain ways and negative rights are those with correlative duties to refrain from acting in certain ways. Therefore, the moral significance, if any, of the distinction between positive rights and negative rights depends upon the moral significance, if any, of the distinction between action and omission of action.[7]

The ordinarily implicit argument for considering rights to subsistence to be secondary would, then, appear to be basically this. Since subsistence rights are positive and require other people to do more than negative rights require – perhaps more than people can actually do – negative rights, such as those to security, should be fully guaranteed first. Then, any remaining resources could be devoted, as long as they lasted, to the positive – and perhaps impossible – task of providing for subsistence. Unfortunately for this argument, neither rights to physical security nor rights to subsistence fit neatly into their assigned sides of the simplistic positive/negative dichotomy. We must consider whether security rights are purely negative and then whether subsistence rights are purely positive. I will try to show (1) that security rights are more "positive" than they are often said to be, (2) that subsistence rights are more "negative" than they are often said to be, and, given (1) and (2), (3) that the distinctions between security rights and subsistence rights, though not entirely illusory, are too fine to support any weighty conclusions, especially the very weighty conclusion that security rights are basic and subsistence rights are not.

In the case of rights to physical security, it may be possible *to avoid violating* someone's rights to physical security yourself by merely refraining from acting in any of the ways that would constitute violations. But it is impossible to *protect* anyone's rights to physical security without taking, or making payments toward the taking of, a wide range of positive actions. For example, at the very least the protection of rights to physical security necessitates police forces; criminal courts; penitentiaries; schools for training police, lawyers, and guards; and taxes to support an enormous system for the prevention, detection, and punishment of violations of personal security.[8] All these activities and institutions are attempts at providing social guarantees for individuals' security so that they are not left to face alone forces that they cannot handle on their own. How much more than these expenditures one thinks would be necessary in order for people actually to be reasonably secure (as distinguished from merely having the cold comfort of knowing that the occasional criminal is punished after someone's security has already been violated) depends on one's theory of violent crime, but it is not unreasonable to believe that it would involve extremely expensive, "positive" programs. Probably no one knows how much positive action would have to be taken in a contemporary society like the United States significantly to reduce the levels of muggings, rapes, murders, and other assaults that violate personal security, and in fact to make people reasonably secure.

Someone might suggest that this blurs rights to physical security with some other type of rights, which might be called rights-to-be-protected-against-assaults-upon-physical-security. According to this distinction, rights to physical security are negative, requiring others only to refrain from assaults, while rights-to-be-protected-against-assaults-upon-physical-security are positive, requiring others to take positive steps to prevent assaults.

Perhaps if one were dealing with some wilderness situation in which individuals' encounters with each other were infrequent and irregular, there might be some point in noting to someone: I am not asking you to cooperate with a system of guarantees to protect me from third parties, but only to refrain from attacking me yourself. But in

an organized society, insofar as there were any such things as rights to physical security that were distinguishable from some other rights-to-be-protected-from-assaults-upon-physical-security, no one would have much interest in the bare rights to physical security. What people want and need, as even Mill partly recognized, is the protection of their rights.[9] Insofar as this frail distinction holds up, it is the rights-to-be-protected-against-assaults that any reasonable person would demand from society. A demand for physical security is not normally a demand simply to be left alone, but a demand to be protected against harm.[10] It is a demand for positive action, or, in the words of our initial account of a right, a demand for social guarantees against at least the standard threats.

So it would be very misleading to say simply that physical security is a negative matter of other people's refraining from violations. Ordinarily it is instead a matter of some people refraining from violations and of third parties being prevented from violations by the positive steps taken by first and second parties. The "negative" refraining may in a given case be less significant than the "positive" preventing – it is almost never the whole story. The end-result of the positive preventative steps taken is of course an enforced refraining from violations, not the performance of any positive action. The central core of the right is a right that others not act in certain ways. But the mere core of the right indicates little about the social institutions needed to secure it, and the core of the right does not contain its whole structure. The protection of "negative rights" requires positive measures, and therefore their actual enjoyment requires positive measures. In any imperfect society enjoyment of a right will depend to some extent upon protection against those who do not choose not to violate it.

Rights to subsistence too are in their own way considerably more complex than simply labeling them "positive" begins to indicate. In fact, their fulfillment involves at least two significantly different types of action. On the one hand, rights to subsistence sometimes do involve correlative duties on the part of others to provide the needed commodities when those in need are helpless to secure a supply for themselves, as, for example, the affluent may have a duty to finance food supplies and transportation and distribution facilities in the case of famine. Even the satisfaction of subsistence rights by such positive action, however, need not be any more expensive or involve any more complex governmental programs than the effective protection of security rights would. A food stamp program, for example, could be cheaper or more expensive than, say, an anti-drug program aimed at reducing muggings and murders by addicts. Which program was more costly or more complicated would depend upon the relative dimensions of the respective problems and would be unaffected by any respect in which security is "negative" and subsistence is "positive." Insofar as any argument for giving priority to the fulfillment of "negative rights" rests on the assumption that actually securing "negative rights" is usually cheaper or simpler than securing "positive rights," the argument rests on an empirical speculation of dubious generality.

The other type of action needed to fulfill subsistence rights is even more difficult to distinguish sharply from the action needed to fulfill security rights. Rights to physical subsistence often can be completely satisfied without the provision by others of any commodities to those whose rights are in question. All that is sometimes necessary is to protect the persons whose subsistence is threatened from the individuals and institutions that will otherwise intentionally or unintentionally harm them. A demand for the fulfillment of rights to subsistence may involve not a demand to be provided with grants of commodities but merely a demand to be provided some opportunity for supporting oneself.[11] The request is not to be supported but to be allowed to be self-supporting on the basis of one's own hard work.

What is striking is the similarity between protection against the destruction of the basis for supporting oneself and protection against assaults upon one's physical security. We can turn now to some examples that clearly illustrate that the honoring of subsistence rights sometimes involves action no more positive than the honoring of security rights does. Some cases in which all that is asked is protection from harm that would destroy the capacity to be self-supporting involve threats to subsistence of a complexity that is not usually noticed with regard to security, although the adequate protection of security would involve analyses and measures more complex than a preoccupation with police and prisons. The complexity of the circumstances of subsistence should not, however, be allowed to obscure the basic fact that essentially all that is being asked in the name of subsistence rights in these examples is protection from destructive acts by other people.

Subsistence Rights and Scarcity

The choice of examples for use in an essentially theoretical discussion that does nevertheless have implications for public policy presents an intractable dilemma.

Hypothetical cases and actual cases each have advantages and disadvantages that are mirror images of each other's. A description of an actual case has the obvious advantage that it is less susceptible to being tailored to suit the theoretical point it is adduced to support, especially if the description is taken from the work of someone other than the proponent of the theoretical point. Its disadvantage is that if the description is in fact an inaccurate account of the case in question, the mistake about what is happening in that case may appear to undercut the theoretical point that is actually independent of what is happening in any single case. Thus the argument about the theoretical point may become entangled in arguments about an individual instance that was at most only one supposed illustration of the more general point.

Hypothetical cases are immune to disputes about whether they accurately depict an independent event, since, being explicitly hypothetical, they are not asserted to correspond to any one real case. But precisely because they are not constrained by the need to remain close to an independent event, they may be open to the suspicion of having been streamlined precisely in order to fit the theoretical point they illustrate and having thereby become atypical of actual cases.

The only solution I can see is to offer, when a point is crucial, an example of each kind. It is vital to the argument of this book to establish that many people's lack of the substance of their subsistence rights – of, that is, the means of subsistence like food – is a deprivation caused by standard kinds of threats that could be controlled by some combination of the mere restraint of second parties and the maintenance of protective institutions by first and third parties, just as the standard threats that deprive people of their physical security could be controlled by restraint and protection against non-restraint. So I will start with a hypothetical case in order to clarify the theoretical point before introducing the partly extraneous complexity of actual events, and then in *Basic Rights* I go on to quote a description of some actual current economic policies that deprive people of subsistence. The hypothetical case is at the level of a single peasant village, and the actual case concerns long-term national economic strategies. Anyone familiar with the causes of malnutrition in underdeveloped countries today will recognize that the following hypothetical case is in no way unusual.[12]

Suppose the largest tract of land in the village was the property of the descendant of a family that had held title to the land for as many generations back as anyone could remember. By absolute standards this peasant was by no means rich, but his land was the richest in the small area that constituted the universe for the inhabitants of this village. He grew, as his father and grandfather had, mainly the black beans that are the staple (and chief – and adequate – source of protein) in the regional diet. His crop usually constituted about a quarter of the black beans marketed in the village. Practically every family grew part of what they needed, and the six men he hired during the seasons requiring extra labor held the only paid jobs in the village – everyone else just worked his own little plot.

One day a man from the capital offered this peasant a contract that not only guaranteed him annual payments for a 10-year lease on his land but also guaranteed him a salary (regardless of how the weather, and therefore the crops, turned out – a great increase in his financial security) to be the foreman for a new kind of production on his land. The contract required him to grow flowers for export and also offered him the opportunity, which was highly recommended, to purchase through the company, with payments in installments, equipment that would enable him to need to hire only two men. The same contract was offered to, and accepted by, most of the other larger landowners in the general region to which the village belonged.

Soon, with the sharp reduction in supply, the price of black beans soared. Some people could grow all they needed (in years of good weather) on their own land, but the families that needed to supplement their own crop with purchases had to cut back their consumption. In particular, the children in the four families headed by the laborers who lost their seasonal employment suffered severe malnutrition, especially since the parents had originally worked as laborers only because their own land was too poor or too small to feed their families.

Now, the story contains no implication that the man from the capital or the peasants-turned-foremen were malicious or intended to do anything worse than single-mindedly pursue their own respective interests. But the outsider's offer of the contract was one causal factor, and the peasant's acceptance of the contract was another causal factor, in producing the malnutrition that would probably persist, barring protective intervention, for at least the decade the contract was to be honored. If the families in the village had rights to subsistence, their rights were being violated. Society, acting presumably by way of the government, ought to protect them from a severe type of active harm that eliminates their ability even to feed themselves.

But was anyone actually harming the villagers, or were they simply suffering a regrettable decline in their fortunes? If someone was violating their rights, who exactly was the violator? Against whom specifically should the government be protecting them? For, we normally make a distinction between violating someone's rights and allowing someone's rights to be violated while simply minding our own business. It makes a considerable difference – to take an example from another set of basic rights – whether I myself assault someone or I merely carry on with my own affairs while allowing a third person to assault someone when I could protect the victim and end the assault. Now, I may have a duty not to allow assaults that I can without great danger to myself prevent or stop, as well as a duty not to assault people myself, but there are clearly two separable issues here. And it is perfectly conceivable that I might have the one duty (to avoid harming) and not the other (to protect from harm by third parties), because they involve two different types of action.[13]

The switch in land-use within the story might then be described as follows. Even if one were willing to grant tentatively that the villagers all seemed to have rights to subsistence, some of which were violated by the malnutrition that some suffered after the switch in crops, no individual or organization can be identified as the violator: not the peasant-turned-foreman, for example, because – let us assume – he did not foresee the "systemic" effects of his individual choice; not the business representative from the capital because – let us assume – although he was knowledgeable enough to know what would probably happen, it would be unrealistically moralistic to expect him to forgo honest gains for himself and the company he represented because the gains had undesired, even perhaps regretted, "side-effects"; not any particular member of the governmental bureaucracy because – let us assume – no one had been assigned responsibility for maintaining adequate nutrition in this particular village. The local peasant and the business representative were both minding their own business in the village, and no one in the government had any business with this village. The peasant and the representative may have attended to their own affairs while harm befell less fortunate villagers, but allowing harm to occur without preventing it is not the same as directly inflicting it yourself. The malnutrition was just, literally, unfortunate: bad luck, for which no one could fairly be blamed. The malnutrition was, in effect, a natural disaster – was, in the obnoxious language of insurance law, an act of God. Perhaps the village was, after all, becoming over-populated.[14]

But, of course, the malnutrition resulting from the new choice of crop was not a natural disaster. The comforting analogy does not hold. The malnutrition was a social disaster. The malnutrition was the product of specific human decisions permitted by the presence of specific social institutions and the absence of others, in the context of the natural circumstances, especially the scarcity of land upon which to grow food, that were already given before the decisions were made. The harm in question, the malnutrition, was not merely allowed to happen by the parties to the flower-growing contract. The harm was partly caused by the requirement in the contract for a switch away from food, by the legality of the contract, and by the performance of the required switch in crops. If there had been no contract or if the contract had not required a switch away from food for local consumption, there would have been no malnutrition as things were going.[15] In general, when persons take an action that is sufficient in some given natural and social circumstances to bring about an undesirable effect, especially one that there is no particular reason to think would otherwise have occurred, it is perfectly normal to consider their action to be one active cause of the harm. The parties to the contract partly caused the malnutrition.

But the society could have protected the villagers by countering the initiative of the contracting parties in any one of a number of ways that altered the circumstances, and the absence of the appropriate social guarantees is another cause of the malnutrition. Such contracts could, for example, have already been made illegal. Or they could have been allowed but managed or taxed in order to compensate those who would otherwise predictably be damaged by them. Exactly what was done would be, *for the most part*, an economic and political question.[16] But it is possible to have social guarantees against the malnutrition that is repeatedly caused in such standard, predictable ways.

Is a right to subsistence in such a case, then, a positive right in any important ways that a right to security is not? Do we actually find a contrast of major significance? No. As in the cases of the threats to physical security that we normally consider, the threat to subsistence is human activity with largely predictable effects.[17] Even if, as we tend to assume, the motives for deprivations of security tend to be vicious while the motives for deprivations of subsistence tend to be callous, the people affected usually need protection all the same. The design, building, and maintenance of institutions and practices that protect people's subsistence against the callous – and even

the merely over-energetic – is no more and no less positive than the conception and execution of programs to control violent crimes against the person. It is not obvious which, if either, it is more realistic to hope for or more economical to pursue. It is conceivable, although I doubt if anyone really knows, that the two are more effectively and efficiently pursued together. Neither looks simple, cheap, or "negative."

This example of the flower contract is important in part because, at a very simple level, it is in fact typical of much of what is happening today among the majority of the people in the world, who are poor and rural, and are threatened by forms of "economic development" that lower their own standard of living.[18] But it is also important because, once again in a very simple way, it illustrates the single most critical fact about rights to subsistence; where subsistence depends upon tight supplies of essential commodities (like food), a change in supply can have, often by way of intermediate price effects, an indirect but predictable and devastating effect on people's ability to survive. A change in supply can transport self-supporting people into helplessness and, if no protection against the change is provided, into malnutrition or death. Severe harm to some people's ability to maintain themselves can be caused by changes in the use to which other people put vital resources (like land) they control. In such cases even someone who denied that individuals or organizations have duties to supply commodities to people who are helpless to obtain them for themselves, might grant that the government ought to execute the society's duty of protecting people from having their ability to maintain their own survival destroyed by the actions of others. If this protection is provided, there will be much less need later to provide commodities themselves to compensate for deprivations.

What transmits the effect in such cases is the local scarcity of the vital commodity. Someone might switch thousands of acres from food to flowers without having any effect on the diet of anyone else where the supply of food was adequate to prevent a significant price rise in response to the cut in supply. And it goes without saying that the price rises are vitally important only if the income and wealth of at least some people is severely limited, as of course it is in every society, often for the rural majority. It is as if an abundant supply sometimes functions as a sponge to absorb the otherwise significant effect on other people, but a tight supply (against a background of limited income and wealth) sometimes functions as a conductor to transmit effects to others, who feel them sharply.

It is extremely difficult merely to mind one's own business amidst a scarcity of vital commodities. It is illusory to think that this first commandment of liberalism can always be obeyed. The very scarcity draws people into contact with each other, destroys almost all area for individual maneuver, and forces people to elbow each other in order to move forward. The tragedy of scarcity, beyond the deprivations necessitated by the scarcity itself, is that scarcity tends to make each one's gain someone else's loss. One can act for oneself only by acting against others, since there is not enough for all. Amidst abundance of food a decision to grow flowers can be at worst a harmless act and quite likely a socially beneficial one. But amidst a scarcity of food, due partly to a scarcity of fertile land, an unmalicious decision to grow flowers can cause death – unless there are social guarantees for adequate nutrition. A call for social guarantees for subsistence in situations of scarcity is not a call for intervention in what were formerly private affairs.

Avoidance, Protection, and Aid

Still, it is true that sometimes fulfilling a right does involve transferring commodities to the person with the right and sometimes it merely involves not taking commodities away. Is there not some grain of truth obscured by the dichotomy between negative and positive rights? Are there not distinctions here that it is useful to make?

The answer, I believe, is: yes, there are distinctions, but they are not distinctions between rights. The useful distinctions are among duties, and there are no one-to-one pairings between kinds of duties and kinds of rights. The complete fulfillment of each kind of right involves the performance of multiple kinds of duties. This conceptual change has, I believe, important practical implications, although it will be only in chapter 7 [of *Basic Rights*] that the implications can begin to be illustrated. In the remainder of this chapter I would like to tender a very simple tripartite typology of duties. For all its own simplicity, it goes considerably beyond the usual assumption that for every right there is a single correlative duty, and suggests instead that for every basic right – and many other rights as well – there are three types of duties, all of which must be performed if the basic right is to be fully honored but not all of which must necessarily be performed by the same individuals or institutions. This latter point opens the possibility of distributing each of the three kinds of duty somewhat differently and perhaps confining any difficulties about the correlativity

of subsistence rights and their accompanying duties to fewer than all three kinds of duties.

So I want to suggest that with every basic right, three types of duties correlate:

(I) Duties to *avoid* depriving.
(II) Duties to *protect* from deprivation.
(III) Duties to *aid* the deprived.

This may be easier to see in the case of the more familiar basic right, the right to physical security (the right not to be tortured, executed, raped, assaulted, etc.). For every person's right to physical security, there are three correlative duties:

(I) Duties not to eliminate a person's security – duties to *avoid* depriving.
(II) Duties to protect people against deprivation of security by other people – duties to *protect* from deprivation.
(III) Duties to provide for the security of those unable to provide for their own – duties to *aid* the deprived.

Similarly, for every right to subsistence there are:

(I) Duties not to eliminate a person's only available means of subsistence – duties to *avoid* depriving.
(II) Duties to protect people against deprivation of the only available means of subsistence by other people – duties to *protect* from deprivation.
(III) Duties to provide for the subsistence of those unable to provide for their own – duties to *aid* the deprived.

If this suggestion is correct, the common notion that *rights* can be divided into rights to forbearance (so-called negative rights), as if some rights have correlative duties only to avoid depriving, and rights to aid (so-called positive rights), as if some rights have correlative duties only to aid, is thoroughly misguided. This misdirected simplification is virtually ubiquitous among contemporary North Atlantic theorists and is, I think, all the more pernicious for the degree of unquestioning acceptance it has now attained. It is duties, not rights, that can be divided among avoidance and aid, and protection. And – this is what matters – every basic right entails duties of all three types. Consequently the attempted division of rights, rather than duties, into forbearance and aid (and protection, which is often understandably but unhelpfully blurred into avoidance, since protection is partly, but only partly, the enforcement of avoidance) can only breed confusion.

It is impossible for any basic right – however "negative" it has come to seem – to be fully guaranteed unless all three types of duties are fulfilled. The very most "negative"-seeming right to liberty, for example, requires positive action by society to protect it and positive action by society to restore it when avoidance and protection both fail. This by no means implies, as I have already mentioned, that all three types of duties fall upon everyone else or even fall equally upon everyone upon whom they do fall. Although this tripartite analysis of duties is, I believe, perfectly general, I will focus here upon the duties correlative to subsistence rights: subsistence duties.

The Generality of the Tripartite Analysis

However, perhaps a brief word on the general issue is useful before turning to a fairly detailed analysis of the threefold duties correlative to the rights that most concern us: subsistence rights. Obviously theses of three ascending degrees of generality might be advanced:

- All subsistence rights involve threefold correlative duties.
- All basic rights involve threefold correlative duties.
- Most moral rights involve threefold correlative duties.

I subscribe to all three theses. But naturally the support will be most thorough for the first thesis and least thorough for the last. For the most part I am content to leave matters at that, because the only point that I am concerned fully to establish is the priority of subsistence rights, that is, their equal priority with all other basic rights. Consequently, the arguments need, strictly speaking, to be thorough only for subsistence rights. But a contrasting pair of observations are also in order.

On the one hand, the argument here is from the particular to the general, not the converse. It is not because I assumed that normal rights involve some, or threefold, duties that I concluded that subsistence rights involve some, and threefold, duties. I explored subsistence rights, as we are about to do, and found that they can be fully accounted for only by means of admitting three kinds of correlated duties. I looked at the same time at security rights and, in Chapter 3 of *Basic Rights*, at rights

to liberty and found again that an adequate explanation involves all three kinds of multiply interrelated duties, thus coming to suspect that all basic rights, at the very least, require the same tripartite analysis of the duty side of the coin.

On the other hand, on the basis of these detailed examinations of these three rights I am indeed tempted to recommend that the most general thesis be made analytically true, that is, that any right not involving the threefold duties be acknowledged to be an exceptional case. If the account of a right given at the beginning of chapter 1 of *Basic Rights* were made a strict definition, then it would do just this. If a right provides the rational basis for a justified demand that the actual enjoyment of the substance of the right be socially guaranteed against standard threats, then a right provides the rational basis for insisting upon the performance, as needed, of duties to avoid, duties to protect, and duties to aid, as they will shortly be explained. This picture does seem to me to fit all the standard cases of moral rights.[19] If, however, someone can give clear counter-examples to the final step of generalization (the move from duties for basic rights to duties for moral rights generally), I can see little cause for concern, provided the admission of rights that lack some kinds of correlative duties, to the realm of non-basic rights, is not allowed to devalue the coinage of rights generally.

Subsistence Duties

The first type of subsistence duty is neither a duty to provide help nor a duty to protect against harm by third parties but is the most nearly "negative" or passive kind of duty that is possible: a duty simply not to take actions that deprive others of a means that, but for one's own harmful actions, would have satisfied their subsistence rights or enabled them to satisfy their own subsistence rights, where the actions are not necessary to the satisfaction of one's own basic rights and where the threatened means is the only realistic one.[20] Duties to avoid depriving require merely that one refrain from making an unnecessary gain for oneself by a means that is destructive for others.

Part of the relation between these subsistence duties to avoid depriving (type I) and subsistence duties to protect from deprivation (type II) is quite straightforward. If everyone could be counted upon voluntarily to fulfill duties to avoid, duties to protect would be unnecessary. But since it would be naive to expect everyone to fulfill his or her duties to avoid and since other people's very survival is at stake, it is clearly necessary that some individuals or institutions have the duty of enforcing the duty to avoid. The duty to protect is, then, in part a secondary duty of enforcing the primary duty of avoiding the destruction of people's means of subsistence. In this respect it is analogous to, for example, the duty of the police to enforce the duty of parents not to starve their children.

The natural institution in many societies to have the task of enforcing those primary duties that need enforcement is the executive branch of some level of government, acting on behalf of the members of society other than the offending individuals or institutions. Which level of government takes operating responsibility is largely a practical matter and might vary among societies. Where the source of harm is, for example, a transnational corporation, protection may need to be provided by the home government or even by multilateral government action.[21] But clearly if duties to avoid depriving people of their last means of subsistence are to be taken seriously, some provision must be made for enforcing this duty on behalf of the rest of humanity upon those who would not otherwise fulfill it. Perhaps it would be worth considering non-governmental enforcement institutions as the bearers in some cases of the secondary duty to protect, but the primary institution would normally appear to be the government of the threatened person's own nation. It is normally taken to be a central function of government to prevent irreparable harm from being inflicted upon some members of society by other individual members, by institutions, or by interactions of the two. It is difficult to imagine why anyone should pay much attention to the demands of any government that failed to perform this function, if it were safe to ignore its demands.

Duties to aid (type III) are in themselves fairly complicated, and only one kind will be discussed here. At least three sub-categories of duties to aid need to be recognized. What they have in common is the requirement that resources be transferred to those who cannot provide for their own survival. First are duties to aid (III–1) that are attached to certain roles or relationships and rest therefore upon only those who are in a particular role or relationship and are borne toward only those other persons directly involved. Some central cases are the duties of parents toward their own young children and the duties of grown children toward their own aged parents. Naturally, important issues can arise even with regard to such relatively clear duties as the duty to provide food to

the helplessly young and to the helplessly old, but I have nothing to add here regarding these duties, which are not universal. By their not being universal I mean that although all parents may normally have certain duties toward their own children, no child can justifiably hold that all people, or even all parents, have *this* sort of duty toward it. All people may of course have other duties toward the child, including universal ones, and possibly including one of the other two sub-categories of duties to aid that are to be mentioned next.

The only difference between the second and third sub-categories of duties to aid is the source of the deprivation because of which aid is needed. In the second case (III–2) the deprivation is the result of failures to fulfill duties to avoid depriving and duties to protect from deprivation – some people have acted in such a way as to eliminate the last available means of subsistence for other people and the responsible government has failed to protect the victims. Thus, the need for assistance is the result of a prior twofold failure to perform duties, and the victims have been harmed by both actions and omissions of actions by other people.

In the third case (III–3) the deprivation is not the result of failures in duty and, in just this sense, the deprivation is "natural," that is, the deprivation suffered is not a case of harm primarily caused by other people. The clearest case of a natural deprivation calling for aid is a natural disaster like a hurricane or an earthquake. As always, questions arise at the borderline between cases – for example, was the death toll increased because the weather bureau or civil defense organization failed to protect with timely warnings? But uncontroversial central cases in which no human beings are much to blame are perfectly familiar, even if not so frequent as we might like to believe.

Where supplies of the necessities of life, or of the resources needed to grow or make the necessities, are scarce, duties of types I and II take on increased importance. The results of the fulfillment only of I and II would already be dramatic in the poorer areas of the world, in which most of the earth's inhabitants eke out their existences. It is easy to underestimate the importance of these two kinds of subsistence duties, which together are intended to prevent deprivation. But to eliminate the only realistic means a person has for obtaining food or other physical necessities is to cause that person, for example, the physical harm of malnutrition or of death by starvation. When physical harm but not death is caused, the effect of eliminating the only means of support can be every degree as serious as the effect of a violation of physical security by means of a bodily assault. The physical effects of malnutrition can be irreversible and far more profound than the physical effects of many an assault in fact are. And when starvation is caused, the ultimate effect of eliminating the only means of support is precisely the same as the effect of murder. Those who are helpless in the face of insuperable obstacles to their continued existence are at least one level worse off than those who are defenseless in the face of assaults upon their physical security. The defenseless will at least be able to maintain themselves if they are provided with protection against threatening assaults. If protected but otherwise left alone, they will manage. But the helpless, if simply left alone – even if they should be protected against all assaults upon their security – will die for lack of the means of subsistence. They will merely, in Coleridge's phrase, "die so slowly that none call it murder."[22]

Now of course differences between deprivations of security and deprivations of subsistence can also be noted, as already mentioned. Normally in a violation of physical security by means of assault or murder, the human agent's central intention is indeed to bring about, or at least includes bringing about, the physical harm or death that is caused for the victim, although obviously one also can injure or kill inadvertently. In the case of the elimination of the means of physical subsistence, the human agent's central intention may at least sometimes be focused on other consequences of his or her action, such as the increased security of income that would result from a multi-year salaried contract to grow flowers rather than a precarious annual attempt to grow food. The harm to the victims may be entirely unintended. Such difference in intention between the two cases is undoubtedly relevant to any assessment of the moral stature respectively of the two persons who partly cause the harm in the two cases. But for the two victims the difference between intended physical harm and unintended physical harm may matter little, since the harmfulness of the action taken may be the same in both cases and may be even greater where unintended.

Nevertheless, it may be arbitrary to assign a role of *the* perpetrator to any one person or group in a case of the deprivation of subsistence. The deprivations in question may in fact be "systemic": the product of the joint workings of individual actions and social institutions no one of which by itself caused the harm. But what follows from this is not that no one is responsible (since everyone is). What follows is that the distinction between duties to avoid (I) and duties to protect (II), which is

relatively clear in the abstract, blurs considerably in concrete reality.[23] The division of labor between individual restraint and institutional protection can be worked out in any of several acceptable ways, the full details of which would go considerably beyond the scope of this book, but between the two kinds of duties, individuals ought not to be deprived by the actions (intentional or unintentional) of others of all hope of sustaining themselves.

This means, however, that duties to protect (II) are not simply secondary duties to enforce the primary duty to avoid (I). We can mark as II–1 the duties to protect that are merely secondary duties to enforce the duty to avoid. But duties to protect also encompass the design of social institutions that do not leave individuals with duties to avoid, the fulfillment of which would necessitate super-human qualities. This task of constructing institutions can be marked as II–2. In the original example of the flower contract, some would judge that the peasant receiving the offer to switch out of food production, in the circumstances stipulated, could reasonably have been expected to foresee the consequences of the switch and to refrain from making it. But it is probably more realistic neither to expect him to have the information and comprehension necessary to foresee the consequences nor to expect him to choose not to reduce his own insecurity – and certainly an example could readily be constructed in which an individual could not reasonably be expected to know in advance the probable bad consequences for others of his or her action or to give them more weight than improvements in his or her own precarious situation.[24]

For such cases, in which individual restraint would be too much to ask, the duty to protect (II–2) includes the design of laws and institutions that avoid reliance upon unreasonable levels of individual self-control. Many actions that are immoral ought nevertheless not to be made illegal. But one of the best possible reasons for making an act illegal is its contributing to harm as fundamental as the deprivation of someone's last available means of subsistence. And a number of intermediate steps between total prohibition and complete tolerance of an action are possible, such as tax laws that create disincentives of various strengths against the kind of action that would contribute to the deprivation of subsistence from others and create alternative sources of increased economic security for oneself. Social institutions must, at the very least, be designed to enable ordinary human beings, who are neither saints nor geniuses, to do each other a minimum of serious harm.

In sum, then, we find that the fulfillment of a basic right to subsistence involves at least the following kinds of duties:

(I) To avoid depriving.
(II) To protect from deprivation
  1. By enforcing duty (I) and
  2. By designing institutions that avoid the creation of strong incentives to violate duty (I).

(III) To aid the deprived
  1. Who are one's special responsibility,
  2. Who are victims of social failures in the performance of duties (I), (II–1), (II–2) and
  3. Who are victims of natural disasters.

The Systematic Interdependence of Duties

Fulfillment of a basic right (and, I think, of most other moral rights as well) requires, then, performance by some individuals or institutions of each of these three general kinds of correlative duties. Duties to avoid depriving possibly come closest to failing to be essential, because duties to protect provide for the enforcement of duties to avoid. Even if individuals, organizations, and governments were otherwise inclined to violate rights to security, for example, by failing to fulfill their respective duties to avoid, forceful fulfillment of duties to protect by whomever they fell upon – presumably a national government – could probably produce behavior in compliance with duties to avoid. But reliance on duties to protect rather than duties to avoid would constitute heavy reliance on something like national police power rather than self-restraint by individuals, corporations, and lower-level governments, and would involve obvious disadvantages even if – probably, especially if – the police power were adequate actually to enforce duties to avoid upon a generally reluctant society. Unfortunately this much power to protect would also be enormous power to deprive, which is a lesson about police that even dictators sometimes have to learn the hard way.

Since duties to avoid and duties to protect taken together have only one purpose, to prevent deprivations, the reverse of what was just described is obviously also possible: if everyone who ought to fulfill duties to avoid did so, performance of duties to protect might not be necessary. Law-enforcement agencies could perhaps be disbanded in a society of restrained organizational and individual behavior. But although reliance entirely upon duties to protect is undesirable even if possible, a safe

complete reliance upon duties to avoid is most improbable in the absence of at least minimal performance of duties to protect. Organizations and individuals who will voluntarily avoid deprivation that would otherwise be advantageous to them because they know that their potential victims are protected, cannot be expected to behave in the same way when they know their potential victims are without protection.

The general conclusions about duties to avoid and duties to protect, then, are, first, that strictly speaking it is essential for the guarantee of any right only that either the one or the other be completely fulfilled, but, second, that for all practical purposes it is essential to insist upon the fulfillment of both, because complete reliance on either one alone is probably not feasible and, in the case of duties to protect, almost certainly not desirable.

What division of labor is established by one's account of duties between self-restraint and restraint by others, such as police forces, will obviously have an enormous effect upon the quality of life of those living in the social system in question. I do not want to pursue the questions involved in deciding upon the division, except to note that if either duties to avoid or duties to protect are construed too narrowly, the other duty then becomes unrealistically broad. For example, if a government, in the exercise of its duty to protect, fails to impose constraints upon agribusinesses designed to prevent them from creating malnutrition, the prevention of malnutrition will then depend upon the self-restraint of the agribusinesses. But much evidence suggests that individual agribusinesses are unwilling or unable to take into account the nutritional effect of their decisions about the use of land, local credit and capital, water, and other resources. This is especially true if the agribusiness is producing export crops and most especially if it is investing in a foreign country, the nutritional level of whose people is easily considered irrelevant.[25] If indeed a particular type of corporation has demonstrated an inability to forgo projects that produce malnutrition, given their setting, it is foolish to rely on corporate restraint, and whichever governments have responsibility to protect those who are helpless to resist the corporation's activity – host governments, home government or both – will have to fulfill their duties to protect. If, on the other hand, the corporations would restrain themselves, the governments could restrain them less. How to work this out is difficult and important. The present point is simply that between the bearers of the two duties, the job of preventing deprivation ought to get done, if there is a right not to be deprived of whatever is threatened. And the side that construes its own role too narrowly, if it actually has the power to act, may be as much at fault for contributing to the violation of rights as the side that fails to take up all the resulting slack.

However, as I have already indicated, the duty to protect ought not to be understood only in terms of the maintenance of law-enforcement, regulatory, and other closely related agencies. A major and more constructive part of the duty to protect is the duty to design social institutions that do not exceed the capacity of individuals and organizations, including private and public corporations, to restrain themselves. Not only the kinds of acute threats of deprivation that police can prevent, but the kinds of chronic threats that require imaginative legislation and, sometimes, long-term planning fall under the duty to protect.[26]

Nevertheless, it is duties to aid that often have the highest urgency, because they are often owed to persons who are suffering the consequences of failures to fulfill both duties to avoid and duties to protect, that is, they are duties of type III–2. These people will have been totally deprived of their rights to subsistence if they are then not aided either. This greater urgency does not, of course, mean that duties to aid are more compelling overall than the first two types of duty, and indeed it is specifically against duties to aid that complaints that the correlative duties accompanying subsistence rights are too burdensome may seem most plausible. It is important to notice that to the extent that duties to avoid and to protect are fulfilled, duties to assist will be less burdensome. If the fulfillment of duties to protect is sufficiently inadequate, duties to assist may be overwhelming and may seem unrealistically great, as they do today to many people. For example, because the Dutch colonial empire failed to protect the people of Java against the effects of the Dutch schemes for agricultural exports, the nutritional problems of the majority of Indonesians today strike some people as almost beyond all solution.[27] The colossal failure of the Dutch colonial government in its duties to protect (or, even, to avoid deprivation) has created virtually Sisyphean duties to aid. These presumably fall to some degree upon the Dutch people who are today still profiting from their centuries of spoils. But whoever precisely has these duties to aid – there are plenty to go around – their magnitude has clearly been multiplied by past dereliction in the performance of the other two kinds of duties by the Dutch among others….

This much, however, is already clear. The account of correlative duties is for the most part a more detailed specification of what the account of rights calls social

guarantees against standard threats. Provisions for avoidance, protection, and aid are what are needed for a reasonable level of social guarantees. Making the necessary provisions for the fulfillment of subsistence rights may sometimes be burdensome, especially when the task is to recover from past neglect of basic duties. But we have no reason to believe, as proponents of the negative/positive distinction typically assert, that the performance of the duties correlative to subsistence rights would always or usually be more difficult, more expensive, less practicable, or harder to "deliver" than would the actual performance of the duties correlative to the rights that are conventionally labeled negative and that are more often announced than in fact fulfilled. And the burdens connected with subsistence rights do not fall primarily upon isolated individuals who would be expected quietly to forgo advantages to themselves for the sake of not threatening others, but primarily upon human communities that can work cooperatively to design institutions that avoid situations in which people are confronted by subsistence-threatening forces they cannot themselves handle. In spite of the sometimes useful terminology of third parties helping first parties against second parties, etc., it is worth noting, while assessing the burden of subsistence duties, that the third-party bearers of duties can also become the first-party bearers of rights when situations change. No one is assured of living permanently on one side of the rights/duties coin.

Notes

1 See introduction to Henry Shue, *Basic Rights* (Princeton: Princeton University Press, 1980).

2 For a forceful re-affirmation of this view in the current political context (and further references), see Hugo Adam Bedau, "Human Rights and Foreign Assistance Programs," in *Human Rights and US Foreign Policy*, ed. by Peter G. Brown and Douglas MacLean (Lexington, MA: Lexington Books, 1979), pp. 29–44. Also see Charles Frankel, *Human Rights and Foreign Policy*, Headline Series No. 241 (New York: Foreign Policy Association, 1978), especially pp. 36–49, where Frankel advanced a "modest list of fundamental rights" that explicitly excluded economic rights as "dangerously utopian." A version of the general distinction has recently been re-affirmed by Thomas Nagel – see "Equality," in *Mortal Questions* (New York: Cambridge University Press, 1979), pp. 114–15. An utterly unrealistic but frequently invoked version of the distinction is in Maurice Cranston, *What Are Human Rights?* (London: The Bodley Head, 1973), chapter VIII. An interesting attempt to show that the positive/negative distinction is compatible with economic rights is John Langan, "Defining Human Rights: A Revision of the Liberal Tradition," Working Paper (Washington: Woodstock Theological Center, 1979). For a provocative and relevant discussion of "negative responsibility" (responsibility for what one fails to prevent), see Bernard Williams, "A Critique of Utilitarianism," in *Utilitarianism: For & Against* (New York: Cambridge University Press, 1973), pp. 93 ff.

3 Naturally my use of the same argument for the basic status of both security and subsistence is at least an indirect challenge to (1)(b). No question is raised here, however, about (1)(a): the thesis that subsistence and security are sharply distinguishable. People who should be generally sympathetic to my fundamental thesis that subsistence rights are basic rights, do sometimes try to reach the same conclusion by the much shorter seeming route of denying that security and subsistence are importantly different from each other. For example, it is correctly observed that both security and subsistence are needed for survival and then maintained that both are included in a right to survival, or right to life. Though I am by no means hostile to this approach, it does have three difficulties that I believe can be avoided by my admittedly somewhat more circuitous path of argument. First, it is simply not correct that one cannot maintain a clear and useful distinction between security and subsistence, as, in fact, I hope to have done up to this point. Second, arguments for a general right to life that includes subsistence rights appear to need some premise to the effect that the right to life entails rights to at least some of the means of life. Thus, they face the same "weakness of too much strength" – straining credulity by implying more than most people are likely to be able to believe – that we tried to avoid at the end of chapter 1 of *Basic Rights*. A right-to-the-means-of-life argument might be able to skirt the problem equally well by using a notion of a standard threat to life, analogous to our notion of a standard threat to the enjoyment of rights, but this alternative tack seems, at best, no better off. Third, the concept of a right to life is now deeply infected with ambiguities concerning whether it is a purely negative right, a purely positive right, or, as I shall soon be maintaining with regard to both security and subsistence, an inseparable mixture of positive and negative elements. The appeal for many people of a right to life seems to depend, however, upon its being taken to be essentially negative, while it can fully include subsistence rights only if it has major positive elements.

4 I think one can often show the implausibility of an argument by an exhaustive statement of all the assumptions it needs. I have previously attempted this in the case of one of John Rawls's arguments for the priority of liberty – see "Liberty and Self-Respect," *Ethics* 85:3 (April 1975): 195–203.

5 I have given a summary of the argument against 3 and arguments against thinking that either the right to a fair trial or the right not to be tortured are negative rights in "Rights in the Light of Duties," in Brown and MacLean, pp. 65–81. I have also argued directly against what is here called 2b and briefly introduced the account of duties presented in the final sections of this chapter. My goal, which I have no illusions about having attained, has been to do as definitive a job on positive and negative rights as Gerald C. MacCallum, Jr. did on positive and negative liberty in his splendid article, "Negative and Positive Freedom," *Philosophical Review* 76:3 (July 1967): 312–34.

6 See note 3 above.

7 Elsewhere I have briefly queried the moral significance of the action/omission distinction – see the essay cited in note 5 above. For a fuller discussion, see Judith Lichtenberg, "On Being Obligated to Give Aid: Moral and Political Arguments," PhD dissertation, City University of New York, 1978.

8 In FY 1975 in the United States the cost of the "criminal justice system" was $17 billion, or $71 per capita, *New York Times*, July 21, 1977, p. A3. In several countries that year the total annual income was less than $71 per capita. Obviously such isolated statistics prove nothing, but they are suggestive. One thing they suggest is that adequate provisions for this supposedly negative right would not necessarily be less costly than adequate provisions for some rights supposed to be positive. Nor is it evident that physical security does any better on what Frankel called the test of being "realistically deliverable" (45) and Cranston called "the test of practicability" (66). On Cranston's use of the latter, see chapter 4 of *Basic Rights*.

9 "To have a right, then, is, I conceive, to have something which society ought to defend me in the possession of" – John Stuart Mill, *Utilitarianism* (Indianapolis: Bobbs-Merrill, 1957), p. 66 (chapter V, 14th paragraph from the end).

10 This is not a point about ordinary language, in which there is obviously a significant difference between "leave me alone" and "protect me against people who will not leave me alone." My thesis is that people who are not already grinding axes for minimal government will naturally and reasonably think in terms of enjoying a considerable degree of security, will want to have done whatever within reason is necessary, and will recognize that more is necessary than refraining campaigns – campaigns urging self-restraint upon would-be murderers, muggers, rapists, et al. I am of course not assuming that existing police and penal institutions are the best forms of social guarantees for security; I am assuming only that more effective institutions would probably be at least equally complex and expensive.

11 Therefore, as we shall see below, the complete fulfillment of a subsistence right may involve not the actual provision of any aid at all but only the performance of duties to avoid depriving and to protect against deprivation.

12 The literature on underdeveloped countries in fact abounds in actual cases that have the essential features of the so-called hypothetical case, and I have simply presented a stylized sketch of a common pattern. Most anecdotes are in the form of "horror stories" about transnational corporations switching land out of the production of the food consumed by the local poor. See, for example, Robert J. Ledogar, *Hungry for Profits: US Food and Drug Multinationals in Latin America* (New York: IDOC, 1976), pp. 92–8 (Ralston Purina in Colombia) and Richard J. Barnet and Ronald E. Müller, *Global Reach: The Power of the Multinational Corporations* (New York: Simon and Schuster, 1974), p. 182 (carnations in Colombia). For a gargantuan case on a regional scale involving cattle-ranching, see Shelton H. Davis, *Victims of the Miracle: Development and the Indians of Brazil* (New York: Cambridge University Press, 1977). To a considerable extent the long-term development policy of Mexico for at least thirty of the last forty years has followed this basic pattern of depriving the rural poor of food for subsistence for the sake of greater agricultural production of other crops – see the extremely careful and balanced study by Cynthia Hewitt de Alcantara, *Modernizing Mexican Agriculture: Socioeconomic Implications of Technological Change 1940–1970*. Report No. 76.5 (Geneva: United Nations Research Institute for Social Development, 1976); and Judith Adler Hellman, *Mexico in Crisis* (New York: Holmes & Meier Publishers, 1978), chapter 3. For a sophisticated theoretical analysis of some of the underlying dynamics, see Jeffery M. Paige, *Agrarian Revolution: Social Movements and Export Agriculture in the Underdeveloped World* (New York: Free Press, 1975), which has case studies of Angola, Peru, and Vietnam.

13 That is, they are conceptually distinct; whether this distinction makes any moral difference is another matter. See above, note 7, and the distinctions at the beginning of this chapter.

14 The increasingly frequent and facile appeal to "overpopulation" as a reason not to prevent preventable starvation is considered in chapter 4 of *Basic Rights*.

15 This much of the analysis is derived from the following important article: Onora O'Neill, "Lifeboat Earth," in *World Hunger and Moral Obligation*, edited by William Aiken and Hugh La Follette (Englewood Cliffs: Prentice-Hall, 1977), pp. 140–64. I return to discussion of the causal complexity of such cases at the end of my discussion of "Subsistence Duties" below.

16 For example, land-use laws might prohibit removing prime agricultural land from food production. Alternatively, land might be allowed to be used in the manner most beneficial to the national balance of payments with tax laws designed to guarantee compensating transfers to increase the purchasing power of the villagers (e.g., food stamps), etc. I discuss the question of how to apportion the duties to prevent social disasters in chapter 5 of *Basic Rights*.

17 There are of course non-human threats to both security and subsistence, like floods, as well. And we expect a minimally adequate society also to make arrangements to prevent, to control, or to minimize the ill effects of floods and other destructive natural forces. However, for an appreciation of the extent to which supposedly natural famines are the result of inadequate social arrangements, see Richard G. Robbins, *Famine in Russia 1891–92* (New York: Columbia University Press, 1975); and Michael F. Lofchie, "Political and Economic Origins of African Hunger," *Journal of Modern African Studies*, 13:4 (December 1975): 551–67. As Lofchie says: "The point of departure for a political understanding of African hunger is so obvious it is almost always overlooked: the distinction between drought and famine …. To the extent that there is a connection between drought and famine, it is mediated by the political and economic arrangements of a society. These can either minimize the human consequences of drought or accentuate its effects" (553). For a demonstration that the weather and other natural factors actually played fairly minor roles in the Great Bengal Famine, see the analysis by Amartya Sen, *Poverty and Famines* (Oxford: Clarendon Press, 1981) and, more generally, chapter 4 of my *Basic Rights*. To treat the *absence* of adequate social arrangements as a cause of a famine precipitated by a natural event like a drought or a flood, as these writers and I do, is to assume that it is reasonable to have expected the absent arrangements to have been present.

18 See note 12 above.

19 On whether an adequate definition can be literally exceptionless, see note 2 to chapter 1 of *Basic Rights*.

20 I take the need for the qualification "not necessary to the satisfaction of one's own basic rights" to be fairly obvious. However admirable self-sacrifice may be, it is surely not a basic duty owed to people generally, and the surrender of one's right to subsistence – or security – would in many circumstances constitute a literal sacrifice of oneself, that is, one's life. Unfortunately, the content of a duty does not dictate the identity of its bearers. Chapter 5 of *Basic Rights* discusses how to assign in a reasonable way the responsibility for fulfilling various duties.

21 How to bring transnational corporations under some constraints in order to prevent great social harms, like violations of basic rights, is one of our great political challenges. See the discussion of recommendation (4) in *Basic Rights*, chapter 7 and the relevant notes.

22 I am, of course, not proposing that we start calling it murder, but I am proposing that we acknowledge the parallels and act in appropriately parallel ways.

23 Without becoming anti-intellectual, or even atheoretical, we theorists might remember that a crystal-clear abstract distinction may not only have no positive practical value but may sometimes contribute to vice. Writing about an entirely different matter, Barrie A. Paskins has put the general point eloquently: "We can imagine and describe cases in which we would think torture justified and unjustified. We can state the grounds on which we are making the discrimination. But what we cannot do is this: *we cannot provide for ourselves, or for those who must act for us in real situations, any way of making our notional distinctions in reality*. What might be claimed about the imaginary example is not that something significantly analogous could not occur but that in reality we cannot enable those who must act to recognize the case for what it is and other cases, by contrast, for what they are. In a real situation we can never be certain that the case in hand is of this kind rather than another. A too vivid imagination blinds us to the dust of war that drifts into the interrogation centre." Barrie A. Paskins, "What's Wrong with Torture?" *British Journal of International Studies* 2 (1976): 144. I think this is a profound methodological point with strong implications concerning the now virtually incorrigible habit among moral and political philosophers of relying upon imaginary cases and concerning the "strict compliance" situations and "ideal theory" discussed by John Rawls and Kantians generally. I am trying to develop the methodological point in an essay with the working title, "Extreme Cases."

24 On the rationality of peasants, see James C. Scott, *The Moral Economy of the Peasant: Rebellion and Subsistence in Southeast Asia* (New Haven: Yale University Press, 1976), chapters 1 and 2.

25 See note 12 above.

26 I am indebted to John Langan for having emphasized this point. For a different argument, see his paper cited in note 2 above, p. 25.

27 For the classic account, see Clifford Geertz, *Agricultural Involution: The Processes of Ecological Change in Indonesia* (Berkeley: University of California Press for the Association of Asian Studies, 1963), chapters 4 and 5. Although various aspects of Geertz's analysis are naturally no longer accepted, the main points relevant here still stand.

23

The Dark Side of Human Rights

Onora O'Neill

In his *Reflections on the Revolution in France* Edmund Burke asks

> What is the use of discussing a man's abstract right to food or medicine? The question is upon the method of procuring and administering them. In that deliberation I shall always advise to call in the aid of the farmer and the physician rather than the professor of metaphysics.[1]

Burke's question is sharp. What is the point of having a right? More specifically what is the point of having an abstract right, unless you also have a way of securing whatever it is that you have a right to? Why should we prize natural or abstract rights if there is no way of ensuring their delivery? And if we need to secure their delivery, are not 'the farmer and the physician' not merely of greater use than abstract or natural rights, but also of greater use than positive rights to claim food or medicine? For a hungry person, positive and justiciable rights to food are to be sure better than abstract rights that are not justiciable: but those who know how to grow, harvest, store and cook food are more useful, and having the food is better still. When we are ill, positive and justiciable rights to health care are to be sure better than abstract rights that are not justiciable: but skilled doctors and nurses are more useful, and receiving their care is better still.

In a way it is surprising to find Burke discussing abstract rights to food or health care, for these presumed rights came to full prominence only in the late twentieth century. They are commonly called welfare rights, and contrasted with liberty rights. This, I think, is a misnomer. The salient feature of these rights is not that they contribute to the welfare of the recipient (although they are likely to do so), but that they are rights to goods or services. If there are to be rights to goods or services, those goods and services must be provided, and more specifically provided *by someone* – for example, by the farmer and the physician.

Most of the abstract rights against which Burke campaigned were the rights proclaimed in the *Declaration of the Rights of Man and of the Citizen* of 1789 (*Declaration of 1789*). They are what we now call liberty rights. The short list in Article 2 of the *Declaration* states succinctly 'the natural rights of man, which must not be prevented … are freedom, property, security and resistance to oppression'.[2] Needless to say, the right to property is not to be understood as a right to some amount of property, but as a right to security of tenure of property: it too is a liberty right, not a right to any goods or services.[3] Much of the *Declaration of 1789* is concerned with the rights to the process needed to make liberty rights justiciable: rights to the rule of law, to habeas corpus, to what we would now call accountable public

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administration. The rights of the *Declaration of 1789* are rights against *all* others and *all* institutions. Liberty rights are universal – and so are the corresponding obligations. They are compromised if *any* others are exempt from those counterpart obligations. If anyone may infringe my rights to freedom, property and security, or to resist oppression, I have only incomplete and blemished rights of these sorts.

On closer consideration, matters have turned out to be rather more complicated. The institutions for securing and enforcing liberty rights require an allocation of certain obligations to specified others rather than to all others. First-order obligations to respect liberty rights must be universal, but second-order obligations to ensure that everyone respects liberty rights must be allocated. There is no effective rule of law without law enforcement, and law enforcement needs law enforcers who are assigned specific tasks; there is no effective accountability of public administration without institutions that allocate the tasks and responsibilities and hold specified office-holders to account. Nevertheless, the asymmetry between abstract liberty rights and abstract rights to goods and services is convincing: we can know who violates a liberty right without any allocation of obligations, but we cannot tell who violates a right to goods or services unless obligations have been allocated.

This well-known point has not impeded the rise and rise of an international human rights culture that is replete with claims about abstract rights to goods and services, now seen as universal human rights, but often muddled or vague, or both, about the allocation of the obligations without which these rights not merely cannot be met, but remain undefined. The cornucopia of universal human rights includes both liberty rights[4] and rights to goods and services, and specifically rights to food and rights to health care. The right to food is proclaimed in Article 11 of the 1966 *International Covenant on Economic, Social and Cultural Rights* (*CESCR*), which asserts 'the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions'[5] (the *continuous improvement* is a nice touch!). Article 11 of *CESCR* has been adopted as a guiding principle of the Food and Agriculture Organization (FAO), which has made its mission 'food security for all'.[6] The right to health (to *health*, not just to *health care*: another nice touch!) is proclaimed in Article 12 of the *CESCR*, which recognizes 'the right of everyone to the enjoyment of the highest attainable standard of physical and mental health'.[7] Article 12 has been adopted as the guiding principle of the World Health Organization (WHO).[8]

There is an interesting difference between Articles 11 and 12 of *CESCR*. The right to food is viewed as a right to *adequate food*, not to the *best attainable food*; the right to health is viewed as a right to the *highest attainable standard … of health*, and not as a *right to adequate health*. One can see why the drafters of the *Covenant* may have shrunk from proclaiming a *right to adequate health*, but in qualifying this right as a *right to the highest attainable standard of health* many questions were begged. Is this right only a right to the standard of health that a person can attain with locally available and affordable treatment – however meagre that may be? Or is it a right to the highest standard available globally – however expensive that may be? The first is disappointingly minimal, and the latter barely coherent (how can everyone have a right to the best?). And what is required of the farmer, the physician and others who actually have to provide food and health care? Uncertainties of this sort are unavoidable unless the obligations that correspond to rights to goods and services are well specified.

Norms, Aspirations and Cynicism

Does any of this matter? Perhaps we should view the Declarations and Covenants that promulgate human rights as setting out noble aspirations, which are helpful to articulate and bear in mind when establishing institutions, programmes, policies and activities that allocate obligations. In effect, we would concede that the rhetoric of universal human rights to goods or services was deceptive, but defend it as a noble lie that helps to mobilize support for establishing justiciable rights of great importance. There is something to be said for this view of human rights Declarations and Covenants as ideological documents that can help mobilize energy for action that makes a difference, but many would see this as cynical.

In any case, this interpretation of human rights claims would be wholly at odds with ordinary understandings of rights. Both liberty rights and rights to goods and services are standardly seen as *claim rights* or *entitlements* that are valid against those with the counterpart obligations. Rights are seen as one side of a normative relationship between right-holders and obligation-bearers. We normally regard supposed claims or entitlements that nobody is obliged to respect or honour as null and void, indeed undefined. An understanding of the normative

arguments that link rights to obligations underlies daily and professional discussion both of supposedly *universal* human rights, and of the *special* rights created by specific voluntary actions and transactions (treaty, contract, promise, marriage etc.). There cannot be a claim to rights that are rights against nobody, or nobody in particular: universal rights will be rights against all comers; special rights will be rights against specifiable others.

Only if we jettison the entire normative understanding of rights in favour of a merely aspirational view, can we break the normative link between rights and their counterpart obligations. If we take rights seriously and see them as normative rather than aspirational, we must take obligations seriously. If on the other hand we opt for a merely aspirational view, the costs are high. For then we would also have to accept that where human rights are unmet there is no breach of obligation, nobody at fault, nobody who can be held to account, nobody to blame and nobody who owes redress. We would in effect have to accept that human rights claims are not real claims.

Most advocates of human rights would be reluctant to jettison the thought that they are *prescriptive* or *normative* in favour of seeing them as merely *aspirational*.[9] We generally view human rights claims as setting out requirements from the standpoint of recipients, who are *entitled to* or *have a claim to* action or forbearance by others with corresponding obligations. From a normative or prescriptive view, the point of human rights claims would be eroded if nobody were required to act or forbear to meet these claims. A normative view of rights claims has to take obligations seriously, since they are the counterparts to rights; it must view them as articulating the normative requirements that fall either on all or on specified obligation-bearers. Few proponents of human rights would countenance the thought that there are human rights that nobody is obliged to respect. (The converse thought is unproblematic: there can be obligations even where no claimants are defined; such 'imperfect' obligations are generally seen as moral obligations, but not as obligations of justice with counterpart rights.)

The claim that rights must have well-specified counterpart obligations is not equivalent to the commonplace piety that rights and responsibilities go together, which asserts only that right-holders are also obligation-bearers. This is often, but not always, true. Many agents – citizens, workers, students, teachers, employees – are both right-holders and obligation-bearers. But some right-holders – infants, the severely disabled, the senile – cannot carry obligations, so have no responsibilities. By contrast, the claim that rights must have counterpart obligations asserts the exceptionless logical point that where anyone is to have a right there must be identifiable others (either all others or specified others) with accurately corresponding obligations. From a normative view of rights, obligations and claimable rights are two perspectives on a single normative pattern: without the obligations there are no rights. So while obligations will drop out of sight if we read human rights 'claims' merely as aspirations rather than requirements, so too will rights, as they are usually understood. Unsurprisingly aspirational readings of human rights documents are not popular. However, such readings at least offer an exit strategy if we conclude that claiming rights without specifying counterpart obligations is an unacceptable deception, and find that we can't develop an adequate normative account of obligations and rights.

Clearly it would be preferable to offer a serious account of the allocation of obligations that correspond to all human rights. But do Declarations and Covenants provide an account – or even a clue – to the allocation of the obligations that are the counterparts to rights to goods and services? This point was complicated at the birth of human rights by the unfortunately obscure drafting of the 1948 *UDHR*,[10] which gestures to the thought that certain obligations lie with states, then confusingly assigns them indifferently to nations, countries and peoples as well as states. Not all of these have the integrated capacities for action and decision-making needed for agency, and so for carrying obligations. For present purposes I shall leave problems arising from this unfortunate drafting aside, and rely on the fact that in later documents, including *CESCR*, these ambiguities are apparently resolved in favour of assigning obligations to states party, that is, to the signatory states.

This approach has apparent advantages – and stings in its tail. The first sting is that states that do not ratify a Covenant will not incur the obligations it specifies: not a welcome conclusion to advocates of universal human rights, since these states thereby escape obligations to respect, let alone enforce, the rights promulgated. The second sting is sharper. The obligations created by signing and ratifying Covenants are *special*, not *universal* obligations. So the rights which are their corollaries will also be *special* or *institutional rights*, not *universal human rights*. Once we take a normative view of rights and obligations, they must be properly matched. If human rights are independent of institutional structures, if they are not created by special transactions, so too are the corresponding obligations; conversely if obligations are the creatures of convention, so too are the rights.

These unwelcome implications of taking the human rights documents at face value might be avoided in several ways. One well-known thought is that so long as we confine ourselves to liberty rights there is no allocation problem, since these rights are only complete if *all* others are obliged to respect them. We can coherently see universal liberty rights as independent of institutions or transactions, and read the parts of instruments that deal with liberty rights as affirming rather than creating those rights (justifying such claims would be a further task). But the fact that liberty rights do not face an allocation problem (although enforcing them raises just that problem) offers small comfort to those who hope to show that rights to goods or services, for example to food or medicine, are universal human rights rather than the creatures of convention. A normative view of human rights cannot view rights to food and medicine as pre-institutional while denying that there are any pre-institutional counterpart obligations or obligation holders; it must take a congruent view of the counterpart obligations. But this suggests that such rights must be special, institutional rights rather than universal human rights. There is, of course, nothing wrong or problematic about conventional or institutional rights, but if Declarations and Covenants create rights to goods and services, claims that they arc universal or human rights lack justification. Declarations and Covenants cannot show that some particular configuration of institutional rights and obligations is universally optimal or desirable, or even justifiable.

This dilemma might be fudged by allowing the idea of human rights to goods and services to drift between two interpretations. A view of rights to goods and services as independent of institutions and transactions could be cited as offering a basis for justifying some rather than other institutional arrangements. A view of rights to goods and services as the creatures of convention could fit with well-defined counterpart institutional obligations, but offers no claims about their justification other than the fact that (some) states have signed up to them. Equivocation is a desperate justificatory strategy. Yet this equivocation is disconcertingly common in discussions of human rights claims.

This dilemma within normative views of rights and obligations can be resolved in more than one way. We could conclude that liberty rights are fundamental and universal, and claim that they can be justified without reference to Covenants or institutions, but concede that rights to goods and services are special (institutional, positive) rights that can be justified only by appeal to specific transactions, such as signing and ratifying Covenants. We could try to justify a configuration of special rights and the institutional structures that secure them and their counterpart obligations. For example, we might argue that certain rights to goods and services and their counterpart obligations protect basic human needs or interests, or that they have utilitarian or economic justification. Or we could justify institutional structures that define and secure special rights and obligations more deeply by appealing to a theory of the good (moral realists) or a theory of duty (Kantians). The option that is closed is to claim that human rights and obligations are corollary normative claims, but that there are some universal rights without counterpart obligations. So there are plenty of possibilities – although each may raise its own difficulties. If none of these possibilities can be made to work, the default position would be to reject normative views of human rights and to see human rights claims as aspirational (noting that aspirations need justification too) and to treat the task of establishing institutions that allow for justiciable claims as a task to be guided in part by appealing to those aspirations. And then, it may seem, we in effect endorse a cynical reading of the human rights Declarations and Covenants.

State Obligations

These are awkward problems, but I think that others may lie deeper. The deepest problem may be that the obligations assigned to states by some of the most significant Declarations and Covenants are *not* the corollaries of the human rights that the documents proclaim. The Covenants do not assign states straightforward obligations to respect liberty rights (after all, liberty rights have to be respected by all, not only by states), but rather second-order obligations to *secure* respect for them. Equally, they do not assign states obligations to meet rights to goods and services, but rather second-order obligations to *ensure* that they are met. For example, Article 2 of the *CESCR* proclaims that

> Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realisation of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.[11]

'Achieving progressively the full realisation of … rights … by all appropriate means' is evidently not merely a matter of respecting the rights recognized in *CESCR*. It is a matter of ensuring that others – both individuals and institutions – carry out the obligations that correspond to those rights. Later comments by the Office of the High Commissioner for Human Rights spell out some of the obligations that states are taken to assume if they ratify the two Covenants.[12]

An immediate and encouraging thought might be that if the obligations assigned to states by the international Declarations and Covenants are *not* the counterparts of the human rights proclaimed, but second-order obligations to ensure or secure respect for such rights, then this may resolve the allocation problem for rights to goods and services. States party to a Covenant are seen as acquiring special obligations by signing and ratifying the instrument. It would then be clear that those special, second-order obligations did not have counterpart rights, let alone counterpart universal human rights. They are second-order obligations to secure some configuration of first-order rights and obligations. This thought may be helpful: since obligations without counterpart rights are normatively coherent (unlike rights without counterpart obligations), we can take a normative view of the obligations assumed by states that sign and ratify the Covenants, and can see them as setting requirements. Human rights enter into the Covenants only indirectly as aspects of the content of second-order state obligations.

But a second thought is far less congenial to those who would like to see human rights as normative. If the obligations that the Declarations and Covenants assign to states are *not* the counterparts of the human rights these instruments declare or recognize, then they also do not define the first-order obligations that are the counterparts of human rights. Rather the problem of giving a coherent normative instantiation of Declarations and Convenants is devolved to the states party, which may (or may not) set out to secure positive rights for their citizens. If the claims of the human rights documents have normative force they must be matched by obligations; if they are not matched by obligations, they are *at best* aspirational.

As I suggested earlier, it may not be wholly a misfortune if the supposed rights declared in the Declarations and Covenants are seen as aspirations. Legal commentators might be willing to say that there is still substance in there, in that the States party take on real obligations to realize these aspirations. Non-lawyers may habitually make the mistake of thinking that Declarations and Covenants claim that there are pre-institutional universal human rights, but their mistake is not necessary – although politically convenient – for progress towards the realization of the underlying aspirations, once states have signed up. This is a coherent position, but unlikely to be popular with those who seek to base ethical and political claims on appeals to human rights, which they see as normatively fundamental rather than as the creatures of the convention that are anchored in the Covenants that assign obligations to realize aspirations to states.

And there are further difficulties. If we read Declarations and Covenants as instruments by which states assume second-order obligations to define and allocate first-order obligations that correspond to certain human rights (now no longer seen as universal rights), why should all the obligations lie with states? A plausible answer would be that states, and only states, have the powers necessary to carry the relevant second-order obligations to define and allocate first-order obligations and rights to individuals and institutions. The story is told of a journalist who asked the bank robber Willie Sutton why he robbed banks and got the puzzled answer: 'That's where the money is'. Similarly we might reply to anyone who wonders why Declarations and Covenants assign obligations that are to secure human rights to states by pointing out that that's where the power is.

But the thought that it makes sense to assign all second-order obligations to define and allocate obligations to states because they, and only they, have the power to discharge these obligations is often less than comforting. Many states violate rather than respect human rights. Assigning second-order obligations to define and allocate first-order obligations and rights to agents who do not even reliably respect the first-order obligations that correspond to those rights may be rather like putting foxes in charge of hen houses. It is true enough that those who are to achieve progressively the full realization of human rights must have capacities to do so – but it does not follow that those with (a good range of) the necessary capacities can be trusted to do so. Some states – not only those we think of as rogue states – disregard or override many of the Covenant rights. Some sign and ratify the relevant international instruments, but make limited efforts to work towards their full realization.

Other states lack the power to carry the obligations to 'achieve progressively the full realisation of the rights recognized' in Declarations and Covenants. Weak states – failed states, quasi states – cannot carry such

demanding obligations. Although they may not always violate them, they cannot secure their inhabitants' liberty rights; still less can they ensure that their inhabitants have effective entitlements to goods and services. It is an empty gesture to assign the obligations needed for human rights to weak states, comparable to the empty gesture made by town councils in Britain in the 1980s that proclaimed their towns nuclear free zones. Indeed, even strong and willing states may find that they cannot 'achieve progressively the full realisation of the rights recognized' in Declarations and Covenants. Strong states may have a monopoly of the legitimate use of force within their territories; but they seldom have a monopoly of the effective use of other forms of power. There are plenty of reasons for thinking carefully about the specific character of state power, and for questioning the assumption that powerful – let alone weak – states can carry the range of second-order obligations that they ostensibly take on in signing and ratifying human rights instruments.

Given these realities, it may be worth reconsidering whether all second-order obligations to secure human rights should lie with states. Perhaps some of them should lie with powerful non-state actors, such as transnational corporations, powerful non-governmental organizations, or major religious, cultural, and professional and educational bodies. The assumption that states and states alone should hold all the relevant obligations may reflect the extraordinary dominance of state power in the late twentieth century, rather than a timeless solution to the problem of allocating obligations to provide goods and services effectively. For present purposes, I shall leave these unsettling possibilities unexplored, but say a little more about some of the cultural and political costs that are linked to persistent confusion between normative and aspirational views of human rights.

Control and Blame

If human rights are not pre-conventional, universal rights, but are grounded in the special obligations assumed by states, then there is – at the very least – an awkward gap between reality and rhetoric. The second-order obligations of states are discharged by imposing first-order obligations on others and enforcing them. The reality is that state agency and state power, and that of derivative institutions, is used to construct institutions that (partially) secure rights, and that to do this it is necessary to control the action of individuals and institutions systematically and in detail. If states party are to discharge the second-order obligations they assume in signing and ratifying human rights Covenants, they must not only ensure that liberty rights are respected by all, but must assign and enforce first-order obligations whose discharge will deliver rights to goods and services to all. Human beings, it is evident, will not merely be the intended *beneficiaries* of these obligations, but will carry the intended *burdens*.

The system of control that states must impose to ensure that these obligations are discharged is likely to be dauntingly complex. Yet, as Burke pointed out, what we really need if we are to have food and medicine is the active engagement of 'the farmer and the physician'. Can that active engagement be secured or improved by imposing detailed and complex obligations on those who are to carry the relevant first-order obligations? There is much to consider here, and I offer very brief comments under four headings: complexity, compliance, complaint and compensation.

Complexity

Detailed control is needed to 'achieve progressively the full realisation' of very complex sets of potentially conflicting rights, which must be mutually adjusted. It is no wonder that legislation in the age of human rights has become prolix and demanding. Those who frame it have to seek to ensure that individuals and institutions conform to a very large number of constraints in all activities, so have to set and enforce very detailed requirements.[13] It is now common in developed societies to find that legislation imposes highly complex procedures that bristle with duties to register, duties to obtain permission, duties to consult, rights to appeal, as well as proliferating requirements to record, to disclose and to report. Such legislation is typically supplemented by copious regulation, relentless 'guidance', prolix codes of good practice and highly intrusive forms of accountability. These highly detailed forms of social control may be unavoidable in a public culture that aims to 'achieve progressively the full realisation' of an extraordinarily complex set of rights, so has to impose complex demands and burdens on all activities and all areas of life.

The results are demanding for the state agencies that are supposed to set the requirements and police the system. They can be dementing for the institutions and individuals that are to carry the first-order obligations – not least for the farmer and the physician. Complex controls risk stifling active engagement.

Those of whom too much that is extraneous to their basic tasks – growing food, caring for the sick – is required are likely to resent the proliferating and time-consuming requirements to obtain permissions, to consult third parties, to record, to disclose, to report and to comply with the demands of inspectors or regulators. These requirements for control and accountability impose heavy human and financial costs, and are often damaging to the performance of primary tasks. Those who face these burdens on their attempts to perform demanding substantive tasks – the farmer and the physician – may comply and resent (and sometimes engage in defensive practices); they may protest and complain; or they may withdraw from activities that have been made too burdensome. The costs of complex control systems are paid in increasing wariness and weariness, scepticism and resentment, and ultimately in less active engagement by 'the farmer and the physician', and by others who come to see themselves primarily as obligation-bearers rather than as right-holders.

Compliance

Individuals who are subject to hyper complex legislation, regulation and control are offered two roles. As obligation-bearers their role is compliance; as right holders they are permitted and encouraged to seek redress and to complain when others fail to comply. The individuals and institutions on whom first-order obligations are imposed in the name of securing human rights are offered limited options: they can soldier loyally on in compliance with the obligations states impose; they can voice their discontent; they can exit from the tasks that have been made too burdensome by the excess complexity of legislation and regulation.[14] Loyal compliance becomes harder and more burdensome when the sheer number and complexity of requirements imposed damages the quality with which substantive tasks can be achieved. Voicing concern and objecting to these controls provides some, but limited relief. Exit from the activities that have been made too burdensome may often be the most reasonable and the preferred option. For 'the farmer and the physician', exit means giving up growing food and caring for the sick.

There may be ways of extending human rights that do not carry these costs, that use a 'lighter touch', that achieve 'better regulation'.[15] But the jury is out on this matter. At present, and certainly in the UK, the juggernaut of human rights demands, at every stage of legislation and of the regulatory process, tends to increase complexity even when the costs for 'the farmer and the physician', and the damage to the services they provide, are high and well known.

Complaint

First-order obligation-bearers are also right-holders, and it may be that the burdens their obligations impose are recompensed by the rights they enjoy as a result of others discharging their obligations. However, the experience of right-holders is not symmetric with that of obligation-bearers. Individuals act as right-holders only when something has gone awry. In that situation they may complain, seek redress and compensation. The legislation and regulation of states that take human rights seriously often provide a range of remedies – for those with the time, energy, courage (or foolhardiness) to pursue them. When complaints work, redress may be achieved and, compensation may be secured. But often the experience of complainants is less than happy because the process of achieving redress is complex, exhausting and frustrating, and the remedies less than would satisfy and assuage a sense of injury. Since the role of complainant is too often one that exhausts, demoralizes and undermines active engagement, many who are wronged do not choose this course of action. For 'the farmer and the physician' and for many others the choice is mainly between loyalty and exit: giving voice is not generally a positive experience, since it requires complainants to see themselves as victims rather than as actively engaged.

Compensation and Blame

The best outcome of the voice option is that, with luck and persistence, those who take on the role of victim or complainant achieve redress and compensation, or some opportunity for the dubious pleasures of casting blame. Compensation clearly has its positive side – although it may be hard to achieve, limited in amount and is not always worth the struggle through the complexities of process. Blaming by contrast is a readily available and cheap pleasure – even for complainants whose case is not upheld. Those who cast blame can appropriate, enjoy and prolong their role and status as victims, can enjoy indignation and a feeling of superiority, even if they cannot quite identify or demonstrate the failings of others. If it proves impossible to identify a blameworthy culprit, they can at least blame the system, that is to say the institutional framework that is failing to achieve

'progressively the full realisation of the rights recognized … by all appropriate means, including particularly the adoption of legislative measures'.

There is a dark and tempting undercurrent of pleasure in blaming. Nobody has written about the psychology of blaming, or about its murky appeal and insidious psychological effects, more brilliantly and darkly than Nietzsche. Some of his comments are particularly apt to the realities of the farmer and the physician:

> Suffering people all have a horrible willingness and capacity for inventing pretexts for painful emotional feelings. They already enjoy their suspicions, they're brooding over bad actions and apparent damage. They ransack the entrails of their past and present, looking for dark and dubious stories, in which they are free to feast on an agonizing suspicion and to get intoxicated on their own poisonous anger. They rip open the oldest wounds, they bleed themselves to death from long-healed scars. They turn friends, wives, children, and anyone else who is closest to them into criminals. 'I am suffering. Someone or other must be to blame for that'.[16]

I do not wish to suggest that the human rights culture inevitably promotes this rancorous approach to life. But I do not think we should accept at face value the view that it is all about respect for persons and treating others as agents. Much of it is indeed about protecting the weak and vulnerable. But it is also about extending the power of states over non-state actors and human individuals, about establishing systems of control and discipline that extend into the remotest corners of life, about running people's lives for them while leaving them with the consoling pleasures of blame. As Bernard Williams puts it, blame is 'the characteristic reaction of the morality system' in which obligations and rights have become the sole ethical currency.[17]

We find it unsurprising that the ruling ideas of past eras have been superseded and modified, and we can hardly doubt that human rights are a central ruling idea of our age. Yet we do not find much current discussion of the likelihood that the idea of human rights may suffer the same fate. Public discourse is for the most part admiring, and often represents human rights as unquestionable truth and progress: we may question anything – except human rights. Indeed, unlike some earlier dominant ideologies, the human rights movement has acquired the beguiling feature of being an ideology not only of and for the ruling classes, but an ideology for – and increasingly of – the oppressed. This seems to me a good reason for thinking particularly carefully and critically about the internal structure of human rights claims, for trying to be less gestural about their basis and their limits, and for being more explicit about their costs as well as their benefits. The farmer and the physician, and others whose work and commitment are indispensable, are the key to securing a decent standard of life for all: their active enthusiasm and efforts are more valuable than their dour compliance with prescribed procedures, their resentful protest, let alone their refusal to contribute.

Notes

This is a revised version of the *Martin Wight Lecture* given at the London School of Economics on 14 October 2004. I am grateful for a number of helpful comments at and following the lecture, especially from Conor Gearty, Nick Rengger and Chris Brown.

1 Edmund Burke, *Reflections on the Revolution in France*, Conor Cruise O'Brien, ed. (London: Penguin Books, 1984), pp. 151–2.

2 *Declaration of the Rights of Man and of the Citizen*, 1789, http://www.magnacartaplus.org/french-rights/1789.htm.

3 Note also Article 17 of the *Declaration of 1789*: 'Property, being an inviolable and sacred right, no one may be deprived of it: unless public necessity, legally investigated, clearly requires it, and just and prior compensation has been paid'.

4 Set out in the *UN International Covenant on Civil and Political Rights*, 1966 (*CCPR*). This Covenant also 'recognizes' various rights that are not liberty rights. See http://www.magnacartaplus.org/uno-docs/covenant.htm.

5 *CESCR*, Art 11. See http://www.unhchr.ch/html/menu3/b/a_cescr.htm.

6 See the FAO website atn http://www.fao.org/UNFAO/about/index_en.html.

7 *CESCR*, Art 12. The two Articles expand on rights proclaimed in Article 25 if the *Universal Declaration of Human Rights* of 1948 (UDHR), which runs 'Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control'. For the text of the

UDHR see http://www.bee-leaf.com/universaldeclaration humanrights.html.

8 The WHO's objective, as set out in its Constitution, is 'the attainment by all peoples of the highest possible level of health', defined expansively as 'a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity'. http://www.who.int/about/en/.

9 See recently James Griffin, 'Discrepancies between the Best Philosophical Account of Human Rights and the International Law of Human Rights', *Proceedings of the Aristotelian Society*, Cl, 2001, pp. 1–28.

10 The text can be found at http://www.imcl/biz/docs/humanrights.pdf. For further comments on some confusions about obligations and agency in *UDHR*, see Onora O'Neill, 'Agents of Justice', in Thomas W. Pogge, *Global Justice* (Oxford: Blackwell, 2001), pp. 188–203.

11 Article 2 *CESCR* at http://www.unhchr.ch/html/menu3/b/a_cescr.htm.

12 *The Nature of States Parties Obligations*, Art. 2, para. 1 of the Covenant, Fifth session, 1990, Office of the High Commissioner for Human Rights, *CESCR* General comment 3, http://www.unhchr.ch/tbs/doc.nsf/(symbol)/CESCR+General+comment+3.En?Open Document.

13 Michael Moran, *The British Regulatory State: High Modernism and Hyper-innovation* (Oxford: Oxford University Press, 2003). Moran argues that the new regulatory state is neither liberal nor decentralizing, despite its commitment to human rights. Rather it is both interventionist and centralizing in ways that colonize hitherto relatively independent domains of civil society – including those of the farmer and the physician.

14 See Albert O. Hirschmann, *Exit, Voice and Loyalty: Responses to Decline in Firms, Organizations and States* (Cambridge, MA: Harvard University Press, 1970), for a classic analysis of these options.

15 The United Kingdom government established a *Better Regulation Task Force* in 1997. It promotes the 'five principles of better regulation' which are said to be Proportionality, Accountability, Consistency, Transparency and Targeting (consistency is a nice touch!). See the task force's website at http://www.brtf.gov.uk/.

16 Friedrich Nietzsche, *The Genealogy of Morals*, Part III, Section 15. This translation, which draws on earlier received versions, can be found at *The Nietzsche channel*'s website at http://www.geocities.com/thenietzschechannel/onthe3.htm#3e15.

17 Bernard Williams, *Ethics and the Limits of Philosophy* (London: Fontana, 1985), p. 177.

24

A Defense of Abortion

Judith Jarvis Thomson

Most opposition to abortion relies on the premise that the fetus is a human being, a person, from the moment of conception. The premise is argued for, but, as I think, not well. Take, for example, the most common argument. We are asked to notice that the development of a human being from conception through birth into childhood is continuous; then it is said that to draw a line, to choose a point in this development and say "before this point the thing is not a person, after this point it is a person" is to make an arbitrary choice, a choice for which in the nature of things no good reason can be given. It is concluded that the fetus is, or anyway that we had better say it is, a person from the moment of conception. But this conclusion does not follow. Similar things might be said about the development of an acorn into an oak tree, and it does not follow that acorns are oak trees, or that we had better say they are. Arguments of this form are sometimes called "slippery slope arguments" – the phrase is perhaps self-explanatory – and it is dismaying that opponents of abortion rely on them so heavily and uncritically.

I am inclined to agree, however, that the prospects for "drawing a line" in the development of the fetus look dim. I am inclined to think also that we shall probably have to agree that the fetus has already become a human person well before birth. Indeed, it comes as a surprise when one first learns how early in its life it begins to acquire human characteristics. By the tenth week, for example, it already has a face, arms and legs, fingers and toes; it has internal organs, and brain activity is detectable.[1] On the other hand, I think that the premise is false, that the fetus is not a person from the moment of conception. A newly fertilized ovum, a newly implanted clump of cells, is no more a person than an acorn is an oak tree. But I shall not discuss any of this. For it seems to me to be of great interest to ask what happens if, for the sake of argument, we allow the premise. How, precisely, are we supposed to get from there to the conclusion that abortion is morally impermissible? Opponents of abortion commonly spend most of their time establishing that the fetus is a person, and hardly any time explaining the step from there to the impermissibility of abortion. Perhaps they think the step too simple and obvious to require much comment. Or perhaps instead they are simply being economical in argument. Many of those who defend abortion rely on the premise that the fetus is not a person, but only a bit of tissue that will become a person at birth; and why pay out more arguments than you have to? Whatever the explanation, I suggest that the step they take is neither easy nor obvious, that it calls for closer examination than it is commonly given, and that when we do give it this closer examination we shall feel inclined to reject it.

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I propose, then, that we grant that the fetus is a person from the moment of conception. How does the argument go from here? Something like this, I take it. Every person has a right to life. So the fetus has a right to life. No doubt the mother has a right to decide what shall happen in and to her body; everyone would grant that. But surely a person's right to life is stronger and more stringent than the mother's right to decide what happens in and to her body, and so outweighs it. So the fetus may not be killed; an abortion may not be performed.

It sounds plausible. But now let me ask you to imagine this. You wake up in the morning and find yourself back to back in bed with an unconscious violinist. A famous unconscious violinist. He has been found to have a fatal kidney ailment, and the Society of Music Lovers has canvassed all the available medical records and found that you alone have the right blood type to help. They have therefore kidnapped you, and last night the violinist's circulatory system was plugged into yours, so that your kidneys can be used to extract poisons from his blood as well as your own. The director of the hospital now tells you, "Look, we're sorry the Society of Music Lovers did this to you – we would never have permitted it if we had known. But still, they did it, and the violinist now is plugged into you. To unplug you would be to kill him. But never mind, it's only for nine months. By then he will have recovered from his ailment, and can safely be unplugged from you." Is it morally incumbent on you to accede to this situation? No doubt it would be very nice of you if you did, a great kindness. But do you *have* to accede to it? What if it were not nine months, but nine years? Or longer still? What if the director of the hospital says, "Tough luck, I agree, but you've now got to stay in bed, with the violinist plugged into you, for the rest of your life. Because remember this. All persons have a right to life, and violinists are persons. Granted you have a right to decide what happens in and to your body, but a person's right to life outweighs your right to decide what happens in and to your body. So you cannot ever be unplugged from him." I imagine you would regard this as outrageous, which suggests that something really is wrong with that plausible-sounding argument I mentioned a moment ago.

In this case, of course, you were kidnapped; you didn't volunteer for the operation that plugged the violinist into your kidneys. Can those who oppose abortion on the ground I mentioned make an exception for a pregnancy due to rape? Certainly. They can say that persons have a right to life only if they didn't come into existence because of rape; or they can say that all persons have a right to life, but that some have less of a right to life than others, in particular, that those who came into existence because of rape have less. But these statements have a rather unpleasant sound. Surely the question of whether you have a right to life at all, or how much of it you have, shouldn't turn on the question of whether or not you are the product of a rape. And in fact the people who oppose abortion on the ground I mentioned do not make this distinction, and hence do not make an exception in case of rape.

Nor do they make an exception for a case in which the mother has to spend the nine months of her pregnancy in bed. They would agree that would be a great pity, and hard on the mother; but all the same, all persons have a right to life, the fetus is a person, and so on. I suspect, in fact, that they would not make an exception for a case in which, miraculously enough, the pregnancy went on for nine years, or even the rest of the mother's life.

Some won't even make an exception for a case in which continuation of the pregnancy is likely to shorten the mother's life; they regard abortion as impermissible even to save the mother's life. Such cases are nowadays very rare, and many opponents of abortion do not accept this extreme view. All the same, it is a good place to begin: a number of points of interest come out in respect to it.

1. Let us call the view that abortion is impermissible even to save the mother's life "the extreme view." I want to suggest first that it does not issue from the argument I mentioned earlier without the addition of some fairly powerful premises. Suppose a woman has become pregnant, and now learns that she has a cardiac condition such that she will die if she carries the baby to term. What may be done for her? The fetus, being a person, has a right to life, but as the mother is a person too, so has she a right to life. Presumably they have an equal right to life. How is it supposed to come out that an abortion may not be performed? If mother and child have an equal right to life, shouldn't we perhaps flip a coin? Or should we add to the mother's right to life her right to decide what happens in and to her body, which everybody seems to be ready to grant – the sum of her rights now outweighing the fetus' right to life?

The most familiar argument here is the following. We are told that performing the abortion would be directly killing[2] the child, whereas doing nothing would not be killing the mother, but only letting her die. Moreover, in killing the child, one would be killing an innocent person, for the child has committed no crime, and is not aiming at his mother's death. And then there are a variety of ways in which this might be continued. (1) But as directly killing an innocent person is always and absolutely impermissible, an abortion may not be performed.

Or, (2) as directly killing an innocent person is murder, and murder is always and absolutely impermissible, an abortion may not be performed.[3] Or, (3) as one's duty to refrain from directly killing an innocent person is more stringent than one's duty to keep a person from dying, an abortion may not be performed. Or, (4) if one's only options are directly killing an innocent person or letting a person die, one must prefer letting the person die, and thus an abortion may not be performed.[4]

Some people seem to have thought that these are not further premises which must be added if the conclusion is to be reached, but that they follow from the very fact that an innocent person has a right to life.[5] But this seems to me to be a mistake, and perhaps the simplest way to show this is to bring out that while we must certainly grant that innocent persons have a right to life, the theses in (1) through (4) are all false. Take (2), for example. If directly killing an innocent person is murder, and thus is impermissible, then the mother's directly killing the innocent person inside her is murder, and thus is impermissible. But it cannot seriously be thought to be murder if the mother performs an abortion on herself to save her life. It cannot seriously be said that she *must* refrain, that she *must* sit passively by and wait for her death. Let us look again at the case of you and the violinist. There you are, in bed with the violinist, and the director of the hospital says to you, "It's all most distressing, and I deeply sympathize, but you see this is putting an additional strain on your kidneys, and you'll be dead within the month. But you *have* to stay where you are all the same. Because unplugging you would be directly killing an innocent violinist, and that's murder, and that's impermissible." If anything in the world is true, it is that you do not commit murder, you do not do what is impermissible, if you reach around to your back and unplug yourself from that violinist to save your life.

The main focus of attention in writings on abortion has been on what a third party may or may not do in answer to a request from a woman for an abortion. This is in a way understandable. Things being as they are, there isn't much a woman can safely do to abort herself. So the question asked is what a third party may do, and what the mother may do, if it is mentioned at all, is deduced, almost as an afterthought, from what it is concluded that third parties may do. But it seems to me that to treat the matter in this way is to refuse to grant to the mother that very status of person which is so firmly insisted on for the fetus. For we cannot simply read off what a person may do from what a third party may do. Suppose you find yourself trapped in a tiny house with a growing child. I mean a very tiny house, and a rapidly growing child – you are already up against the wall of the house and in a few minutes you'll be crushed to death. The child on the other hand won't be crushed to death; if nothing is done to stop him from growing he'll be hurt, but in the end he'll simply burst open the house and walk out a free man. Now I could well understand it if a bystander were to say, "There's nothing we can do for you. We cannot choose between your life and his, we cannot be the ones to decide who is to live, we cannot intervene." But it cannot be concluded that you too can do nothing, that you cannot attack it to save your life. However innocent the child may be, you do not have to wait passively while it crushes you to death. Perhaps a pregnant woman is vaguely felt to have the status of house, to which we don't allow the right of self-defense. But if the woman houses the child, it should be remembered that she is a person who houses it.

I should perhaps stop to say explicitly that I am not claiming that people have a right to do anything whatever to save their lives. I think, rather, that there are drastic limits to the right of self-defense. If someone threatens you with death unless you torture someone else to death, I think you have not the right, even to save your life, to do so. But the case under consideration here is very different. In our case there are only two people involved, one whose life is threatened, and one who threatens it. Both are innocent: the one who is threatened is not threatened because of any fault, the one who threatens does not threaten because of any fault. For this reason we may feel that we bystanders cannot intervene. But the person threatened can.

In sum, a woman surely can defend her life against the threat to it posed by the unborn child, even if doing so involves its death. And this shows not merely that the theses in (1) through (4) are false; it shows also that the extreme view of abortion is false, and so we need not canvass any other possible ways of arriving at it from the argument I mentioned at the outset.

2. The extreme view could of course be weakened to say that while abortion is permissible to save the mother's life, it may not be performed by a third party, but only by the mother herself. But this cannot be right either. For what we have to keep in mind is that the mother and the unborn child are not like two tenants in a small house which has, by an unfortunate mistake, been rented to both: the mother *owns* the house. The fact that she does adds to the offensiveness of deducing that the mother can do nothing from the supposition that third parties can do nothing. But it does more than this: it casts a bright light on the supposition that third parties

can do nothing. Certainly it lets us see that a third party who says "I cannot choose between you" is fooling himself if he thinks this is impartiality. If Jones has found and fastened on a certain coat, which he needs to keep him from freezing, but which Smith also needs to keep him from freezing, then it is not impartiality that says "I cannot choose between you" when Smith owns the coat. Women have said again and again "This body is *my* body!" and they have reason to feel angry, reason to feel that it has been like shouting into the wind. Smith, after all, is hardly likely to bless us if we say to him, "Of course it's your coat, anybody would grant that it is. But no one may choose between you and Jones who is to have it."

We should really ask what it is that says "no one may choose" in the face of the fact that the body that houses the child is the mother's body. It may be simply a failure to appreciate this fact. But it may be something more interesting, namely the sense that one has a right to refuse to lay hands on people, even where it would be just and fair to do so, even where justice seems to require that somebody do so. Thus justice might call for somebody to get Smith's coat back from Jones, and yet you have a right to refuse to be the one to lay hands on Jones, a right to refuse to do physical violence to him. This, I think, must be granted. But then what should be said is not "no one may choose," but only "*I* cannot choose," and indeed not even this, but "*I* will not *act*," leaving it open that somebody else can or should, and in particular that anyone in a position of authority, with the job of securing people's rights, both can and should. So this is no difficulty. I have not been arguing that any given third party must accede to the mother's request that he perform an abortion to save her life, but only that he may.

I suppose that in some views of human life the mother's body is only on loan to her, the loan not being one which gives her any prior claim to it. One who held this view might well think it impartiality to say "I cannot choose." But I shall simply ignore this possibility. My own view is that if a human being has any just, prior claim to anything at all, he has a just, prior claim to his own body. And perhaps this needn't be argued for here anyway, since, as I mentioned, the arguments against abortion we are looking at do grant that the woman has a right to decide what happens in and to her body.

But although they do grant it, I have tried to show that they do not take seriously what is done in granting it. I suggest the same thing will reappear even more clearly when we turn away from cases in which the mother's life is at stake, and attend, as I propose we now do, to the vastly more common cases in which a woman wants an abortion for some less weighty reason than preserving her own life.

3. Where the mother's life is not at stake, the argument I mentioned at the outset seems to have a much stronger pull. "Everyone has a right to life, so the unborn person has a right to life." And isn't the child's right to life weightier than anything other than the mother's own right to life, which she might put forward as ground for an abortion?

This argument treats the right to life as if it were unproblematic. It is not, and this seems to me to be precisely the source of the mistake.

For we should now, at long last, ask what it comes to, to have a right to life. In some views having a right to life includes having a right to be given at least the bare minimum one needs for continued life. But suppose that what in fact *is* the bare minimum a man needs for continued life is something he has no right at all to be given? If I am sick unto death, and the only thing that will save my life is the touch of Henry Fonda's cool hand on my fevered brow, then all the same, I have no right to be given the touch of Henry Fonda's cool hand on my fevered brow. It would be frightfully nice of him to fly in from the West Coast to provide it. It would be less nice, though no doubt well meant, if my friends flew out to the West Coast and carried Henry Fonda back with them. But I have no right at all against anybody that he should do this for me. Or again, to return to the story I told earlier, the fact that for continued life that violinist needs the continued use of your kidneys does not establish that he has a right to be given the continued use of your kidneys. He certainly has no right against you that *you* should give him continued use of your kidneys. For nobody has any right to use your kidneys unless you give him such a right; and nobody has the right against you that you shall give him this right – if you do allow him to go on using your kidneys, this is a kindness on your part, and not something he can claim from you as his due. Nor has he any right against anybody else that *they* should give him continued use of your kidneys. Certainly he had no right against the Society of Music Lovers that they should plug him into you in the first place. And if you now start to unplug yourself, having learned that you will otherwise have to spend nine years in bed with him, there is nobody in the world who must try to prevent you, in order to see to it that he is given something he has a right to be given.

Some people are rather stricter about the right to life. In their view, it does not include the right to be given anything, but amounts to, and only to, the right not to be

killed by anybody. But here a related difficulty arises. If everybody is to refrain from killing that violinist, then everybody must refrain from doing a great many different sorts of things. Everybody must refrain from slitting his throat, everybody must refrain from shooting him – and everybody must refrain from unplugging you from him. But does he have a right against everybody that they shall refrain from unplugging you from him? To refrain from doing this is to allow him to continue to use your kidneys. It could be argued that he has a right against us that *we* should allow him to continue to use your kidneys. That is, while he had no right against us that we should give him the use of your kidneys, it might be argued that he anyway has a right against us that we shall not now intervene and deprive him of the use of your kidneys. I shall come back to third-party interventions later. But certainly the violinist has no right against you that *you* shall allow him to continue to use your kidneys. As I said, if you do allow him to use them, it is a kindness on your part, and not something you owe him.

The difficulty I point to here is not peculiar to the right to life. It reappears in connection with all the other natural rights; and it is something which an adequate account of rights must deal with. For present purposes it is enough just to draw attention to it. But I would stress that I am not arguing that people do not have a right to life – quite to the contrary, it seems to me that the primary control we must place on the acceptability of an account of rights is that it should turn out in that account to be a truth that all persons have a right to life. I am arguing only that having a right to life does not guarantee having either a right to be given the use of or a right to be allowed continued use of another person's body – even if one needs it for life itself. So the right to life will not serve the opponents of abortion in the very simple and clear way in which they seem to have thought it would.

4. There is another way to bring out the difficulty. In the most ordinary sort of case, to deprive someone of what he has a right to is to treat him unjustly. Suppose a boy and his small brother are jointly given a box of chocolates for Christmas. If the older boy takes the box and refuses to give his brother any of the chocolates, he is unjust to him, for the brother has been given a right to half of them. But suppose that, having learned that otherwise it means nine years in bed with that violinist, you unplug yourself from him. You surely are not being unjust to him, for you gave him no right to use your kidneys, and no one else can have given him any such right. But we have to notice that in unplugging yourself, you are killing him; and violinists, like everybody else, have a right to life, and thus in the view we were considering just now, the right not to be killed. So here you do what he supposedly has a right you shall not do, but you do not act unjustly to him in doing it.

The emendation which may be made at this point is this: the right to life consists not in the right not to be killed, but rather in the right not to be killed unjustly. This runs a risk of circularity, but never mind: it would enable us to square the fact that the violinist has a right to life with the fact that you do not act unjustly toward him in unplugging yourself, thereby killing him. For if you do not kill him unjustly, you do not violate his right to life, and so it is no wonder you do him no injustice.

But if this emendation is accepted, the gap in the argument against abortion stares us plainly in the face: it is by no means enough to show that the fetus is a person, and to remind us that all persons have a right to life – we need to be shown also that killing the fetus violates its right to life, i.e., that abortion is unjust killing. And is it?

I suppose we may take it as a datum that in a case of pregnancy due to rape the mother has not given the unborn person a right to the use of her body for food and shelter. Indeed, in what pregnancy could it be supposed that the mother has given the unborn person such a right? It is not as if there were unborn persons drifting about the world, to whom a woman who wants a child says "I invite you in."

But it might be argued that there are other ways one can have acquired a right to the use of another person's body than by having been invited to use it by that person. Suppose a woman voluntarily indulges in intercourse, knowing of the chance it will issue in pregnancy, and then she does become pregnant; is she not in part responsible for the presence, in fact the very existence, of the unborn person inside her? No doubt she did not invite it in. But doesn't her partial responsibility for its being there itself give it a right to the use of her body?[6] If so, then her aborting it would be more like the boy's taking away the chocolates, and less like your unplugging yourself from the violinist – doing so would be depriving it of what it does have a right to, and thus would be doing it an injustice.

And then, too, it might be asked whether or not she can kill it even to save her own life: If she voluntarily called it into existence, how can she now kill it, even in self-defense?

The first thing to be said about this is that it is something new. Opponents of abortion have been so concerned to make out the independence of the fetus, in order to establish that it has a right to life, just as its

mother does, that they have tended to overlook the possible support they might gain from making out that the fetus is *dependent* on the mother, in order to establish that she has a special kind of responsibility for it, a responsibility that gives it rights against her which are not possessed by any independent person – such as an ailing violinist who is a stranger to her.

On the other hand, this argument would give the unborn person a right to its mother's body only if her pregnancy resulted from a voluntary act, undertaken in full knowledge of the chance a pregnancy might result from it. It would leave out entirely the unborn person whose existence is due to rape. Pending the availability of some further argument, then, we would be left with the conclusion that unborn persons whose existence is due to rape have no right to the use of their mothers' bodies, and thus that aborting them is not depriving them of anything they have a right to and hence is not unjust killing.

And we should also notice that it is not at all plain that this argument really does go even as far as it purports to. For there are cases and cases, and the details make a difference. If the room is stuffy, and I therefore open a window to air it, and a burglar climbs in, it would be absurd to say: "Ah, now he can stay, she's given him a right to the use of her house – for she is partially responsible for his presence there, having voluntarily done what enabled him to get in, in full knowledge that there are such things as burglars, and that burglars burgle." It would be still more absurd to say this if I had had bars installed outside my windows, precisely to prevent burglars from getting in, and a burglar got in only because of a defect in the bars. It remains equally absurd if we imagine it is not a burglar who climbs in, but an innocent person who blunders or falls in. Again, suppose it were like this: people-seeds drift about in the air like pollen, and if you open your windows, one may drift in and take root in your carpets or upholstery. You don't want children, so you fix up your windows with fine mesh screens, the very best you can buy. As can happen, however, and on very, very rare occasions does happen, one of the screens is defective; and a seed drifts in and takes root. Does the person-plant who now develops have a right to the use of your house? Surely not – despite the fact that you voluntarily opened your windows, you knowingly kept carpets and upholstered furniture, and you knew that screens were sometimes defective. Someone may argue that you are responsible for its rooting, that it does have a right to your house, because after all you *could* have lived out your life with bare floors and furniture, or with sealed windows and doors. But this won't do – for by the same token anyone can avoid a pregnancy due to rape by having a hysterectomy, or anyway by never leaving home without a (reliable!) army.

It seems to me that the argument we are looking at can establish at most that there are *some* cases in which the unborn person has a right to the use of its mother's body, and therefore *some* cases in which abortion is unjust killing. There is room for much discussion and argument as to precisely which, if any. But I think we should sidestep this issue and leave it open, for at any rate the argument certainly does not establish that all abortion is unjust killing.

5. There is room for yet another argument here, however. We surely must all grant that there may be cases in which it would be morally indecent to detach a person from your body at the cost of his life. Suppose you learn that what the violinist needs is not nine years of your life, but only one hour: all you need do to save his life is to spend one hour in that bed with him. Suppose also that letting him use your kidneys for that one hour would not affect your health in the slightest. Admittedly you were kidnapped. Admittedly you did not give anyone permission to plug him into you. Nevertheless it seems to me plain you *ought* to allow him to use your kidneys for that hour – it would be indecent to refuse.

Again, suppose pregnancy lasted only an hour, and constituted no threat to life or health. And suppose that a woman becomes pregnant as a result of rape. Admittedly she did not voluntarily do anything to bring about the existence of a child. Admittedly she did nothing at all which would give the unborn person a right to the use of her body. All the same it might well be said, as in the newly emended violinist story, that she *ought* to allow it to remain for that hour – that it would be indecent in her to refuse.

Now some people are inclined to use the term "right" in such a way that it follows from the fact that you ought to allow a person to use your body for the hour he needs, that he has a right to use your body for the hour he needs, even though he has not been given that right by any person or act. They may say that it follows also that if you refuse, you act unjustly toward him. This use of the term is perhaps so common that it cannot be called wrong; nevertheless it seems to me to be an unfortunate loosening of what we would do better to keep a tight rein on. Suppose that box of chocolates I mentioned earlier had not been given to both boys jointly, but was given only to the older boy. There he sits, stolidly eating his way through the box, his small brother watching enviously.

Here we are likely to say "You ought not to be so mean. You ought to give your brother some of those chocolates." My own view is that it just does not follow from the truth of this that the brother has any right to any of the chocolates. If the boy refuses to give his brother any, he is greedy, stingy, callous – but not unjust. I suppose that the people I have in mind will say it does follow that the brother has a right to some of the chocolates, and thus that the boy does act unjustly if he refuses to give his brother any. But the effect of saying this is to obscure what we should keep distinct, namely the difference between the boy's refusal in this case and the boy's refusal in the earlier case, in which the box was given to both boys jointly, and in which the small brother thus had what was from any point of view clear title to half.

A further objection to so using the term "right" that from the fact that A ought to do a thing for B, it follows that B has a right against A that A do it for him, is that it is going to make the question of whether or not a man has a right to a thing turn on how easy it is to provide him with it; and this seems not merely unfortunate, but morally unacceptable. Take the case of Henry Fonda again. I said earlier that I had no right to the touch of his cool hand on my fevered brow, even though I needed it to save my life. I said it would be frightfully nice of him to fly in from the West Coast to provide me with it, but that I had no right against him that he should do so. But suppose he isn't on the West Coast. Suppose he has only to walk across the room, place a hand briefly on my brow – and lo, my life is saved. Then surely he ought to do it, it would be indecent to refuse. Is it to be said "Ah, well, it follows that in this case she has a right to the touch of his hand on her brow, and so it would be an injustice in him to refuse"? So that I have a right to it when it is easy for him to provide it, though no right when it's hard? It's rather a shocking idea that anyone's rights should fade away and disappear as it gets harder and harder to accord them to him.

So my own view is that even though you ought to let the violinist use your kidneys for the one hour he needs, we should not conclude that he has a right to do so – we should say that if you refuse, you are, like the boy who owns all the chocolates and will give none away, self-centered and callous, indecent in fact, but not unjust. And similarly, that even supposing a case in which a woman pregnant due to rape ought to allow the unborn person to use her body for the hour he needs, we should not conclude that he has a right to do so; we should conclude that she is self-centered, callous, indecent, but not unjust, if she refuses. The complaints are no less grave; they are just different. However, there is no need to insist on this point. If anyone does wish to deduce "he has a right" from "you ought," then all the same he must surely grant that there are cases in which it is not morally required of you that you allow that violinist to use your kidneys, and in which he does not have a right to use them, and in which you do not do him an injustice if you refuse. And so also for mother and unborn child. Except in such cases as the unborn person has a right to demand it – and we were leaving open the possibility that there may be such cases – nobody is morally *required* to make large sacrifices, of health, of all other interests and concerns, of all other duties and commitments, for nine years, or even for nine months, in order to keep another person alive.

6. We have in fact to distinguish between two kinds of Samaritan: the Good Samaritan and what we might call the Minimally Decent Samaritan. The story of the Good Samaritan, you will remember, goes like this:

> A certain man went down from Jerusalem to Jericho, and fell among thieves, which stripped him of his raiment, and wounded him, and departed, leaving him half dead.
>
> And by chance there came down a certain priest that way; and when he saw him, he passed by on the other side.
>
> And likewise a Levite, when he was at the place, came and looked on him, and passed by on the other side.
>
> But a certain Samaritan, as he journeyed, came where he was; and when he saw him he had compassion on him.
>
> And went to him, and bound up his wounds, pouring in oil and wine, and set him on his own beast, and brought him to an inn, and took care of him.
>
> And on the morrow, when he departed, he took out two pence, and gave them to the host, and said unto him, "Take care of him; and whatsoever thou spendest more, when I come again, I will repay thee." (Luke 10:30–5)

The Good Samaritan went out of his way, at some cost to himself, to help one in need of it. We are not told what the options were, that is, whether or not the priest and the Levite could have helped by doing less than the Good Samaritan did, but assuming they could have, then the fact they did nothing at all shows they were not even Minimally Decent Samaritans, not because they

were not Samaritans, but because they were not even minimally decent.

These things are a matter of degree, of course, but there is a difference, and it comes out perhaps most clearly in the story of Kitty Genovese, who, as you will remember, was murdered while thirty-eight people watched or listened, and did nothing at all to help her. A Good Samaritan would have rushed out to give direct assistance against the murderer. Or perhaps we had better allow that it would have been a Splendid Samaritan who did this, on the ground that it would have involved a risk of death for himself. But the thirty-eight not only did not do this, they did not even trouble to pick up a phone to call the police. Minimally Decent Samaritanism would call for doing at least that, and their not having done it was monstrous.

After telling the story of the Good Samaritan, Jesus said "Go, and do thou likewise." Perhaps he meant that we are morally required to act as the Good Samaritan did. Perhaps he was urging people to do more than is morally required of them. At all events it seems plain that it was not morally required of any of the thirty-eight that he rush out to give direct assistance at the risk of his own life, and that it is not morally required of anyone that he give long stretches of his life – nine years or nine months – to sustaining the life of a person who has no special right (we were leaving open the possibility of this) to demand it.

Indeed, with one rather striking class of exceptions, no one in any country in the world is *legally* required to do anywhere near as much as this for anyone else. The class of exceptions is obvious. My main concern here is not the state of the law in respect to abortion, but it is worth drawing attention to the fact that in no state in this country is any man compelled by law to be even a Minimally Decent Samaritan to any person; there is no law under which charges could be brought against the thirty-eight who stood by while Kitty Genovese died. By contrast, in most states in this country women are compelled by law to be not merely Minimally Decent Samaritans, but Good Samaritans to unborn persons inside them. This doesn't by itself settle anything one way or the other, because it may well be argued that there should be laws in this country – as there are in many European countries – compelling at least Minimally Decent Samaritanism.[7] But it does show that there is a gross injustice in the existing state of the law. And it shows also that the groups currently working against liberalization of abortion laws, in fact working toward having it declared unconstitutional for a state to permit abortion, had better start working for the adoption of Good Samaritan laws generally, or earn the charge that they are acting in bad faith.

I should think, myself, that Minimally Decent Samaritan laws would be one thing, Good Samaritan laws quite another, and in fact highly improper. But we are not here concerned with the law. What we should ask is not whether anybody should be compelled by law to be a Good Samaritan, but whether we must accede to a situation in which somebody is being compelled – by nature, perhaps – to be a Good Samaritan. We have, in other words, to look now at third-party interventions. I have been arguing that no person is morally required to make large sacrifices to sustain the life of another who has no right to demand them, and this even where the sacrifices do not include life itself; we are not morally required to be Good Samaritans or anyway Very Good Samaritans to one another. But what if a man cannot extricate himself from such a situation? What if he appeals to us to extricate him? It seems to me plain that there are cases in which we can, cases in which a Good Samaritan would extricate him. There you are, you were kidnapped, and nine years in bed with that violinist lie ahead of you. You have your own life to lead. You are sorry, but you simply cannot see giving up so much of your life to the sustaining of his. You cannot extricate yourself, and ask us to do so. I should have thought that – in light of his having no right to the use of your body – it was obvious that we do not have to accede to your being forced to give up so much. We can do what you ask. There is no injustice to the violinist in our doing so.

7. Following the lead of the opponents of abortion, I have throughout been speaking of the fetus merely as a person, and what I have been asking is whether or not the argument we began with, which proceeds only from the fetus being a person, really does establish its conclusion. I have argued that it does not.

But of course there are arguments and arguments, and it may be said that I have simply fastened on the wrong one. It may be said that what is important is not merely the fact that the fetus is a person, but that it is a person for whom the woman has a special kind of responsibility issuing from the fact that she is its mother. And it might be argued that all my analogies are therefore irrelevant – for you do not have that special kind of responsibility for that violinist, Henry Fonda does not have that special kind of responsibility for me. And our attention might be drawn to the fact that men and women both *are* compelled by law to provide support for their children.

I have in effect dealt (briefly) with this argument in section 4 above; but a (still briefer) recapitulation now may be in order. Surely we do not have any such "special responsibility" for a person unless we have assumed it, explicitly or implicitly. If a set of parents do not try to prevent pregnancy, do not obtain an abortion, and then at the time of birth of the child do not put it out for adoption, but rather take it home with them, then they have assumed responsibility for it, they have given it rights, and they cannot *now* withdraw support from it at the cost of its life because they now find it difficult to go on providing for it. But if they have taken all reasonable precautions against having a child, they do not simply by virtue of their biological relationship to the child who comes into existence have a special responsibility for it. They may wish to assume responsibility for it, or they may not wish to. And I am suggesting that if assuming responsibility for it would require large sacrifices, then they may refuse. A Good Samaritan would not refuse – or anyway, a Splendid Samaritan, if the sacrifices that had to be made were enormous. But then so would a Good Samaritan assume responsibility for that violinist; so would Henry Fonda, if he is a Good Samaritan, fly in from the West Coast and assume responsibility for me.

8. My argument will be found unsatisfactory on two counts by many of those who want to regard abortion as morally permissible. First, while I do argue that abortion is not impermissible, I do not argue that it is always permissible. There may well be cases in which carrying the child to term requires only Minimally Decent Samaritanism of the mother, and this is a standard we must not fall below. I am inclined to think it a merit of my account precisely that it does *not* give a general yes or a general no. It allows for and supports our sense that, for example, a sick and desperately frightened fourteen-year-old schoolgirl, pregnant due to rape, may *of course* choose abortion, and that any law which rules this out is an insane law. And it also allows for and supports our sense that in other cases resort to abortion is even positively indecent. It would be indecent in the woman to request an abortion, and indecent in a doctor to perform it, if she is in her seventh month, and wants the abortion just to avoid the nuisance of postponing a trip abroad. The very fact that the arguments I have been drawing attention to treat all cases of abortion, or even all cases of abortion in which the mother's life is not at stake, as morally on a par ought to have made them suspect at the outset.

Secondly, while I am arguing for the permissibility of abortion in some cases, I am not arguing for the right to secure the death of the unborn child. It is easy to confuse these two things in that up to a certain point in the life of the fetus it is not able to survive outside the mother's body; hence removing it from her body guarantees its death. But they are importantly different. I have argued that you are not morally required to spend nine months in bed, sustaining the life of that violinist; but to say this is by no means to say that if, when you unplug yourself, there is a miracle and he survives, you then have a right to turn round and slit his throat. You may detach yourself even if this costs him his life; you have no right to be guaranteed his death, by some other means, if unplugging yourself does not kill him. There are some people who will feel dissatisfied by this feature of my argument. A woman may be utterly devastated by the thought of a child, a bit of herself, put out for adoption and never seen or heard of again. She may therefore want not merely that the child be detached from her, but more, that it die. Some opponents of abortion are inclined to regard this as beneath contempt – thereby showing insensitivity to what is surely a powerful source of despair. All the same, I agree that the desire for the child's death is not one which anybody may gratify, should it turn out to be possible to detach the child alive.

At this place, however, it should be remembered that we have only been pretending throughout that the fetus is a human being from the moment of conception. A very early abortion is surely not the killing of a person, and so is not dealt with by anything I have said here.

Notes

1 Daniel Callahan, *Abortion: Law, Choice and Morality* (New York, 1970), p. 373. This book gives a fascinating survey of the available information on abortion. The Jewish tradition is surveyed in David M. Feldman, *Birth Control in Jewish Law* (New York, 1968), Part 5; the Catholic tradition in John T. Noonan, Jr., "An Almost Absolute Value in History," in *The Morality of Abortion*, ed. John T. Noonan, Jr. (Cambridge, MA, 1970).

2 The term "direct" in the arguments I refer to is a technical one. Roughly, what is meant by "direct killing" is either killing as an end in itself, or killing as a means to some end, for example, the end of saving someone else's life. See note 6, below, for an example of its use.

3 Cf. *Encyclical Letter of Pope Pius XI on Christian Marriage*, St. Paul Editions (Boston, n.d.), p. 32: "however much we may pity the mother whose health and even life is gravely

imperiled in the performance of the duty allotted to her by nature, nevertheless what could ever be a sufficient reason for excusing in any way the direct murder of the innocent? This is precisely what we are dealing with here." Noonan (*The Morality of Abortion*, p. 43) reads this as follows: "What cause can ever avail to excuse in any way the direct killing of the innocent? For it is a question of that."

4 The thesis in (4) is in an interesting way weaker than those in (1), (2), and (3): they rule out abortion even in cases in which both mother *and* child will die if the abortion is not performed. By contrast, one who held the view expressed in (4) could consistently say that one needn't prefer letting two persons die to killing one.

5 Cf. the following passage from Pius XII, *Address to the Italian Catholic Society of Midwives*: "The baby in the maternal breast has the right to life immediately from God. – Hence there is no man, no human authority, no science, no medical, eugenic, social, economic or moral "indication" which can establish or grant a valid juridical ground for a direct deliberate disposition of an innocent human life, that is a disposition which looks to its destruction either as an end or as a means to another end perhaps in itself not illicit. – The baby, still not born, is a man in the same degree and for the same reason as the mother" (quoted in Noonan, *The Morality of Abortion*, p. 45).

6 The need for a discussion of this argument was brought home to me by members of the Society for Ethical and Legal Philosophy, to whom this paper was originally presented.

7 For a discussion of the difficulties involved, and a survey of the European experience with such laws, see *The Good Samaritan and the Law*, ed. James M. Ratcliffe (New York, 1966).

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Justice and Minority Rights

Will Kymlicka

Three Forms of Group-Differentiated Rights

Virtually all liberal democracies are either multinational or polyethnic, or both. The 'challenge of multiculturalism' is to accommodate these national and ethnic differences in a stable and morally defensible way (Gutmann 1993). In this section, I will discuss some of the most important ways in which democracies have responded to the demands of national minorities and ethnic groups.

In all liberal democracies, one of the major mechanisms for accommodating cultural differences is the protection of the civil and political rights of individuals. It is impossible to overstate the importance of freedom of association, religion, speech, mobility, and political organization for protecting group difference. These rights enable individuals to form and maintain the various groups and associations which constitute civil society, to adapt these groups to changing circumstances, and to promote their views and interests to the wider population. The protection afforded by these common rights of citizenship is sufficient for many of the legitimate forms of diversity in society.

Various critics of liberalism – including some Marxists, communitarians, and feminists – have argued that the liberal focus on individual rights reflects an atomistic, materialistic, instrumental, or conflictual view of human relationships. I believe that this criticism is profoundly mistaken, and that individual rights can be and typically are used to sustain a wide range of social relationships. Indeed, the most basic liberal right – freedom of conscience – is primarily valuable for the protection it gives to intrinsically social (and non-instrumental) activities.[1]

However, it is increasingly accepted in many countries that some forms of cultural difference can only be accommodated through special legal or constitutional measures, above and beyond the common rights of citizenship. Some forms of group difference can only be accommodated if their members have certain group-specific rights – what Iris Young calls 'differentiated citizenship' (I. Young 1989: 258).

For example, a recent government publication in Canada noted that:

> In the Canadian experience, it has not been enough to protect only universal individual rights. Here, the Constitution and ordinary laws also protect other rights accorded to individuals as members of certain communities. This accommodation of both types of rights makes our constitution unique and reflects the

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> Canadian value of equality that accommodates difference. The fact that community rights exist alongside individual rights goes to the very heart of what Canada is all about. (Government of Canada 1991a: 3).

It is quite misleading to say that Canada is unique in combining universal individual rights and group-specific 'community rights'. Such a combination exists in many other federal systems in Europe, Asia, and Africa. As I noted earlier, even the constitution of the United States, which is often seen as a paradigm of individualism, allows for various group-specific rights, including the special status of American Indians and Puerto Ricans.

It is these special group-specific measures for accommodating national and ethnic differences that I will focus on. There are at least three forms of group-specific rights: (1) self-government rights; (2) polyethnic rights; and (3) special representation rights. I will say a few words about each, before considering some of the issues they raise.

Self-government Rights

In most multination states, the component nations are inclined to demand some form of political autonomy or territorial jurisdiction, so as to ensure the full and free development of their cultures and the best interests of their people. At the extreme, nations may wish to secede, if they think their self-determination is impossible within the larger state.

The right of national groups to self-determination is given (limited) recognition in international law. According to the United Nations' Charter, 'all peoples have the right to self-determination'. However, the UN has not defined 'peoples', and it has generally applied the principle of self-determination only to overseas colonies, not internal national minorities, even when the latter were subject to the same sort of colonization and conquest as the former. This limitation on self-determination to overseas colonies (known as the 'salt-water thesis') is widely seen as arbitrary, and many national minorities insist that they too are 'peoples' or 'nations', and, as such, have the right of self-determination. They demand certain powers of self-government which they say were not relinquished by their (often involuntary) incorporation into a larger state.[2]

One mechanism for recognizing claims to self-government is federalism, which divides powers between the central government and regional sub-units (provinces/states/cantons). Where national minorities are regionally concentrated, the boundaries of federal subunits can be drawn so that the national minority forms a majority in one of the subunits. Under these circumstances, federalism can provide extensive self-government for a national minority, guaranteeing its ability to make decisions in certain areas without being outvoted by the larger society.

For example, under the federal division of powers in Canada, the province of Quebec (which is 80 per cent francophone) has extensive jurisdiction over issues that are crucial to the survival of the French culture, including control over education, language, culture, as well as significant input into immigration policy. The other nine provinces also have these powers, but the major impetus behind the existing division of powers, and indeed behind the entire federal system, is the need to accommodate the Québécois. At the time of Confederation, most English Canadian leaders were in favour of a unitary state, like Britain, and agreed to a federal system primarily to accommodate French Canadians.

One difficulty in a federal system is maintaining the balance between centralization and decentralization. While most Quebecers want an even more decentralized division of powers, most English Canadians favour a stronger central government. One of the challenges facing Canada, therefore, is finding an acceptable form of 'asymmetrical federalism' which grants Quebec powers not given to other provinces. Other federal states face a similar problem.[3]

Federalism is often used to accommodate national diversity, and so some commentators include the rights and powers attached to federal units amongst the 'collective rights' of national minorities (e.g. F. Morton 1985: 77; Van Dyke 1982: 24–31). Of course, many federal systems arose for reasons quite unrelated to cultural diversity. Federalism is often simply a form of administrative decentralization (as in Germany), or the result of historical accidents of colonization (as in Australia). There is no inherent connection between federalism and cultural diversity. But federalism is one common strategy of accommodating national minorities. It is not surprising that countries which are 'a federation of peoples' should also form a political federation.[4]

In the United States, however, a deliberate decision was made not to use federalism to accommodate the self-government rights of national minorities. It would have been quite possible in the nineteenth century to create states dominated by the Navaho, for example, or by Chicanos, Puerto Ricans and native Hawaiians. At the time these groups were incorporated into the United States,

they formed majorities in their homelands. However, a deliberate decision was made not to accept any territory as a state unless these national groups were outnumbered. In some cases, this was achieved by drawing boundaries so that Indian tribes or Hispanic groups were outnumbered (Florida). In other cases, it was achieved by delaying statehood until anglophone settlers swamped the older inhabitants (e.g. Hawaii; the south-west). In cases where the national minority was not likely to be outnumbered, a new type of non-federal political unit was created, such as the 'commonwealth' of Puerto Rico, or the 'Protectorate' of Guam.[5]

As a result, none of the fifty states can be seen as ensuring self-government for a national minority, the way that Quebec ensures self-government for the Québécois. Self-government is instead achieved through political institutions located inside existing states (e.g. Indian reservations), or entirely outside the federal system (e.g. Puerto Rico, Guam). This has tended to make national minorities in the United States more vulnerable, since their self-government powers do not have the same constitutional protection as states' rights. On the other hand, it has provided greater flexibility in redefining those powers so as to suit the needs and interests of each minority. It is much easier to negotiate new self-government provisions for the Navaho or Puerto Ricans than to modify the powers of individual states.

Federalism can only serve as a mechanism for self-government if the national minority forms a majority in one of the federal subunits, as the Québécois do in Quebec. This is not true of most indigenous peoples in North America, who are fewer in number and whose communities are often dispersed across state/provincial lines. Moreover, with few exceptions (such as the Navaho), no redrawing of the boundaries of these federal subunits would create a state, province, or territory with an indigenous majority. It would have been possible to create a state or province dominated by an Indian tribe in the nineteenth century, but, given the massive influx of settlers since then, it is now virtually inconceivable.

One exception concerns the Inuit in the north of Canada, who wish to divide the Northwest Territories into two, so that they will form the majority in the eastern half (to be called 'Nunavut'). This redrawing of federal boundaries is seen as essential to the implementation of the Inuit's right of self-government, and has recently been approved by the federal government.

For the other indigenous peoples in North America, however, self-government has been primarily tied to the system of reserved lands (known as tribal 'reservations' in the United States, and band 'reserves' in Canada). Substantial powers have been devolved from the federal government to the tribal/band councils which govern each reserve. Indian tribes/bands have been acquiring increasing control over health, education, family law, policing, criminal justice, and resource development. They are becoming, in effect, a third order of government, with a collection of powers that is carved out of both federal and state/provincial jurisdictions.[6] However, the administrative difficulties are daunting. Indian tribes/bands differ enormously in the sorts of powers they desire. Moreover, they are territorially located within existing states/provinces, and must co-ordinate their self-government with state/provincial agencies. The exact scope and mechanisms of indigenous self-government in Canada and the United States therefore remain unclear.

Similar systems of self-government exist, or are being sought, by many other indigenous peoples. A recent international declaration regarding the rights of indigenous peoples emphasizes the importance of political self-government. In many parts of the world, however, the hope for political powers is almost utopian, and the more immediate goal is simply to secure the existing land base from further erosion by settlers and resource developers. Indeed, a recent study showed that the single largest cause of ethnic conflict in the world today is the struggle by indigenous peoples for the protection of their land rights.[7]

Self-government claims, then, typically take the form of devolving political power to a political unit substantially controlled by the members of the national minority, and substantially corresponding to their historical homeland or territory. It is important to note that these claims are not seen as a temporary measure, nor as a remedy for a form of oppression that we might (and ought) someday to eliminate. On the contrary, these rights are often described as 'inherent', and so permanent (which is one reason why national minorities seek to have them entrenched in the constitution).

Polyethnic Rights

As I noted earlier, immigrant groups in the last thirty years [1970s to 1990s] have successfully challenged the 'Anglo-conformity' model which assumed that they should abandon all aspects of their ethnic heritage and assimilate to existing cultural norms and customs. At first, this challenge simply took the form of demanding the right freely to express their particularity without fear of prejudice or discrimination in the mainstream society.

It was the demand, as Walzer put it, that 'politics be separated from nationality – as it was already separated from religion' (Walzer 1982: 6–11).

But the demands of ethnic groups have expanded in important directions. It became clear that positive steps were required to root out discrimination and prejudice, particularly against visible minorities.

For this reason, anti-racism policies are considered part of the 'multiculturalism' policy in Canada and Australia, as are changes to the education curriculum to recognize the history and contribution of minorities. However, these policies are primarily directed at ensuring the effective exercise of the common rights of citizenship, and so do not really qualify as group-differentiated citizenship rights.

Some ethnic groups and religious minorities have also demanded various forms of public funding of their cultural practices. This includes the funding of ethnic associations, magazines and festivals. Given that most liberal states provide funding to the arts and museums, so as to preserve the richness and diversity of our cultural resources, funding for ethnic studies and ethnic associations can be seen as falling under this heading. Indeed, some people defend this funding simply as a way of ensuring that ethnic groups are not discriminated against in state funding of art and culture. Some people believe that public funding agencies have traditionally been biased in favour of European-derived forms of cultural expression, and programmes targeted at ethnic groups remedy this bias. A related demand is for the provision of immigrant language education in schools.

Perhaps the most controversial demand of ethnic groups is for exemptions from laws and regulations that disadvantage them, given their religious practices. For example, Jews and Muslims in Britain have sought exemption from Sunday closing or animal slaughtering legislation; Sikh men in Canada have sought exemption from motorcycle helmet laws and from the official dress-codes of police forces, so that they can wear their turban; Orthodox Jews in the United States have sought the right to wear the yarmulka during military service; and Muslim girls in France have sought exemption from school dress-codes so that they can wear the *chador*.[9]

These group-specific measures – which I call 'polyethnic rights' – are intended to help ethnic groups and religious minorities express their cultural particularity and pride without it hampering their success in the economic and political institutions of the dominant society. Like self-government rights, these polyethnic rights are not seen as temporary, because the cultural differences they protect are not something we seek to eliminate. But, unlike self-government rights, polyethnic rights are usually intended to promote integration into the larger society, not self-government.

Special Representation Rights

While the traditional concern of national minorities and ethnic groups has been with either self-government or polyethnic rights, there has been increasing interest by these groups, as well as other non-ethnic social groups, in the idea of special representation rights.

Throughout the Western democracies, there is increasing concern that the political process is 'unrepresentative', in the sense that it fails to reflect the diversity of the population. Legislatures in most of these countries are dominated by middle-class, able-bodied, white men. A more representative process, it is said, would include members of ethnic and racial minorities, women, the poor, the disabled, etc. The under-representation of historically disadvantaged groups is a general phenomenon. In the United States and Canada, women, racial minorities, and indigenous peoples all have under one-third of the seats they would have based on their demographic weight. People with disabilities and the economically disadvantaged are also significantly under-represented.[10]

One way to reform the process is to make political parties more inclusive, by reducing the barriers which inhibit women, ethnic minorities, or the poor from becoming party candidates or party leaders; another way is to adopt some form of proportional representation, which has historically been associated with greater inclusiveness of candidates.

However, there is increasing interest in the idea that a certain number of seats in the legislature should be reserved for the members of disadvantaged or marginalized groups. During the debate in Canada over the Charlottetown Accord, for example, a number of recommendations were made for the guaranteed representation of women, ethnic minorities, official language minorities, and Aboriginals.

Group representation rights are often defended as a response to some systemic disadvantage or barrier in the political process which makes it impossible for the group's views and interests to be effectively represented. In so far as these rights are seen as a response to oppression or systemic disadvantage, they are most plausibly seen as a temporary measure on the way to a society

where the need for special representation no longer exists – a form of political 'affirmative action'. Society should seek to remove the oppression and disadvantage, thereby eliminating the need for these rights.

However, the issue of special representation rights for groups is complicated, because special representation is sometimes defended, not on grounds of oppression, but as a corollary of self-government. A minority's right to self-government would be severely weakened if some external body could unilaterally revise or revoke its powers, without consulting the minority or securing its consent. Hence it would seem to be a corollary of self-government that the national minority be guaranteed representation on any body which can interpret or modify its powers of self-government (e.g. the Supreme Court). Since the claims of self-government are seen as inherent and permanent, so too are the guarantees of representation which flow from it (unlike guarantees grounded on oppression).[11]

The Equality Argument

Many defenders of group-specific rights for ethnic and national minorities insist that they are needed to ensure that all citizens are treated with genuine equality. On this view, 'the accommodation of differences is the essence of true equality',[12] and group-specific rights are needed to accommodate our differences. I think this argument is correct, within certain limits.

Proponents of 'benign neglect' will respond that individual rights already allow for the accommodation of differences, and that true equality requires equal rights for each individual regardless of race or ethnicity.[13] This assumption that liberal equality precludes group-specific rights is relatively recent, and arose in part as an (over-)generalization of the racial desegregation movement in the United States. It has some superficial plausibility. In many cases, claims for group-specific rights are simply an attempt by one group to dominate and oppress another.

But some minority rights eliminate, rather than create, inequalities. Some groups are unfairly disadvantaged in the cultural market-place, and political recognition and support rectify this disadvantage. I will start with the case of national minorities. The viability of their societal cultures may be undermined by economic and political decisions made by the majority. They could be outbid or outvoted on resources and policies that are crucial to the survival of their societal cultures. The members of majority cultures do not face this problem. Given the importance of cultural membership, this is a significant inequality which, if not addressed, becomes a serious injustice.

Group-differentiated rights – such as territorial autonomy, veto powers, guaranteed representation in central institutions, land claims, and language rights – can help rectify this disadvantage, by alleviating the vulnerability of minority cultures to majority decisions. These external protections ensure that members of the minority have the same opportunity to live and work in their own culture as members of the majority.

These rights may impose restrictions on the members of the larger society, by making it more costly for them to move into the territory of the minority (e.g. longer residency requirements, fewer government services in their language), or by giving minority members priority in the use of certain land and resources (e.g. indigenous hunting and fishing rights). But the sacrifice required of non-members by the existence of these rights is far less than the sacrifice members would face in the absence of such rights.

Where these rights are recognized, members of the majority who choose to enter the minority's homeland may have to forgo certain benefits they are accustomed to. This is a burden. But without such rights, the members of many minority cultures face the loss of their culture, a loss which we cannot reasonably ask people to accept.

Any plausible theory of justice should recognize the fairness of these external protections for national minorities. They are clearly justified, I believe, within a liberal egalitarian theory, such as Rawls's and Dworkin's, which emphasizes the importance of rectifying unchosen inequalities. Indeed inequalities in cultural membership are just the sort which Rawls says we should be concerned about, since their effects are 'profound and pervasive and present from birth' (Rawls 1971: 96; cf. Dworkin 1981).[14]

This equality-based argument will only endorse special rights for national minorities if there actually is a disadvantage with respect to cultural membership, and if the rights actually serve to rectify the disadvantage. Hence the legitimate scope of these rights will vary with the circumstances. In North America, indigenous groups are more vulnerable to majority decisions than the Québécois or Puerto Ricans, and so their external protections will be more extensive. For example, restrictions on the sale of land which are necessary in the context of indigenous peoples are not necessary, and hence not justified, in the case of Quebec or Puerto Rico.[15]

At some point, demands for increased powers or resources will not be necessary to ensure the same opportunity to live and work in one's culture. Instead, they will simply be attempts to gain benefits denied to others, to have more resources to pursue one's way of life than others have. This was clearly the case with apartheid, where whites constituting under 20 per cent of the population controlled 87 per cent of the land mass of the country, and monopolized all the important levers of state power.

One could imagine a point where the amount of land reserved for indigenous peoples would not be necessary to provide reasonable external protections, but rather would simply provide unequal opportunities to them. Justice would then require that the holdings of indigenous peoples be subject to the same redistributive taxation as the wealth of other advantaged groups, so as to assist the less well off in society. In the real world, of course, most indigenous peoples are struggling to maintain the bare minimum of land needed to sustain the viability of their communities. But it is possible that their land holdings could exceed what justice allows.[16]

The legitimacy of certain measures may also depend on their timing. For example, many people have suggested that a new South African constitution should grant a veto power over certain important decisions to some or all of the major national groups. This sort of veto power is a familiar feature of various 'consociational democracies' in Europe, and, [...] under certain circumstances it can promote justice. But it would probably be unjust to give privileged groups a veto power before there has been a dramatic redistribution of wealth and opportunities (Adam 1979: 295). A veto power can promote justice if it helps protect a minority from unjust policies that favour the majority; but it is an obstacle to justice if it allows a privileged group the leverage to maintain its unjust advantages.

So the ideal of 'benign neglect' is not in fact benign. It ignores the fact that the members of a national minority face a disadvantage which the members of the majority do not face. In any event, the idea that the government could be neutral with respect to ethnic and national groups is patently false. One of the most important determinants of whether a culture survives is whether its language is the language of government – i.e. the language of public schooling, courts, legislatures, welfare agencies, health services, etc. When the government decides the language of public schooling, it is providing what is probably the most important form of support needed by societal cultures, since it guarantees the passing on of the language and its associated traditions and conventions to the next generation. Refusing to provide public schooling in a minority language, by contrast, is almost inevitably condemning that language to ever-increasing marginalization.

The government therefore cannot avoid deciding which societal cultures will be supported. And if it supports the majority culture, by using the majority's language in schools and public agencies, it cannot refuse official recognition to minority languages on the ground that this violates 'the separation of state and ethnicity'. This shows that the analogy between religion and culture is mistaken. As I noted earlier, many liberals say that just as the state should not recognize, endorse, or support any particular church, so it should not recognize, endorse, or support any particular cultural group or identity. But the analogy does not work. It is quite possible for a state not to have an established church. But the state cannot help but give at least partial establishment to a culture when it decides which language is to be used in public schooling, or in the provision of state services. The state can (and should) replace religious oaths in courts with secular oaths, but it cannot replace the use of English in courts with no language.

This is a significant embarrassment for the 'benign neglect' view, and it is remarkable how rarely language rights are discussed in contemporary liberal theory.[17] As Brian Weinstein put it, political theorists have had a lot to say about 'the language of politics' – that is, the symbols, metaphors, and rhetorical devices of political discourse – but have had virtually nothing to say about 'the politics of language' – that is, the decisions about which languages to use in political, legal, and educational forums (Weinstein 1983: 7–13). Yet language rights are a fundamental cause of political conflict, even violence, throughout the world, including Canada, Belgium, Spain, Sri Lanka, the Baltics, Bulgaria, Turkey, and many other countries (Horowitz 1985: 219–24).

One could argue that decisions about the language of schooling and public services should be determined, not by officially recognizing the existence of various groups, but simply by allowing each political subunit to make its own language policy on a democratic basis. If a national minority forms a majority in the relevant unit, they can decide to have their mother tongue adopted as an official language in that unit. But this is because they are a local majority, not because the state has officially recognized them as a 'nation'.

This is sometimes said to be the American approach to language rights, since there is no constitutional

definition of language rights in the United States. But in fact the American government has historically tried to make sure that such 'local' decisions are always made by political units that have an anglophone majority. Decisions about state borders, or about when to admit territories as states, have been explicitly made with the aim of ensuring that there will be an anglophone majority. States in the American south-west and Hawaii were only offered statehood when the national minorities residing in those areas were outnumbered by settlers and immigrants. And some people oppose offering statehood to Puerto Rico precisely on the grounds that it will never have an anglophone majority (Rubinstein 1993; Glazer 1983: 280).

This illustrates a more general point. Leaving decisions about language to political subunits just pushes back the problem. What are the relevant political units – what level of government should make these decisions? Should each neighbourhood be able to decide on the language of public schooling and public services in that neighbourhood? Or should this decision be left to larger units, such as cities or provinces? And how do we decide on the boundaries of these subunits? If we draw municipal or provincial boundaries in one way, then a national minority will not form even a local majority. But if we draw the boundaries another way, then the national minority will form a local majority. In a multination state, decisions on boundaries and the division of powers are inevitably decisions about which national group will have the ability to use which state powers to sustain its culture.[18]

For example, the Inuit in Canada wish to divide the Northwest Territories into two, so that they will form the majority in the eastern half. This is seen as essential to the implementation of their right of self-government. Some liberals object that this proposal violates the separation of state and ethnicity by distributing public benefits and state powers so as to make it easier for a specific group to preserve its culture. But all decisions regarding boundaries and the distribution of powers in multination states have this effect. We can draw boundaries and distribute legislative powers so that a national minority has an increased ability within a particular region to protect its social culture; or we can draw boundaries and distribute legislative powers so that the majority nation controls decisions regarding language, education, immigration, etc. on a country-wide basis.

The whole idea of 'benign neglect' is incoherent, and reflects a shallow understanding of the relationship between states and nations. In the areas of official languages, political boundaries, and the division of powers, there is no way to avoid supporting this or that societal culture, or deciding which groups will form a majority in political units that control culture-affecting decisions regarding language, education, and immigration.

So the real question is, what is a fair way to recognize languages, draw boundaries, and distribute powers? And the answer, I think, is that we should aim at ensuring that all national groups have the opportunity to maintain themselves as a distinct culture, if they so choose. This ensures that the good of cultural membership is equally protected for the members of all national groups. In a democratic society, the majority nation will always have its language and societal culture supported, and will have the legislative power to protect its interests in culture-affecting decisions. The question is whether fairness requires that the same benefits and opportunities should be given to national minorities. The answer, I think, is clearly yes.

Hence group-differentiated self-government rights compensate for unequal circumstances which put the members of minority cultures at a systemic disadvantage in the cultural market-place, regardless of their personal choices in life. This is one of many areas in which true equality requires not identical treatment, but rather differential treatment in order to accommodate differential needs.[19]

This does not mean that we should entirely reject the idea of the cultural market-place. Once the societal cultures of national groups are protected, through language rights and territorial autonomy, then the cultural market-place does have an important role to play in determining the character of the culture. Decisions about which particular aspects of one's culture are worth maintaining and developing should be left to the choices of individual members. For the state to intervene at this point to support particular options or customs within the culture, while penalizing or discouraging others, would run the risk of unfairly subsidizing some people's choices (Kymlicka 1989b). But that is not the aim or effect of many rights for national minorities, which are instead concerned with external protections.

Let me now turn to polyethnic rights for ethnic groups. I believe there is an equality-based argument for these rights as well, which also invokes the impossibility of separating state from ethnicity, but in a different way. I have argued that the context of choice for immigrants, unlike national minorities, primarily involves equal

access to the mainstream culture(s). Having uprooted themselves from their old culture, they are expected to become members of the national societies which already exist in their new country. Hence promoting the good of cultural membership for immigrants is primarily a matter of enabling integration, by providing language training and fighting patterns of discrimination and prejudice. Generally speaking, this is more a matter of rigorously enforcing the common rights of citizenship than providing group-differentiated rights. In so far as common rights of citizenship in fact create equal access to mainstream culture, then equality with respect to cultural membership is achieved.

But even here equality does justify some group-specific rights. Consider the case of public holidays. Some people object to legislation that exempts Jews and Muslims from Sunday closing legislation, on the ground that this violates the separation of state and ethnicity. But almost any decision on public holidays will do so. In the major immigration countries, public holidays currently reflect the needs of Christians. Hence government offices are closed on Sunday, and on the major religious holidays (Easter, Christmas). This need not be seen as a deliberate decision to promote Christianity and discriminate against other faiths (although this was undoubtedly part of the original motivation). Decisions about government holidays were made when there was far less religious diversity, and people just took it for granted that the government work-week should accommodate Christian beliefs about days of rest and religious celebration.

But these decisions can be a significant disadvantage to the members of other religious faiths. And having established a work-week that favours Christians, one can hardly object to exemptions for Muslims or Jews on the ground that they violate the separation of state and ethnicity. These groups are simply asking that their religious needs be taken into consideration in the same way that the needs of Christians have always been taken into account. Public holidays are another significant embarrassment for the 'benign neglect' view, and it is interesting to note how rarely they are discussed in contemporary liberal theory.

Similar issues arise regarding government uniforms. Some people object to the idea that Sikhs or Orthodox Jews should be exempted from requirements regarding headgear in the police or military. But here again it is important to recognize how the existing rules about government uniforms have been adopted to suit Christians. For example, existing dress-codes do not prohibit the wearing of wedding rings, which are an important religious symbol for many Christians (and Jews). And it is virtually inconceivable that designers of government dress-codes would have ever considered designing a uniform that prevented people from wearing wedding rings, unless this was strictly necessary for the job. Again, this should not be seen as a deliberate attempt to promote Christianity. It simply would have been taken for granted that uniforms should not unnecessarily conflict with Christian religious beliefs. Having adopted dress-codes that meet Christian needs, one can hardly object to exemptions for Sikhs and Orthodox Jews on the ground that they violate 'benign neglect'.

One can multiply the examples. For example, many state symbols such as flags, anthems, and mottoes reflect a particular ethnic or religious background ('In God We Trust'). The demand by ethnic groups for some symbolic affirmation of the value of polyethnicity (e.g. in government declarations and documents) is simply a demand that their identity be given the same recognition as the original Anglo-Saxon settlers.

It may be possible to avoid some of these issues by redesigning public holidays, uniforms, and state symbols. It is relatively easy to replace religious oaths with secular ones, and so we should. It would be more difficult, but perhaps not impossible, to replace existing public holidays and workweeks with more 'neutral' schedules for schools and government offices.[20]

But there is no way to have a complete 'separation of state and ethnicity'. In various ways, the ideal of 'benign neglect' is a myth. Government decisions on languages, internal boundaries, public holidays, and state symbols unavoidably involve recognizing, accommodating, and supporting the needs and identities of particular ethnic and national groups. Nor is there any reason to regret this fact. There is no reason to regret the existence of official languages and public holidays, and no one gains by creating unnecessary conflicts between government regulations and religious beliefs. The only question is how to ensure that these unavoidable forms of support for particular ethnic and national groups are provided fairly – that is, how to ensure that they do not privilege some groups and disadvantage others. In so far as existing policies support the language, culture, and identity of dominant nations and ethnic groups, there is an argument of equality for ensuring that some attempts are made to provide similar support for minority groups, through self-government and polyethnic rights.

The Role of Historical Agreements

A second argument in defence of group-differentiated rights for national minorities is that they are the result of historical agreements, such as the treaty rights of indigenous peoples, or the agreement by which two or more peoples agreed to federate.

There are a variety of such agreements in Western democracies, although their provisions have often been ignored or repudiated. For example, the American government has unilaterally abrogated certain treaties with Indian tribes, and the Canadian government proposed in 1969 to extinguish all of its Indian treaties. The language rights guaranteed to Chicanos in the American southwest under the 1848 Treaty of Guadelupe Hidalgo were rescinded by the anglophone settlers as soon as they formed a majority. The language and land rights guaranteed to the Métis under the Manitoba Act of 1870 suffered the same fate in Canada. Yet many treaties and historical agreements between national groups continue to be recognized, and some have considerable legal force. For example, the 1840 Treaty of Waitangi signed by Maori chiefs and British colonists in New Zealand, declared a 'simple nullity' in 1877, has re-emerged as a central legal and political document (Sharp 1990).

The importance of honouring historical agreements is emphasized by proponents of group-differentiated rights, but has had little success convincing opponents. Those people who think that group-differentiated rights are unfair have not been appeased by pointing to agreements that were made by previous generations in different circumstances, often undemocratically and in conditions of substantial inequality in bargaining power. Surely some historical agreements are out of date, while others are patently unfair, signed under duress or ignorance. Why should governments not do what principles of equality require now, rather than what outdated and often unprincipled agreements require?[21]

One answer is to reconsider an underlying assumption of the equality argument. The equality argument assumes that the state must treat its citizens with equal respect. But there is the prior question of determining which citizens should be governed by which states. For example, how did the American government acquire the legitimate authority to govern Puerto Rico or the Navaho? And how did the Canadian government acquire legitimate authority over the Québécois and the Métis?

United Nations declarations state that all 'peoples' are entitled to 'self-determination' – i.e. an independent state. Obviously this principle is not reflected in existing boundaries, and it would be destabilizing, and indeed impossible, to fulfil. Moreover, not all peoples want their own state. Hence it is not uncommon for two or more peoples to decide to form a federation. And if the two communities are of unequal size, it is not uncommon for the smaller culture to demand various group-differentiated rights as part of the terms of federation. Forming a federation is one way of exercising a people's right of self-determination, and the historical terms of federation reflect the group's judgement about how best to exercise that right.

For example, the group-differentiated rights accorded French Canadians in the original confederation agreement in 1867, and the group-differentiated rights accorded Indians under various treaties, reflect the terms under which these communities joined Canada. It can be argued that these agreements define the terms under which the Canadian state acquired authority over these groups. These communities could have exercised their self-determination in other ways, but chose to join Canada, because they were given certain promises. If the Canadian government reneges on these promises, then it voids (morally, if not legally) the agreement which made those communities part of Canada.[22] Because these agreements define the terms under which various groups agreed to federate with Canada, the authority of the Canadian state over these groups flows from, but is also limited by, these agreements (Chartrand 1991; 1993: 240–1).

In short, the way in which a national minority was incorporated often gives rise to certain group-differentiated rights. If incorporation occurred through a voluntary federation, certain rights might be spelled out in the terms of federation (e.g. in treaties), and there are legal and moral arguments for respecting these agreements. If incorporation was involuntary (e.g. colonization), then the national minority might have a claim of self-determination under international law which can be exercised by renegotiating the terms of federation so as to make it more voluntary federation (Macklem 1993; Danley 1991).

This historical argument may justify the same rights as the equality argument. Many of the group-differentiated rights which are the result of historical agreements can be seen as providing the sort of protection required by the equality argument. For example, the right to local autonomy for Indian tribes/bands could be justified on the equality argument, if it helps the larger state show equal concern for the members of Indian communities. Autonomy is also justified on the historical argument, in so far as Indian peoples never gave the federal government jurisdiction over certain issues.

Indeed, it is likely that the equality and historical arguments will yield similar policies. If local autonomy is required to ensure that members of a minority are not disadvantaged, then it is likely that the minority would have demanded autonomy as part of the terms of federation (had the negotiations been fair).

The negotiations between English and French regarding the terms of federation in Canada provide a clear example of this. The Québécois realized that if they agreed to enter the Canadian state in 1867, they would become a permanent minority in the country, and so could be outvoted on decisions made at the federal level. They therefore faced the question whether they should remain outside Confederation, maintaining their status as a separate colony within the British Empire, and hoping one day to become a separate country with a francophone majority.

Québécois leaders agreed to join Canada, even though they would be a minority in the federal parliament. But in return they insisted that jurisdiction over language and education be guaranteed to the provinces, not the federal government. This was 'the non-negotiable condition in return for which they were prepared to concede the principle of representation by population' in the new parliament, a principle that 'would institutionalize their minority position' within the new country (J. Smith 1993: 75). In deciding whether to accept the terms of federation, therefore, Québécois leaders were explicitly concerned about equality – that is, how to ensure that they would not be disadvantaged in the new country. Since they had considerable bargaining power in the negotiations, they were able to ensure their equality in the agreement, through guarantees of language rights and provincial autonomy.

While the equality and historical arguments often lead to the same result, they are none the less quite distinct. On the historical argument, the question is not how should the state treat 'its' minorities, but rather what are the terms under which two or more peoples decided to become partners? The question is not how should the state act fairly in governing its minorities, but what are the limits to the state's right to govern them?

For example, the two arguments may generate different answers to the question of federal funding of self-government rights. Under the equality argument, fairness may require positive state support for the measures required to maintain the viability of the national group. If fairness requires recognizing self-government in certain areas of jurisdiction, then presumably fairness will also require providing the resources needed to make self-government meaningful. The historical argument, however, may only generate a negative right to non-interference from the federal state. If the members of the national minority never gave the federal government the authority to govern them in certain areas, the federal government is unlikely to accept responsibility for funding minority self-government (unless this is itself part of the historical agreement). Any federal obligation to support self-government might be seen more as a form of humanitarian foreign aid than as a matter of domestic egalitarian justice.[23]

Contemporary political philosophers have had very little to say about the moral status of such historical agreements. For example, while Rawls recognizes a moral duty to respect treaties between countries (Rawls 1971: 378), he does not say anything about treaties or other agreements between nations within a country. This is surprising, because such agreements played a vital role in the creation and expansion of many countries, including the United States and Canada.

Respect for such agreements is important, I believe, not only to respect the self-determination of the minority, but also to ensure that citizens have trust in the actions of government. Historical agreements signed in good faith give rise to legitimate expectations on the part of citizens, who come to rely on the agreements made by governments, and it is a serious breach of trust to renege on them.

One difficulty with historical agreements is that they are often hard to interpret. For example, the Canadian government claims Quebec's 'right to be different' was implicitly recognized in the original Confederation agreement (Government of Canada 1991a: p. vi). But others deny this, and insist that Confederation was a union of provinces, not a compact between two cultures. Similar disputes arise over the interpretation of some Indian treaties. Moreover, some Indian tribes did not sign treaties, or signed them under duress. It seems arbitrary and unfair that some groups signed historical agreements while others, through no fault of their own, did not.

Where historical agreements are absent or disputed, groups are likely to appeal to the equality argument. Indian tribes/bands which have clear treaty rights often rest their claim for group-differentiated status on historical agreement; groups who did not sign treaties are more likely to appeal to the equality argument. It is often quite arbitrary whether a particular group happened to sign a particular agreement. However, the equality argument can help those groups which, for whatever reason, lack historical rights.[24]

Historical agreements are much less common in the case of ethnic groups, since immigrants are rarely promised any special rights before arriving in their new country. Indeed, opponents of polyethnic rights sometimes say that ethnic groups should not expect any new group-differentiated rights, precisely because they agreed to come knowing full well that such rights did not exist. Yet there are some cases of polyethnic rights based on historical agreement. For example, the Hutterites (a Christian sect) were explicitly promised by Canadian immigration officials that they would be exempted from certain laws regarding education, land ownership, and military service if they settled in western Canada. (The Canadian government was anxious at the time to settle the newly opened up western frontier.)

This now seems like an anomalous case of an immigrant group given privileges denied to other citizens, and attempts have been made to eliminate these historical rights. On the other hand, solemn promises were given to the Hutterites, who would have emigrated elsewhere had these promises not been made. In this sense, they too can claim that the historical agreement defines the terms under which the Canadian government acquired authority over them.

In assessing group-differentiated rights claims, therefore, we need to know whether the rights being claimed are rectifying disadvantages, or recognizing historical agreements arising from the terms of federation. Both of these are legitimate grounds for group-differentiated rights, I believe, but both raise some difficult issues.

For example, how should we respond to agreements that are now unfair, due to changing conditions? The land claims recognized in various treaties may be too much, or too little, given changes in the size and lifestyle of indigenous communities. The powers given to Quebec in 1867 may no longer be appropriate in an age of telecommunications. To stick to the letter of historical agreements when they no longer meet the needs of minorities seems wrong.

Because of these changing circumstances, and because the original agreements are hard to interpret, many minority communities want to renegotiate their historical agreements. They want to make their group-differentiated rights more explicit in the constitution, and often more expansive. This is a major cause of the current constitutional crisis in Canada. For it has given those Canadians who see group-differentiated rights as unfair a chance to restrict, rather than entrench, such rights.

This suggests that, if we wish to defend group-differentiated rights, we should not rely solely on historical agreements. Since historical agreements must always be interpreted, and inevitably need to be updated and revised, we must be able to ground the historical agreements in a deeper theory of justice. The historical and equality arguments must work together.

The Value of Cultural Diversity

A third defence of group-differentiated rights for national minorities appeals to the value of cultural diversity. As I have discussed, liberals extol the virtue of having a diversity of lifestyles within a culture, so presumably they also endorse the additional diversity which comes from having two or more cultures in the same country. Surely intercultural diversity contributes to the richness of people's lives, as well as intracultural diversity (Schwartz 1986: ch. 1).

This argument is attractive to many people because it avoids relying solely on the interests of group members, and instead focuses on how the larger society also benefits from group-differentiated rights. As Richard Falk puts it, 'societal diversity enhances the quality of life, by enriching our experience, expanding cultural resources'. Hence protecting minority cultures 'is increasingly recognized to be an expression of overall enlightened self-interest' (Falk 1988: 23). Whereas the first two arguments appeal to the *obligations* of the majority, this third argument appeals to the *interests* of the majority, and defends rights in terms of self-interest not justice.

Cultural diversity is said to be valuable, both in the quasi-aesthetic sense that it creates a more interesting world, and because other cultures contain alternative models of social organization that may be useful in adapting to new circumstances.[25] This latter point is often made with respect to indigenous peoples, whose traditional lifestyles provide a model of a sustainable relationship to the environment. As Western attitudes towards nature are increasingly recognized to be unsustainable and self-destructive, indigenous peoples 'may provide models, inspiration, guidance in the essential work of world order redesign' (Falk 1988: 23; cf. Clay 1989: 233; O'Brien 1987: 358).

There is some truth in this argument about the value of cultural diversity. None the less, I think it is a mistake to put much weight on it as a defence of national rights. First, one of the basic reasons for valuing intracultural diversity has less application to intercultural diversity. The value of diversity within a culture is that it creates more options for each individual, and expands her range

of choices. But protecting national minorities does not expand the range of choices open to members of the majority in the same way. As I have explained before, choosing to leave one's culture is qualitatively different from choosing to move around within one's culture. The former is a difficult and painful prospect for most people, and very few people in the mainstream choose to assimilate into a minority culture. Indeed, measures to protect national minorities may actually reduce diversity within the majority culture, compared with a situation where minorities, unable to maintain their own societal culture, are forced to integrate and add their distinctive contribution to the diversity of the mainstream culture. Having two or more cultures within a state does expand choices for each individual, but only to a limited degree, and it would be implausible to make this the primary justification for minority rights.

There are other aesthetic and educational benefits from cultural diversity, apart from the value of expanding individual choice. But it is not clear that any of these values by themselves can justify minority rights. One problem is that the benefits of diversity to the majority are spread thinly and widely, whereas the costs for particular members of the majority are sometimes quite high. Everyone may benefit, in a diffuse way, from having flourishing minority cultures in Quebec and Puerto Rico. But some members of the majority culture are asked to pay a significant price so that others can gain this diffuse benefit. For example, unilingual anglophones residing in Quebec or Puerto Rico are unlikely to get government employment or publicly funded education in English – benefits which they would take for granted elsewhere. Similarly, non-Indians residing on Indian lands may be discriminated against in terms of their access to natural resources, or their right to vote in local elections. It is not clear that the diffuse benefits of diversity for society as a whole justify imposing these sorts of sacrifices on particular people. It seems to me that these sacrifices are only consistent with justice if they are needed, not to promote benefits to the members of the majority, but to prevent even greater sacrifices to the members of the national minority.

Moreover, there are many ways of promoting diversity, and it seems likely that protecting national minorities involves more cost to the majority than other possible ways. For example, a society could arguably gain more diversity at less cost by increasing immigration from a variety of countries than by protecting national minorities. The diversity argument cannot explain why we have an obligation to sustain the particular sort of diversity created by the presence of a viable, self-governing national minority.

There is one further problem with the diversity argument. Let us say that the aesthetic or educational value of diversity does justify imposing certain costs on people in the majority culture. Why then does the value of diversity not also justify imposing a duty on the members of the minority to maintain their traditional culture? If the benefits of cultural diversity to the larger society can justify restricting individual liberties or opportunities, why does it matter whether these restrictions are imposed on people inside or outside the group? I noted earlier that a liberal theory of minority rights can accept external protections, but not internal restrictions. It is difficult to see how the diversity argument can make this distinction. Because it appeals to the interests of the larger society, it cannot explain why minorities should be able to decide for themselves whether or how to maintain their culture.

So it seems to me that the diversity argument is insufficient, by itself, to justify the rights of national minorities. Protecting national minorities does provide benefits to the majority, and these are worth pointing out. But these diffuse benefits are better seen as a desirable by-product of national rights, rather than their primary justification. To date, most majority cultures have not seen it in their 'enlightened self-interest' to maintain minority cultures. No doubt this is due in part to ethnocentric prejudice, but we must recognize the powerful interests that majority nations often have in rejecting self-government rights for national minorities – e.g. increased access to the minority's land and resources, increased individual mobility, political stability, etc. It is unlikely that majorities will accept national rights solely on the basis of self-interest, without some belief that they have an obligation of justice to accept them. Conversely, it is unlikely that majorities will accept their obligations of justice towards national minorities without a belief that they gain something in the process. The diversity argument works best, therefore, when it is combined with arguments of justice.

The diversity argument is more plausible as a defence of polyethnic rights for ethnic groups. Unlike national self-government, these rights do contribute directly to diversity within the majority culture. Moreover, they do not involve the same sort of restrictions on the mobility or economic opportunities of the majority. Indeed, certain polyethnic policies can be seen as natural extensions of state policies regarding the funding of the arts, museums, educational television, etc.[26] Yet here again the

problem arises that there are many ways of promoting diversity. Teaching children to be bilingual promotes diversity, but this cannot explain why we should teach immigrant languages in particular. Hence the diversity argument supplements, but cannot replace, justice arguments based on equality or historical agreement.

The Analogy with States

So far, I have been assuming that the burden of proof lies on those who wish to find room for group-differentiated rights within the liberal tradition. But we can and should question this assumption. In many ways, it is opponents of group-differentiated rights who are proposing a revision of liberal theory and practice. Certain group-differentiated rights have been a long-established part of the liberal tradition. Moreover, such rights are logically presupposed by existing liberal practice.

For example, most liberal theorists accept without question that the world is, and will remain, composed of separate states, each of which is assumed to have the right to determine who can enter its borders and acquire citizenship. I believe that this assumption can only be justified in terms of the same sorts of values which ground group-differentiated rights within each state. I believe that the orthodox liberal view about the right of states to determine who has citizenship rests on the same principles which justify group-differentiated citizenship within states, and that accepting the former leads logically to the latter.

This point is worth exploring in some depth. The existence of states, and the right of governments to control entry across state borders, raises a deep paradox for liberals. Most liberal theorists defend their theories in terms of 'equal respect for persons', and the 'equal rights of individuals'. This suggests that all 'persons' or 'individuals' have an equal right to enter a state, participate in its political life, and share in its natural resources.

In fact, however, these rights are typically reserved for *citizens*. And not everyone can become a citizen, even if they are willing to swear allegiance to liberal principles. On the contrary, there are millions of people who want to gain citizenship in various liberal democracies, but who are refused. Even the most open Western country in terms of immigration accepts only a fraction of the number of people who would come if there were genuinely open borders. Indeed, would-be immigrants are often refused entry, turned back at the border by armed border guards. These people are refused the right to enter and participate in the state because they were not born into the right group.

Citizenship, therefore, is an inherently group-differentiated notion. Unless one is willing to accept either a single world-government or completely open borders between states – and very few liberal theorists have endorsed either of these – then distributing rights and benefits on the basis of citizenship is to treat people differentially on the basis of their group membership.[27]

This creates a profound contradiction within most liberal theories. As Samuel Black notes, liberal theorists often begin by talking about the moral equality of 'persons', but end up talking about the equality of 'citizens', without explaining or even noticing the shift (Black 1991). What can justify restricting the rights of citizenship to members of a particular group, rather than all persons who desire it?

Some critics have argued that liberals cannot justify this restriction, and that the logic of liberalism requires open borders, except perhaps for temporary restrictions in the name of public order.[28] And surely that is right if we cling to the idea that liberalism should be indifferent to people's cultural membership and national identity. Open borders would dramatically increase the mobility and opportunities of individuals, and, if liberalism requires treating people solely 'as individuals' without regard for their group membership, then open borders clearly are preferable from a liberal point of view.

I believe, however, that some limits on immigration can be justified if we recognize that liberal states exist, not only to protect standard rights and opportunities of individuals, but also to protect people's cultural membership. Liberals implicitly assume that people are members of societal cultures, that these cultures provide the context for individual choice, and that one of the functions of having separate states is to recognize the fact that people belong to separate cultures. I noted examples of this in the liberal tradition in Chapter 4 of *Multicultural Citizenship*, and with Rawls's discussion of citizenship and the bonds of culture in Chapter 5. Once we make these assumptions explicit, however, it is clear that, in multination states, some people's cultural membership can only be recognized and protected by endorsing group-differentiated rights within the state.

Liberal theorists invariably limit citizenship to the members of a particular group, rather than all persons who desire it. The most plausible reason for this – namely, to recognize and protect our membership in distinct cultures – is also a reason for allowing group-differentiated citizenship within a state. There may be other reasons

for restricting citizenship to a particular group which do not make any reference to the importance of cultural groups. It is difficult to say, since few liberals actually discuss the shift from 'equality of persons' to 'equality of citizens'. But I think it is fair to say this: in so far as liberal theorists accept the principle that citizenship can be restricted to the members of a particular group, the burden of proof lies on them to explain why they are not also committed to accepting group-differentiated rights within a state.[29] So long as liberals believe in separate states with restricted citizenship, the burden of proof lies as much with opponents of group-differentiated rights as with their defenders.

Conclusion

[…] I have tried to show that liberals can and should accept a wide range of group-differentiated rights for national minorities and ethnic groups, without sacrificing their core commitments to individual freedom and social equality.

It may be useful briefly to summarize my argument. I have tried to show how freedom of choice is dependent on social practices, cultural meanings, and a shared language. Our capacity to form and revise a conception of the good is intimately tied to our membership in a societal culture, since the context of individual choice is the range of options passed down to us by our culture. Deciding how to lead our lives is, in the first instance, a matter of exploring the possibilities made available by our culture.

However, minority cultures in multination states may need protection from the economic or political decisions of the majority culture if they are to provide this context for their members. For example, they may need self-governing powers or veto rights over certain decisions regarding language and culture, and may need to limit the mobility of migrants or immigrants into their homelands.

While these group-differentiated rights for national minorities may seem discriminatory at first glance, since they allocate individual rights and political powers differentially on the basis of group membership, they are in fact consistent with liberal principles of equality. They are indeed required by the view, defended by Rawls and Dworkin, that justice requires removing or compensating for undeserved or 'morally arbitrary' disadvantages, particularly if these are 'profound and pervasive and present from birth' (Rawls 1971: 96). Were it not for these group-differentiated rights, the members of minority cultures would not have the same ability to live and work in their own language and culture that the members of majority cultures take for granted. This, I argued, can be seen as just as profound and morally arbitrary a disadvantage as the inequalities in race and class that liberals more standardly worry about.

This equality-based argument for group-differentiated rights for national minorities is further strengthened by appeals to historical agreements and the value of cultural diversity. And it is confirmed by the way that liberals implicitly invoke cultural membership to defend existing state borders and restrictions on citizenship. I have also argued that polyethnic rights for ethnic groups can be justified in terms of promoting equality and cultural diversity within the mainstream culture.

These claims are by no means uncontroversial, and there are many places where they could be challenged. One could deny that cultural meanings are dependent on a societal culture, or that individuals are closely tied to their own particular societal culture. One could also deny that minority cultures are vulnerable to the decisions of the larger society; or that this vulnerability constitutes an injustice; or that historical agreements have any moral weight; or that cultural diversity is worth promoting.

Yet I think each of these claims is plausible. Anyone who disputes them would be required to provide some alternative account of what makes meaningful choices available to people, or what justice requires in terms of language rights, public holidays, political boundaries, and the division of powers. Moreover, one would also have to offer an alternative account of the justification for restricting citizenship to the members of a particular group, rather than making it available to anyone who desires it. It is not enough to simply assert that a liberal state should respond to ethnic and national differences with benign neglect. That is an incoherent position that avoids addressing the inevitable connections between state and culture.

The idea that group-differentiated rights for national and ethnic groups can and should be accepted by liberals is hardly a radical suggestion. In fact, many multination liberal democracies already accept such an obligation, and provide public schooling and government services in the language of national minorities. Many have also adopted some form of federalism, so that national minorities will form a majority in one of the federal units (states, provinces, or cantons). And many polyethnic liberal states have adopted various forms of polyethnic policies and

group-specific rights or exemptions for immigrant groups. Like Jay Sigler, I believe that providing a liberal defence of minority rights 'does not create a mandate for vast change. It merely ratifies and explains changes that have taken place in the absence of theory' (Sigler 1983: 196).

But if there are strong arguments in favour of group-differentiated rights, why have liberals so often rejected them? The explanation cannot be that liberalism is premissed on 'abstract individualism', on a conception of the individual as a solitary atom who is independent of her cultural environment. I hope that Chapters 4 and 5 of *Multicultural Citizenship* have dispelled any perception that liberals ignore individuals' dependence on society and culture.

But this raises a puzzle. If individual autonomy and self-identity are tied to membership in one's societal culture, developing a theory of the rights of minority cultures would seem to be one of the very first tasks of any liberal theory. Why then have so few contemporary liberal theorists supported measures to protect cultural groups, such as group-specific language rights, land claims, or federal autonomy? I have explored some of the historical reasons in Chapter 4 of *Multicultural Citizenship*. Another part of the explanation, I think, is that contemporary liberal theorists implicitly assume that countries contain only one nation. They are well aware that modern states are culturally diverse – indeed, the pluralistic nature of modern liberal democracies is a pervasive theme in their writings. But they implicitly assume that this diversity is the sort that comes either from variations in people's conceptions of the good or from immigration – that is, they focus on philosophical, religious, and ethnic diversity within a single culture based on a shared language.[30] They do not recognize or discuss the existence of states that are multinational, with a diversity of societal cultures, languages and national groups.

For example, Dworkin notes that 'in the modern world of immigration and boundary shifts', citizens do not share a racial or ethnic background, and that the communal life of the political community cannot include a single 'ethnic allegiance' (1989: 497). But, as I noted earlier, he does assume a common 'cultural structure' based on a 'shared language' (1985: 230, 233; 1989: 488). Similarly, while Rawls emphasizes the 'fact of pluralism' – particularly religious pluralism – he equates the political community with a single 'complete culture', and with a single 'people' who belong to the same 'society and culture' (1978: 70 n. 8; 1993a: 18, 222, 277; 1993b: 48).

This implicit assumption that states are uninational is rarely explained or defended. It is not as if these theorists explicitly reject the possibility that national minorities have special rights, or directly criticize the arguments of equality or history in defence of these rights. On the contrary, they simply ignore the issue entirely. There is no discussion by contemporary liberal theorists of the differences between nation-states and polyethnic or multination states, or of the arguments for modifying liberal principles in countries which are a 'federation of peoples'.

This shows, I think, that it is a mistake to subsume the issue of minority rights under one of the more familiar debates in contemporary political philosophy – e.g. the debate between 'individualists' and 'communitarians', or between 'universalists' and 'contextualists', or between 'impartialists' and 'difference theorists', or between 'rationalists' and 'postmodernists'. This is a very common tendency (see e.g. I. Young 1993a; Gochnauer 1991; Galenkamp 1993; Trakman 1992; Torres 1991; Addis 1991; cf. Todorov 1993: 392–9). But it stems from an oversimplified view of the issues involved in minority rights. According to many commentators, the central question in assessing minority rights is whether one accepts in principle the idea of giving political recognition to communities or group differences. Defenders of individualism and universalism are then said to be opposed in principle to such recognition, whereas defenders of community and difference are in principle supportive of them. But, as I have emphasized, all political theories must accord recognition to certain forms of group differences and support certain cultural communities. This is inevitable in any theory which confronts issues of language policy, public holidays, political boundaries, and immigration rules. This is as true of liberal individualists and socialist internationalists as of conservatives, communitarians and postmodernists.

So the debate over minority rights is not about whether it is ever legitimate to support 'communities' or to recognize 'difference'. Rather, the debate is whether to support the particular sort of cultural difference and community exhibited by national minorities. And, as I have noted, some liberals, despite their 'individualism' and 'universalism', recognize that justice requires extending the same support to national minorities that majority nations receive. Conversely, some communitarians and particularists, despite their commitment to 'community' and 'difference', have been reluctant to accept the demands of national minorities. They view national minorities in the same way they view ethnic groups or new social movements – that is, as forms of difference and community that can and should be

accommodated by group-specific rights within the larger society. They are unwilling to accept that national minorities require recognition as separate and self-governing societies alongside the mainstream society.[31]

The history of minority rights suggests that there is little or no correlation between meta-ethical debates and support for the rights of national minorities. People's views on minority rights are shaped, not only by their foundational moral or philosophical premisses, but by more concrete factors, including ethnocentric prejudice, fears about international peace and superpower relations, and concerns about the preconditions of democratic consensus and social harmony. These considerations do not correlate in any simple or consistent way with people's underlying philosophical and moral premisses.

These larger philosophical debates are not irrelevant to the policy debate over minority rights. But the connection between the two debates is mediated by many additional assumptions about the nature of ethnic and national differences, and their role in domestic and international politics. It is these additional assumptions that largely account for the actual position endorsed by particular theorists, whatever their deeper philosophical premisses.

For this reason, the demands of national minorities and ethnic groups raise a deep challenge to all Western political traditions. All of these traditions have been shaped, implicitly or explicitly, by the same historical influences which have shaped liberal thinking. The task of developing a consistent and principled theory of minority rights is not one that liberals face alone.

Notes

1 On the importance of individual rights to the protection of groups, see Buchanan 1989; Walzer 1990; Macdonald 1989: 122–3; Tomasi 1991; Kymlicka 1990: chs. 4–6.

2 Some indigenous peoples have argued before the UN that they too have a right to self-determination under the UN Charter (see *Mikmaq Tribal Society v Canada* (1984) UN Doc. E/CN.4/Sub.2/204; Grand Council of the Crees 1992). For discussions of the salt-water thesis, and the right of self-determination under international law, see Pomerance 1982; Thornberry 1991: 13–21, 214–18; Crawford 1988; Makinson 1988.

3 On English Canadian opposition to nationalist demands for decentralization, see Stark 1992. A certain amount of *de facto* asymmetry in powers has been a long-standing aspect of Canadian federalism. However, many Canadians are unwilling to recognize this asymmetry formally in the constitution (see Gagnon and Garcea 1988; Taylor 1991; Cairns 1991). This is one reason why the 1992 Charlottetown Accord was defeated in the national referendum. Some people have claimed that a federal system cannot survive if it accords special status, but this is refuted by the experience of many countries. For a survey of various forms of asymmetrical federalism, see Elazar 1987: 54–7.

4 In Germany, federalism was imposed by the Allies after World War II to help prevent the rise of nationalist or authoritarian movements. For helpful discussions of the relationship between federalism and cultural diversity, see Howse and Knop 1993; Minow 1990; Majone 1990; Gagnon 1993; Long 1991; Duchacek 1977; Elkins 1992; Norman 1994.

5 Hence Nathan Glazer is quite wrong when he says that the division of the United States into federal units preceded its ethnic diversity (Glazer 1983: 276–7). This is true of the original thirteen colonies, but decisions about the admission and boundaries of new states were made after the incorporation of national minorities, and these decisions were deliberately made so as to avoid creating states dominated by national minorities.

6 For a comparative review of these developments, see Fleras and Elliot 1992. A proposal to entrench Aboriginal self-government constitutionally as a third order of government in Canada was included in the 1992 Charlottetown Accord. This would have covered both the 'ethnic self-government' exercised by band councils on Indian reserves, and the 'public self-government' exercised by the Inuit majority within the new territory of Nunavut (see Asch 1984: ch. 7). For the relation of Indian self-government to federalism, see Resnik 1989; Cassidy and Bish 1989; Long 1991.

7 Gurr 1993: viii; cf. Nietschmann 1987.

8 Unless otherwise stated, all chapter cross-references in this chapter are to *Multicultural Citizenship* (Oxford: Clarendon Press, 1995).

9 For a discussion of these rights in the British context, see Parekh 1990: 705; 1991: 197–204; Modood 1992; Poulter 1987. In Canada, see E. Kallen 1987: 325–31. In the USA, see Minow 1990; Sandel 1990. For the Muslim girls in France, see Galeotti 1993. It is sometimes said that these measures are purely 'symbolic'. But measures relating to employment are very material, affecting people's 'life chances' not just their 'lifestyles'.

10 For statistics on the (under-)representation of blacks and Hispanics in the United States, see C. Davidson 1992: 46. For statistics on the representation of various social groups in Canada, see RCERPF 1991: 93–6 and 192.

11 While self-government may entail guaranteed representation on intergovernmental bodies which negotiate, interpret, and modify the division of powers, it may also entail

reduced representation on federal bodies which legislate in areas of purely federal jurisdiction, in so far as the self-governing group is not governed by the decisions of these federal bodies. I discuss the relationship between self-government and representation in ch. 7 of *Multicultural Citizenship*.

12 This phrase is from the judgement of the Canadian Supreme Court in explaining its interpretation of the equality guarantees under the Canadian Charter of Rights (*Andrews v. Law Society of British Columbia* 1 SCR 143; 56 DLR (4th) 1). See also Government of Canada 1991b: 10.

13 For examples of this view, see Knopff 1979; F. Morton 1985; Kukathas 1992; Hindess 1993; Maré 1992: 107–10; Rawls 1975: 88, 93, and the references cited in ch. 1 n. 4 of *Multicultural Citizenship*.

14 I explored this relationship between national right and liberal egalitarian justice in Kymlicka 1989a: ch. 9. For what it is worth, I continue to endorse the argument in that chapter, but I should have been clearer about its scope. I would now describe the argument in that chapter as an equality-based defence of certain external protections for national minorities. I did not use those terms at the time, in part because I did not have a very clear conception of the variety of rights, groups, and moral justifications that are involved in the debate.

15 I am here disagreeing with Tamir, who argues that the larger a national minority is, the more rights it should have (1993: 75). On my view, if a binational group is large enough, it may have little need for group-differentiated rights, since it can ensure its survival and development through the usual operation of the economic market-place and democratic decision-making. (This might be true, for example, if a national state contained two nations of roughly equal size and wealth.)

16 On the role of indigenous land claims in a liberal egalitarian framework, see Kymlicka 1996; Penz 1992; 1993; Russell 1993; Tully 1994. It is important to note that the equality argument for land claims is not based on notions of compensatory justice. The compensatory argument says that because indigenous peoples were the legal owners of their traditional lands, and because their lands were taken away illegally, they should be compensated for this historical wrong. Since the debate over land claims is often couched in the language of compensatory justice, I should say a word about this. I take it as given that indigenous peoples have suffered terrible wrongs in being dispossessed of their lands, and that they should be compensated for this in some way. Moreover, I believe that indigenous peoples continue to have certain property rights under the common law (in former British colonies), wherever these have not been explicitly extinguished by legislation. (That is to say, the *terra nullius* doctrine is wrong in terms both of morality and the common law.) But it is a mistake, I think, to put too much weight on historical property rights. For one thing, these claims do not, by themselves, explain why indigenous peoples have rights of self-government. Many groups have been wrongfully dispossessed of property and other economic opportunities, including women, blacks and Japanese immigrants in the United States and Canada during World War II. Each of these groups may be entitled to certain forms of compensatory justice, but this does not by itself explain or justify granting powers of self-government (rather than compensatory programmes to promote integration and equal opportunity within the mainstream). Suffering historical injustice is neither necessary nor sufficient for claiming self-government rights.

Moreover, the idea of compensating for historical wrongs, taken to its logical conclusion, implies that all the land which was wrongly taken from indigenous peoples in the Americas or Australia or New Zealand should be returned to them. This would create massive unfairness, given that the original European settlers and later immigrants have now produced hundreds of millions of descendants, and this land is the only home they know. Changing circumstances often make it impossible and undesirable to compensate for certain historical wrongs. As Jeremy Waldron puts it, certain historical wrongs are 'superseded' (Waldron 1992). Also, the land held by some indigenous groups at the time of contact was itself the result of the conquest or coercion of other indigenous groups (Mulgan 1989: 30–1; Crowe 1974: 65–81). The compensatory argument would presumably require rectifying these pre-contract injustices as well. (For other difficulties with compensatory claims, see Brilmayer 1992.)

The equality argument does not try to turn back the historical clock, nor to restore groups to the situation they would have been in, in the absence of any historical injustice. (These compensatory aims actually fit more comfortably with Nozick's libertarian theory of entitlement than with a liberal egalitarian theory of distributive justice – see Lyons 1981.) The aim of the equality argument is to provide the sort of land base needed to sustain the viability of self-governing minority communities, and hence to prevent unfair disadvantages with respect to cultural membership now and in the future. In short, the equality argument situates land claims within a theory of distributive justice, rather than compensatory justice.

Waldron assumes that indigenous land claims are all based on claims for compensatory justice (Waldron 1992). In fact, however, most indigenous groups focus, not on reclaiming all of what they had before European settlement, but on what they need now to sustain themselves as distinct societies (see the declaration of the World Council of Indigenous Peoples, quoted in Nettheim 1988: 115; Sharp 1990: 150–3). Historical factors are, of course, relevant in other ways. The 'historical agreement' argument I discuss below is very much history-based.

17 The only attempt I know of to reconcile official languages with 'benign neglect' is by Rainer Knopff. He argues that language has two functions: it can function as the vehicle

for the transmission of a particular culture, but it can also function as 'a culturally neutral, or utilitarian, means of communication which allows those of different cultures to participate in the same political community' (Knopff 1979: 67). By placing the emphasis on the utilitarian function, governments 'can enact official languages without at the same time legislating official cultures … in enacting 'official languages', one does not necessarily imply that the cultures which these languages transmit and represent thereby become 'official cultures' (Knopff 1979: 67). Culture, Knopff argues, 'remains a purely private affair' in Canada, for while English and French have official backing as the 'utilitarian' languages, all languages compete on equal terms for 'cultural' allegiance. It is the 'task of the individual members of a culture to show the excellence of their product on the cultural market-place, as it were. If they succeed, the language of that culture will become attractive to others … if [a] culture, and hence, language, cannot show itself to be worthy of choice in the light of standards of the good, then it deserves to disappear' (Knopff 1979: 70). This view of language as a 'culturally neutral medium' has been thoroughly discredited in the literature. In any event, it is simply not true that teaching in the English language in public schools is totally divorced from the teaching of the history and customs of the anglophone society.

18 Some commentators say that governments should draw boundaries and distribute powers so as to protect the viability of national minorities, but that they should not state in law that they are doing this. This enables the state to continue claiming that it treats all ethnic and national differences with 'benign neglect'. For example, van den Berghe argues that deliberately designing or revising federal units to protect minority cultures is consistent with 'benign neglect', so long as it does not involve the explicit legal recognition of groups. He thinks it is one thing to define the powers and boundaries of a political subunit so as to ensure the protection of a minority culture (what he calls 'indirect consociationalism'), but quite another for the constitution or statute law to cite the existence of that minority as the reason for those arrangements (what he calls 'group rights') (van den Berghe 1981: 348). But surely this is hypocritical. If the agreed purpose of indirect consociationalism is to protect minority cultures, then anyone who values honesty and transparency in government (as liberals claim to do) should want that justification to be clear to everyone. Van den Berghe's solution violates the 'publicity condition' which Rawls imposes on liberal theories of justice (Rawls 1971: 133). None the less, this attitude seems to be widely shared. While most Canadians accept that the powers and boundaries of Quebec were fixed to accommodate the needs of the francophone minority in Canada, many objected to the government's proposal to state in the constitution that Quebec formed a 'distinct society' as the homeland of the French Canadian nation, because they saw this as violating the principle that the constitution should not recognize particular ethnic or national groups. Quebecers, however, are no longer willing to have their special status hidden away. They view it as a matter of basic respect that their separate identity be recognized and affirmed at the level of constitutional principle (Taylor 1991: 64).

19 This is similar to the debate over affirmative action for women or people with disabilities. Like self-government rights, affirmative action programmes asymmetrically distribute rights or opportunities on the basis of group membership. Proponents argue that they are required for genuine equality. Critics respond that the economic market-place (like the cultural market-place) already respects equality, by treating job applicants without regard for their group membership. However, an equality-based argument for group-specific affirmative action can be made if the actual operation of the economic market-place works to the disadvantage of certain groups. As with self-government rights, the equality argument for affirmative action seeks to show how the structure of common individual rights is intended to treat all people equally, but in fact works to the disadvantage of the members of a particular collectivity. Many group-specific claims can be seen in this way – that is, as compensating for the disadvantages and vulnerabilities of certain groups within the structure of common individual rights.

Of course, affirmative action for women or people with disabilities differs in many ways from self-government rights for national minorities, since they are compensating for very different kinds of injustices. The former is intended to help disadvantaged groups integrate into society, by breaking down unjust barriers to full integration. The latter is intended to help cultural communities maintain their distinctiveness, by protecting against external decisions. This means that the former are (in theory) temporary, whereas the latter are permanent, barring dramatic shifts in population.

20 Imagine that schools and government offices (and presumably private businesses as well) were open seven days a week all year round, including Christmas and Easter, and that each student and employee was allowed to choose two days off per week, two weeks' vacation per year, plus, say, five additional holidays per year. This would maximize each individual's ability to adapt their schedule to their religious beliefs. But I do not know whether this is realistic or even desirable, given the extent to which social life is built around common weekends and holidays. As an atheist, I have no commitment to resting on the sabbath or celebrating religious holidays. But I do like the fact that most of my friends and family, regardless of their religion, language, and ethnicity, do not work on the weekends or on certain public holidays. Maintaining friendships and other voluntary associations would be much more difficult if society (including schools and other government institutions) were not organized in this way. Perhaps a better solution would be to have one major holiday from each of the largest religious groups in the country. We could have

one Christian holiday (say, Christmas), but replace Easter and Thanksgiving with a Muslim and Jewish holiday. This would maintain the value of common holidays, and would also encourage people of each faith to learn something about the beliefs of other faiths.

21 E.g. the Canadian government justified its proposal to eliminate the treaty rights of Indians on the grounds that 'we can only be just in our time' (Trudeau 1969: 295). Trudeau was paraphrasing John F. Kennedy's famous quote about justice for blacks in the United States.

22 Chartrand argues that this is the current situation with respect to the Métis in Canada, who agreed to join Canada on the basis of promises made to them under the Manitoba Act 1870, which have since been broken (Chartrand 1993: 241).

23 It is interesting to note that some Aboriginal groups in Canada insist that their demands for federal funding of self-government are based solely on historical compensation for the wrongful taking of land, not on appeals to distributive justice between citizens (Lyon 1984: 13–14).

24 For a subtle discussion of the complex interaction between the equality and treaty arguments in the New Zealand context, see Sharp 1990: 135–6; Mulgan 1989: ch. 4. As Sharp notes, there is a tendency to read principles of equality back into the historical treaties.

25 These arguments parallel common arguments for the protection of endangered plant and animal species, which are seen both as enriching the world aesthetically, and as providing potential sources of valuable genetic material or other substances that might be of human benefit.

26 Many liberals defend state funding of the arts or museums on the ground that the state has a responsibility to ensure an adequate range of options for future generations, which the cultural market-place may fail to protect (Dworkin 1985: ch. 11; Raz 1986: 162; Black 1992; Kymlicka 1989b: 893–5). If we accept that active measures are justified to preserve the richness and diversity of our cultural resources, then programmes such as the funding of ethnic festivals or immigrant language classes can be seen as falling under this heading. Indeed, some people defined this funding simply as a way of ensuring that ethnic groups are not discriminated against in state funding of art and culture. (I should note that other liberals view any such state funding as illegitimate (e.g. Rawls 1971: 331–2; Waldron 1989).)

27 Hence the popular contrast between 'consociational' and 'universal' modes of incorporating individuals into the state is misleading (e.g. Asch 1990). There is a distinction between models of citizenship that incorporate citizens on a uniform basis or through membership in some group. But uniform citizenship is not *universal* citizenship. No country allows for universal citizenship.

28 See the references in ch. 5, n. 17, of *Multicultural Citizenship*.

29 One theorist who has attempted to square the circle is Michael Walzer. He argues that restricting citizenship in a state to the members of a particular group is justified in the name of protecting a distinct culture (what he calls a 'community of character'). He recognizes that this same argument can be given for group-differentiated rights *within* a state, but rejects such rights because they violate our 'shared understandings' (Walzer 1983: ch. 2). I have argued elsewhere that Walzer's argument is unsuccessful (Kymlicka 1989a: ch. 11). I should emphasize again that my defence of the legitimacy of partially closed borders is not intended to defend the right of national groups to maintain more than their fair share of resources. On the contrary, I would argue that a country forfeits its right to restrict immigration if it has failed to live up to its obligations to share its wealth with the poorer countries of the world. See Bader 1995; Ackerman 1980: 256–7.

30 On the tendency of liberals to treat diversity as a matter of variations in individual values and beliefs, see A. Phillips 1993; Galeotti 1993: 590. For an example of this 'overly cerebral' conception of diversity, see Rawls 1993a: pp. xxvii–xxix, where he treats modern conflicts of race, ethnicity, and gender as if they were analogous to conflict over religious belief during the Reformation – i.e. as conflicts over individuals' beliefs about 'the meaning, value and purposes of human life'.

31 This is true of Young's postmodernist account of minority rights. According to her view of 'relational difference', cultural groups must 'understand themselves as participating in the same society', and as 'part of a single polity', whose common decision-making procedures are seen as 'legitimately binding' on all people equally. Cultural difference within a state should be accommodated by group-differentiated rights within a single society – e.g. by group representation within the mainstream polity – rather than by establishing two or more separate and self-governing societies within a state (I. Young 1993a: 135). Like many liberals, she fears the impact of national rights on other political movements or on domestic peace.

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PART VI

Liberty

26

Two Concepts of Liberty

Isaiah Berlin

…

To coerce a man is to deprive him of freedom – freedom from what? Almost every moralist in human history has praised freedom. Like happiness and goodness, like nature and reality, the meaning of this term is so porous that there is little interpretation that it seems able to resist. I do not propose to discuss either the history or the more than two hundred senses of this protean word recorded by historians of ideas. I propose to examine no more than two of these senses – but those central ones, with a great deal of human history behind them, and, I dare say, still to come. The first of these political senses of freedom or liberty (I shall use both words to mean the same), which (following much precedent) I shall call the 'negative' sense, is involved in the answer to the question 'What is the area within which the subject – a person or group of persons – is or should be left to do or be what he is able to do or be, without interference by other persons?' The second, which I shall call the positive sense, is involved in the answer to the question 'What, or who, is the source of control or interference that can determine someone to do, or be, this rather than that?' The two questions are clearly different, even though the answers to them may overlap.

I The Notion of 'Negative' Freedom

I am normally said to be free to the degree to which no man or body of men interferes with my activity. Political liberty in this sense is simply the area within which a man can act unobstructed by others. If I am prevented by others from doing what I could otherwise do, I am to that degree unfree; and if this area is contracted by other men beyond a certain minimum, I can be described as being coerced, or, it may be, enslaved. Coercion is not, however, a term that covers every form of inability. If I say that I am unable to jump more than ten feet in the air, or cannot read because I am blind, or cannot understand the darker pages of Hegel, it would be eccentric to say that I am to that degree enslaved or coerced. Coercion implies the deliberate interference of other human beings within the area in which I could otherwise act. You lack political liberty or freedom only if you are prevented from attaining a goal by human beings.[1] Mere incapacity to attain a goal is not lack of political freedom.[2] This is brought out by the use of such modern expressions as 'economic freedom' and its counterpart, 'economic slavery'. It is argued, very plausibly, that if a man is too poor to afford something on which there is no legal ban – a loaf of bread, a journey round the world,

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recourse to the law courts – he is as little free to have it as he would be if it were forbidden him by law. If my poverty were a kind of disease, which prevented me from buying bread, or paying for the journey round the world or getting my case heard, as lameness prevents me from running, this inability would not naturally be described as a lack of freedom, least of all political freedom. It is only because I believe that my inability to get a given thing is due to the fact that other human beings have made arrangements whereby I am, whereas others are not, prevented from having enough money with which to pay for it, that I think myself a victim of coercion or slavery. In other words, this use of the term depends on a particular social and economic theory about the causes of my poverty or weakness. If my lack of material means is due to my lack of mental or physical capacity, then I begin to speak of being deprived of freedom (and not simply about poverty) only if I accept the theory[3] If, in addition, I believe that I am being kept in want by a specific arrangement which I consider unjust or unfair, I speak of economic slavery or oppression. 'The nature of things does not madden us, only ill will does', said Rousseau. The criterion of oppression is the part that I believe to be played by other human beings, directly or indirectly, with or without the intention of doing so, in frustrating my wishes. By being free in this sense I mean not being interfered with by others. The wider the area of non-interference the wider my freedom.

This is what the classical English political philosophers meant when they used this word.[4] They disagreed about how wide the area could or should be. They supposed that it could not, as things were, be unlimited, because if it were, it would entail a state in which all men could boundlessly interfere with all other men; and this kind of 'natural' freedom would lead to social chaos in which men's minimum needs would not be satisfied; or else the liberties of the weak would be suppressed by the strong. Because they perceived that human purposes and activities do not automatically harmonize with one another, and because (whatever their official doctrines) they put high value on other goals, such as justice, or happiness, or culture, or security, or varying degrees of equality, they were prepared to curtail freedom in the interests of other values and, indeed, of freedom itself. For, without this, it was impossible to create the kind of association that they thought desirable. Consequently, it is assumed by these thinkers that the area of men's free action must be limited by law. But equally it is assumed, especially by such libertarians as Locke and Mill in England, and Constant and Tocqueville in France, that there ought to exist a certain minimum area of personal freedom which must on no account be violated; for if it is overstepped, the individual will find himself in an area too narrow for even that minimum development of his natural faculties which alone makes it possible to pursue, and even to conceive, the various ends which men hold good or right or sacred. It follows that a frontier must be drawn between the area of private life and that of public authority. Where it is to be drawn is a matter of argument, indeed of haggling. Men are largely interdependent, and no man's activity is so completely private as never to obstruct the lives of others in any way. 'Freedom for the pike is death for the minnows'; the liberty of some must depend on the restraint of others. 'Freedom for an Oxford don', others have been known to add, 'is a very different thing from freedom for an Egyptian peasant.'

This proposition derives its force from something that is both true and important, but the phrase itself remains a piece of political claptrap. It is true that to offer political rights, or safeguards against intervention by the state, to men who are half-naked, illiterate, underfed, and diseased is to mock their condition; they need medical help or education before they can understand, or make use of, an increase in their freedom. What is freedom to those who cannot make use of it? Without adequate conditions for the use of freedom, what is the value of freedom? First things come first: there are situations, as a nineteenth-century Russian radical writer declared, in which boots are superior to the works of Shakespeare; individual freedom is not everyone's primary need. For freedom is not the mere absence of frustration of whatever kind; this would inflate the meaning of the word until it meant too much or too little. The Egyptian peasant needs clothes or medicine before, and more than, personal liberty, but the minimum freedom that he needs today, and the greater degree of freedom that he may need tomorrow, is not some species of freedom peculiar to him, but identical with that of professors, artists, and millionaires.

What troubles the consciences of Western liberals is not, I think, the belief that the freedom that men seek differs according to their social or economic conditions, but that the minority who possess it have gained it by exploiting, or, at least, averting their gaze from, the vast majority who do not. They believe, with good reason, that if individual liberty is an ultimate end for human beings, none should be deprived of it by others; least of all that some should enjoy it at the expense of others. Equality of liberty; not to treat others as I should not

wish them to treat me; repayment of my debt to those who alone have made possible my liberty or prosperity or enlightenment; justice, in its simplest and most universal sense – these are the foundations of liberal morality. Liberty is not the only goal of men. I can, like the Russian critic Belinsky, say that if others are to be deprived of it – if my brothers are to remain in poverty, squalor, and chains – then I do not want it for myself, I reject it with both hands and infinitely prefer to share their fate. But nothing is gained by a confusion of terms. To avoid glaring inequality or widespread misery I am ready to sacrifice some, or all, of my freedom: I may do so willingly and freely: but it is freedom that I am giving up for the sake of justice or equality or the love of my fellow men. I should be guilt-stricken, and rightly so, if I were not, in some circumstances, ready to make this sacrifice. But a sacrifice is not an increase in what is being sacrificed, namely freedom, however great the moral need or the compensation for it. Everything is what it is: liberty is liberty, not equality or fairness or justice or culture, or human happiness or a quiet conscience. If the liberty of myself or my class or nation depends on the misery of a number of other human beings, the system which promotes this is unjust and immoral. But if I curtail or lose my freedom, in order to lessen the shame of such inequality, and do not thereby materially increase the individual liberty of others, an absolute loss of liberty occurs. This may be compensated for by a gain in justice or in happiness or in peace, but the loss remains, and it is a confusion of values to say that although my 'liberal', individual freedom may go by the board, some other kind of freedom – 'social' or 'economic' – is increased. Yet it remains true that the freedom of some must at times be curtailed to secure the freedom of others. Upon what principle should this be done? If freedom is a sacred, untouchable value, there can be no such principle. One or other of these conflicting rules or principles must, at any rate in practice, yield: not always for reasons which can be clearly stated, let alone generalized into rules or universal maxims. Still, a practical compromise has to be found.

Philosophers with an optimistic view of human nature and a belief in the possibility of harmonizing human interests, such as Locke or Adam Smith and, in some moods, Mill, believed that social harmony and progress were compatible with reserving a large area for private life over which neither the state nor any other authority must be allowed to trespass. Hobbes, and those who agreed with him, especially conservative or reactionary thinkers, argued that if men were to be prevented from destroying one another and making social life a jungle or a wilderness, greater safeguards must be instituted to keep them in their places; he wished correspondingly to increase the area of centralized control and decrease that of the individual. But both sides agreed that some portion of human existence must remain independent of the sphere of social control. To invade that preserve, however small, would be despotism. The most eloquent of all defenders of freedom and privacy, Benjamin Constant, who had not forgotten the Jacobin dictatorship, declared that at the very least the liberty of religion, opinion, expression, property, must be guaranteed against arbitrary invasion. Jefferson, Burke, Paine, Mill, compiled different catalogues of individual liberties, but the argument for keeping authority at bay is always substantially the same. We must preserve a minimum area of personal freedom if we are not to 'degrade or deny our nature'. We cannot remain absolutely free, and must give up some of our liberty to preserve the rest. But total self-surrender is self-defeating. What then must the minimum be? That which a man cannot give up without offending against the essence of his human nature. What is this essence? What are the standards which it entails? This has been, and perhaps always will be, a matter of infinite debate. But whatever the principle in terms of which the area of non-interference is to be drawn, whether it is that of natural law or natural rights, or of utility or the pronouncements of a categorical imperative, or the sanctity of the social contract, or any other concept with which men have sought to clarify and justify their convictions, liberty in this sense means liberty *from*; absence of interference beyond the shifting, but always recognizable, frontier. 'The only freedom which deserves the name is that of pursuing our own good in our own way', said the most celebrated of its champions. If this is so, is compulsion ever justified? Mill had no doubt that it was. Since justice demands that all individuals be entitled to a minimum of freedom, all other individuals were of necessity to be restrained, if need be by force, from depriving anyone of it. Indeed, the whole function of law was the prevention of just such collisions: the state was reduced to what Lassalle contemptuously described as the functions of a night-watchman or traffic policeman.

What made the protection of individual liberty so sacred to Mill? In his famous essay he declares that, unless men are left to live as they wish 'in the path which merely concerns themselves', civilization cannot advance; the truth will not, for lack of a free market in ideas, come to light; there will be no scope for

spontaneity, originality, genius, for mental energy, for moral courage. Society will be crushed by the weight of 'collective mediocrity'. Whatever is rich and diversified will be crushed by the weight of custom, by men's constant tendency to conformity, which breeds only 'withered capacities', 'pinched and hidebound', 'cramped and warped' human beings. 'Pagan self-assertion is as worthy as Christian self-denial.' 'All the errors which a man is likely to commit against advice and warning are far outweighed by the evil of allowing others to constrain him to what they deem is good.' The defence of liberty consists in the 'negative' goal of warding off interference. To threaten a man with persecution unless he submits to a life in which he exercises no choices of his goals; to block before him every door but one, no matter how noble the prospect upon which it opens, or how benevolent the motives of those who arrange this, is to sin against the truth that he is a man, a being with a life of his own to live. This is liberty as it has been conceived by liberals in the modern world from the days of Erasmus (some would say of Occam) to our own. Every plea for civil liberties and individual rights, every protest against exploitation and humiliation, against the encroachment of public authority, or the mass hypnosis of custom or organized propaganda, springs from this individualistic, and much disputed, conception of man.

Three facts about this position may be noted. In the first place Mill confuses two distinct notions. One is that all coercion is, in so far as it frustrates human desires, bad as such, although it may have to be applied to prevent other, greater evils; while non-interference, which is the opposite of coercion, is good as such, although it is not the only good. This is the 'negative' conception of liberty in its classical form. The other is that men should seek to discover the truth, or to develop a certain type of character of which Mill approved – critical, original, imaginative, independent, non-conforming to the point of eccentricity, and so on – and that truth can be found, and such character can be bred, only in conditions of freedom. Both these are liberal views, but they are not identical, and the connexion between them is, at best, empirical. No one would argue that truth or freedom of self-expression could flourish where dogma crushes all thought. But the evidence of history tends to show (as, indeed, was argued by James Stephen in his formidable attack on Mill in his *Liberty, Equality, Fraternity*) that integrity, love of truth, and fiery individualism grow at least as often in severely disciplined communities among, for example, the puritan Calvinists of Scotland or New England, or under military discipline, as in more tolerant or indifferent societies; and if this is so, Mill's argument for liberty as a necessary condition for the growth of human genius falls to the ground. If his two goals proved incompatible, Mill would be faced with a cruel dilemma, quite apart from the further difficulties created by the inconsistency of his doctrines with strict utilitarianism, even in his own humane version of it.[5]

In the second place, the doctrine is comparatively modern. There seems to be scarcely any discussion of individual liberty as a conscious political ideal (as opposed to its actual existence) in the ancient world. Condorcet had already remarked that the notion of individual rights was absent from the legal conceptions of the Romans and Greeks; this seems to hold equally of the Jewish, Chinese, and all other ancient civilizations that have since come to light.[6] The domination of this ideal has been the exception rather than the rule, even in the recent history of the West. Nor has liberty in this sense often formed a rallying cry for the great masses of mankind. The desire not to be impinged upon, to be left to oneself, has been a mark of high civilization both on the part of individuals and communities. The sense of privacy itself, of the area of personal relationships as something sacred in its own right, derives from a conception of freedom which, for all its religious roots, is scarcely older, in its developed state, than the Renaissance or the Reformation.[7] Yet its decline would mark the death of a civilization, of an entire moral outlook.

The third characteristic of this notion of liberty is of greater importance. It is that liberty in this sense is not incompatible with some kinds of autocracy, or at any rate with the absence of self-government. Liberty in this sense is principally concerned with the area of control, not with its source. Just as a democracy may, in fact, deprive the individual citizen of a great many liberties which he might have in some other form of society, so it is perfectly conceivable that a liberal-minded despot would allow his subjects a large measure of personal freedom. The despot who leaves his subjects a wide area of liberty may be unjust, or encourage the wildest inequalities, care little for order, or virtue, or knowledge; but provided he does not curb their liberty, or at least curbs it less than many other régimes, he meets with Mill's specification.[8] Freedom in this sense is not, at any rate logically, connected with democracy or self-government. Self-government may, on the whole, provide a better guarantee of the preservation of civil liberties than other régimes, and has been defended as such by libertarians. But there is no necessary connexion between individual liberty and democratic rule. The

answer to the question 'Who governs me?' is logically distinct from the question 'How far does government interfere with me?' It is in this difference that the great contrast between the two concepts of negative and positive liberty, in the end, consists.[9] For the 'positive' sense of liberty comes to light if we try to answer the question, not 'What am I free to do or be?', but 'By whom am I ruled?' or 'Who is to say what I am, and what I am not, to be or do?' The connexion between democracy and individual liberty is a good deal more tenuous than it seemed to many advocates of both. The desire to be governed by myself, or at any rate to participate in the process by which my life is to be controlled, may be as deep a wish as that of a free area for action, and perhaps historically older. But it is not a desire for the same thing. So different is it, indeed, as to have led in the end to the great clash of ideologies that dominates our world. For it is this – the 'positive' conception of liberty: not freedom from, but freedom to – to lead one prescribed form of life – which the adherents of the 'negative' notion represent as being, at times, no better than a specious disguise for brutal tyranny.

II The Notion of Positive Freedom

The 'positive' sense of the word 'liberty' derives from the wish on the part of the individual to be his own master. I wish my life and decisions to depend on myself, not on external forces of whatever kind. I wish to be the instrument of my own, not of other men's, acts of will. I wish to be a subject, not an object; to be moved by reasons, by conscious purposes, which are my own, not by causes which affect me, as it were, from outside. I wish to be somebody, not nobody; a doer – deciding, not being decided for, self-directed and not acted upon by external nature or by other men as if I were a thing, or an animal, or a slave incapable of playing a human role, that is, of conceiving goals and policies of my own and realizing them. This is at least part of what I mean when I say that I am rational, and that it is my reason that distinguishes me as a human being from the rest of the world. I wish, above all, to be conscious of myself as a thinking, willing, active being, bearing responsibility for my choices and able to explain them by references to my own ideas and purposes. I feel free to the degree that I believe this to be true, and enslaved to the degree that I am made to realize that it is not.

The freedom which consists in being one's own master, and the freedom which consists in not being prevented from choosing as I do by other men, may, on the face of it, seem concepts at no great logical distance from each other – no more than negative and positive ways of saying much the same thing. Yet the 'positive' and 'negative' notions of freedom historically developed in divergent directions not always by logically reputable steps, until, in the end, they came into direct conflict with each other.

One way of making this clear is in terms of the independent momentum which the, initially perhaps quite harmless, metaphor of self-mastery acquired. 'I am my own master'; 'I am slave to no man'; but may I not (as Platonists or Hegelians tend to say) be a slave to nature? Or to my own 'unbridled' passions? Are these not so many species of the identical genus 'slave' – some political or legal, others moral or spiritual? Have not men had the experience of liberating themselves from spiritual slavery, or slavery to nature, and do they not in the course of it become aware, on the one hand, of a self which dominates, and, on the other, of something in them which is brought to heel? This dominant self is then variously identified with reason, with my 'higher nature', with the self which calculates and aims at what will satisfy it in the long run, with my 'real', or 'ideal', or 'autonomous' self, or with my self 'at its best'; which is then contrasted with irrational impulse, uncontrolled desires, my 'lower' nature, the pursuit of immediate pleasures, my 'empirical' or 'heteronomous' self, swept by every gust of desire and passion, needing to be rigidly disciplined if it is ever to rise to the full height of its 'real' nature. Presently the two selves may be represented as divided by an even larger gap: the real self may be conceived as something wider than the individual (as the term is normally understood), as a social 'whole' of which the individual is an element or aspect: a tribe, a race, a church, a state, the great society of the living and the dead and the yet unborn. This entity is then identified as being the 'true' self which, by imposing its collective, or 'organic', single will upon its recalcitrant 'members', achieves its own, and therefore their, 'higher' freedom. The perils of using organic metaphors to justify the coercion of some men by others in order to raise them to a 'higher' level of freedom have often been pointed out. But what gives such plausibility as it has to this kind of language is that we recognize that it is possible, and at times justifiable, to coerce men in the name of some goal (let us say, justice or public health) which they would, if they were more enlightened, themselves pursue, but do not, because they are blind or ignorant or corrupt. This renders it easy for me to conceive of

myself as coercing others for their own sake, in their, not my, interest. I am then claiming that I know what they truly need better than they know it themselves. What, at most, this entails is that they would not resist me if they were rational and as wise as I and understood their interests as I do. But I may go on to claim a good deal more than this. I may declare that they are actually aiming at what in their benighted state they consciously resist, because there exists within them an occult entity – their latent rational will, or their 'true' purpose – and that this entity, although it is belied by all that they overtly feel and do and say, is their 'real' self, of which the poor empirical self in space and time may know nothing or little; and that this inner spirit is the only self that deserves to have its wishes taken into account.[10] Once I take this view, I am in a position to ignore the actual wishes of men or societies, to bully, oppress, torture them in the name, and on behalf, of their 'real' selves, in the secure knowledge that whatever is the true goal of man (happiness, performance of duty, wisdom, a just society, self-fulfilment) must be identical with his freedom – the free choice of his 'true', albeit often submerged and inarticulate, self.

This paradox has been often exposed. It is one thing to say that I know what is good for X, while he himself does not; and even to ignore his wishes for its – and his – sake; and a very different one to say that he has *eo ipso* chosen it, not indeed consciously, not as he seems in everyday life, but in his role as a rational self which his empirical self may not know – the 'real' self which discerns the good, and cannot help choosing it once it is revealed. This monstrous impersonation, which consists in equating what X would choose if he were something he is not, or at least not yet, with what X actually seeks and chooses, is at the heart of all political theories of self-realization. It is one thing to say that I may be coerced for my own good which I am too blind to see: this may, on occasion, be for my benefit; indeed it may enlarge the scope of my liberty. It is another to say that if it is my good, then I am not being coerced, for I have willed it, whether I know this or not, and am free (or 'truly' free) even while my poor earthly body and foolish mind bitterly reject it, and struggle against those who seek however benevolently to impose it, with the greatest desperation.

This magical transformation, or sleight of hand (for which William James so justly mocked the Hegelians), can no doubt be perpetrated just as easily with the 'negative' concept of freedom, where the self that should not be interfered with is no longer the individual with his actual wishes and needs as they are normally conceived, but the 'real' man within, identified with the pursuit of some ideal purpose not dreamed of by his empirical self. And, as in the case of the 'positively' free self, this entity may be inflated into some super-personal entity – a state, a class, a nation, or the march of history itself, regarded as a more 'real' subject of attributes than the empirical self. But the 'positive' conception of freedom as self-mastery, with its suggestion of a man divided against himself, has, in fact, and as a matter of history, of doctrine and of practice, lent itself more easily to this splitting of personality into two: the transcendent, dominant controller, and the empirical bundle of desires and passions to be disciplined and brought to heel. It is this historical fact that has been influential. This demonstrates (if demonstration of so obvious a truth is needed) that conceptions of freedom directly derive from views of what constitutes a self, a person, a man. Enough manipulation with the definition of man, and freedom can be made to mean whatever the manipulator wishes. Recent history has made it only too clear that the issue is not merely academic.

The consequences of distinguishing between two selves will become even clearer if one considers the two major forms which the desire to be self-directed – directed by one's 'true' self – has historically taken: the first, that of self-abnegation in order to attain independence; the second, that of self-realization, or total self-identification with a specific principle or ideal in order to attain the selfsame end.

III The Retreat to the Inner Citadel

I am the possessor of reason and will; I conceive ends and I desire to pursue them; but if I am prevented from attaining them I no longer feel master of the situation. I may be prevented by the laws of nature, or by accidents, or the activities of men, or the effect, often undesigned, of human institutions. These forces may be too much for me. What am I to do to avoid being crushed by them? I must liberate myself from desires that I know I cannot realize. I wish to be master of my kingdom, but my frontiers are long and insecure, therefore I contract them in order to reduce or eliminate the vulnerable area. I begin by desiring happiness, or power, or knowledge, or the attainment of some specific object. But I cannot command them. I choose to avoid defeat and waste, and therefore decide to strive for nothing that I cannot be sure to obtain. I determine myself not to desire what is

unattainable. The tyrant threatens me with the destruction of my property, with imprisonment, with the exile or death of those I love. But if I no longer feel attached to property, no longer care whether or not I am in prison, if I have killed within myself my natural affections, then he cannot bend me to his will, for all that is left of myself is no longer subject to empirical fears or desires. It is as if I had performed a strategic retreat into an inner citadel – my reason, my soul, my 'noumenal' self – which, do what they may, neither external blind force, nor human malice, can touch. I have withdrawn into myself; there, and there alone, I am secure. It is as if I were to say: 'I have a wound in my leg. There are two methods of freeing myself from pain. One is to heal the wound. But if the cure is too difficult or uncertain, there is another method. I can get rid of the wound by cutting off my leg. If I train myself to want nothing to which the possession of my leg is indispensable, I shall not feel the lack of it.' This is the traditional self-emancipation of ascetics and quietists, of stoics or Buddhist sages, men of various religions or of none, who have fled the world, and escaped the yoke of society or public opinion, by some process of deliberate self-transformation that enables them to care no longer for any of its values, to remain, isolated and independent, on its edges, no longer vulnerable to its weapons.[11] All political isolationism, all economic autarky, every form of autonomy, has in it some element of this attitude. I eliminate the obstacles in my path by abandoning the path; I retreat into my own sect, my own planned economy, my own deliberately insulated territory, where no voices from outside need be listened to, and no external forces can have effect. This is a form of the search for security; but it has also been called the search for personal or national freedom or independence.

From this doctrine, as it applies to individuals, it is no very great distance to the conceptions of those who, like Kant, identify freedom not indeed with the elimination of desires, but with resistance to them, and control over them. I identify myself with the controller and escape the slavery of the controlled. I am free because, and in so far as, I am autonomous. I obey laws, but I have imposed them on, or found them in, my own uncoerced self. Freedom is obedience, but 'obedience to a law which we prescribe to ourselves', and no man can enslave himself. Heteronomy is dependence on outside factors, liability to be a plaything of the external world that I cannot myself fully control, and which *pro tanto* controls and 'enslaves' me. I am free only to the degree to which my person is 'fettered' by nothing that obeys forces over which I have no control; I cannot control the laws of nature; my free activity must therefore, *ex hypothesi*, be lifted above the empirical world of causality. This is not the place in which to discuss the validity of this ancient and famous doctrine; I only wish to remark that the related notions of freedom as resistance to (or escape from) unrealizable desire, and as independence of the sphere of causality, have played a central role in politics no less than in ethics.

For if the essence of men is that they are autonomous beings – authors of values, of ends in themselves, the ultimate authority of which consists precisely in the fact that they are willed freely – then nothing is worse than to treat them as if they were not autonomous, but natural objects, played on by causal influences, creatures at the mercy of external stimuli, whose choices can be manipulated by their rulers, whether by threats of force or offers of rewards. To treat men in this way is to treat them as if they were not self-determined. 'Nobody may compel me to be happy in his own way', said Kant. 'Paternalism is the greatest despotism imaginable.' This is so because it is to treat men as if they were not free, but human material for me, the benevolent reformer, to mould in accordance with my own, not their, freely adopted purpose. This is, of course, precisely the policy that the early utilitarians recommended. Helvétius (and Bentham) believed not in resisting, but in using, men's tendency to be slaves to their passions; they wished to dangle rewards and punishments before men – the acutest possible form of heteronomy – if by this means the 'slaves' might be made happier.[12] But to manipulate men, to propel them towards goals which you – the social reformer – see, but they may not, is to deny their human essence, to treat them as objects without wills of their own, and therefore to degrade them. That is why to lie to men, or to deceive them, that is, to use them as means for my, not their own, independently conceived ends, even if it is for their own benefit, is, in effect, to treat them as sub-human, to behave as if their ends are less ultimate and sacred than my own. In the name of what can I ever be justified in forcing men to do what they have not willed or consented to? Only in the name of some value higher than themselves. But if, as Kant held, all values are made so by the free acts of men, and called values only so far as they are this, there is no value higher than the individual. Therefore to do this is to coerce men in the name of something less ultimate than themselves – to bend them to my will, or to someone else's particular craving for (his or their) happiness or expediency or security or convenience. I am aiming at something desired (from

whatever motive, no matter how noble) by me or my group, to which I am using other men as means. But this is a contradiction of what I know men to be, namely ends in themselves. All forms of tampering with human beings, getting at them, shaping them against their will to your own pattern, all thought control and conditioning,[13] is, therefore, a denial of that in men which makes them men and their values ultimate.

Kant's free individual is a transcendent being, beyond the realm of natural causality. But in its empirical form – in which the notion of man is that of ordinary life – this doctrine was the heart of liberal humanism, both moral and political, that was deeply influenced both by Kant and by Rousseau in the eighteenth century. In its *a priori* version it is a form of secularized Protestant individualism, in which the place of God is taken by the conception of the rational life, and the place of the individual soul which strains towards union with Him is replaced by the conception of the individual, endowed with reason, straining to be governed by reason and reason alone, and to depend upon nothing that might deflect or delude him by engaging his irrational nature. Autonomy, not heteronomy: to act and not to be acted upon. The notion of slavery to the passions is – for those who think in these terms – more than a metaphor. To rid myself of fear, or love, or the desire to conform is to liberate myself from the despotism of something which I cannot control. Sophocles, whom Plato reports as saying that old age alone has liberated him from the passion of love – the yoke of a cruel master – is reporting an experience as real as that of liberation from a human tyrant or slave owner. The psychological experience of observing myself yielding to some 'lower' impulse, acting from a motive that I dislike, or of doing something which at the very moment of doing I may detest, and reflecting later that I was 'not myself', or 'not in control of myself', when I did it, belongs to this way of thinking and speaking. I identify myself with my critical and rational moments. The consequences of my acts cannot matter, for they are not in my control; only my motives are. This is the creed of the solitary thinker who has defied the world and emancipated himself from the chains of men and things. In this form, the doctrine may seem primarily an ethical creed, and scarcely political at all; nevertheless, its political implications are clear, and it enters into the tradition of liberal individualism at least as deeply as the 'negative' concept of freedom.

It is perhaps worth remarking that in its individualistic form the concept of the rational sage who has escaped into the inner fortress of his true self seems to arise when the external world has proved exceptionally arid, cruel, or unjust. 'He is truly free', said Rousseau, 'who desires what he can perform, and does what he desires.' In a world where a man seeking happiness or justice or freedom (in whatever sense) can do little, because he finds too many avenues of action blocked to him, the temptation to withdraw into himself may become irresistible. It may have been so in Greece, where the Stoic ideal cannot be wholly unconnected with the fall of the independent democracies before centralized Macedonian autocracy. It was so in Rome, for analogous reasons, after the end of the Republic.[14] It arose in Germany in the seventeenth century, during the period of the deepest national degradation of the German states that followed the Thirty Years War, when the character of public life, particularly in the small principalities, forced those who prized the dignity of human life, not for the first or last time, into a kind of inner emigration. The doctrine that maintains that what I cannot have I must teach myself not to desire; that a desire eliminated, or successfully resisted, is as good as a desire satisfied, is a sublime, but, it seems to me, unmistakable, form of the doctrine of sour grapes: what I cannot be sure of, I cannot truly want.

This makes it clear why the definition of negative liberty as the ability to do what one wishes – which is, in effect, the definition adopted by Mill – will not do. If I find that I am able to do little or nothing of what I wish, I need only contract or extinguish my wishes, and I am made free. If the tyrant (or 'hidden persuader') manages to condition his subjects (or customers) into losing their original wishes and embrace ('internalize') the form of life he has invented for them, he will, on this definition, have succeeded in liberating them. He will, no doubt, have made them *feel* free – as Epictetus feels freer than his master (and the proverbial good man is said to feel happy on the rack). But what he has created is the very antithesis of political freedom.

Ascetic self-denial may be a source of integrity or serenity and spiritual strength, but it is difficult to see how it can be called an enlargement of liberty. If I save myself from an adversary by retreating indoors and locking every entrance and exit, I may remain freer than if I had been captured by him, but am I freer than if I had defeated or captured him? If I go too far, contract myself into too small a space, I shall suffocate and die. The logical culmination of the process of destroying everything through which I can possibly be wounded is suicide. While I exist in the natural world, I can never be wholly secure. Total liberation in this sense (as Schopenhauer correctly perceived) is conferred only by death.[15]

I find myself in a world in which I meet with obstacles to my will. Those who are wedded to the 'negative' concept of freedom may perhaps be forgiven if they think that self-abnegation is not the only method of overcoming obstacles; that it is also possible to do so by removing them: in the case of non-human objects, by physical action; in the case of human resistance, by force or persuasion, as when I induce somebody to make room for me in his carriage, or conquer a country which threatens the interests of my own. Such acts may be unjust, they may involve violence, cruelty, the enslavement of others, but it can scarcely be denied that thereby the agent is able in the most literal sense to increase his own freedom. It is an irony of history that this truth is repudiated by some of those who practise it most forcibly, men who, even while they conquer power and freedom of action, reject the 'negative' concept of it in favour of its 'positive' counterpart. Their view rules over half our world; let us see upon what metaphysical foundation it rests.

IV Self-realization

The only true method of attaining freedom, we are told, is by the use of critical reason, the understanding of what is necessary and what is contingent. If I am a schoolboy, all but the simplest truths of mathematics obtrude themselves as obstacles to the free functioning of my mind, as theorems whose necessity I do not understand; they are pronounced to be true by some external authority, and present themselves to me as foreign bodies which I am expected mechanically to absorb into my system. But when I understand the functions of the symbols, the axioms, the formation and transformation rules – the logic whereby the conclusions are obtained – and grasp that these things cannot be otherwise, because they appear to follow from the laws that govern the processes of my own reason,[16] then mathematical truths no longer obtrude themselves as external entities forced upon me which I must receive whether I want it or not, but as something which I now freely will in the course of the natural functioning of my own rational activity. For the mathematician, the proof of these theorems is part of the free exercise of his natural reasoning capacity. For the musician, after he has assimilated the pattern of the composer's score, and has made the composer's ends his own, the playing of the music is not obedience to external laws, a compulsion and a barrier to liberty, but a free, unimpeded exercise. The player is not bound to the score as an ox to the plough, or a factory worker to the machine. He has absorbed the score into his own system, has, by understanding it, identified it with himself, has changed it from an impediment to free activity into an element in that activity itself. What applies to music or mathematics must, we are told, in principle apply to all other obstacles which present themselves as so many lumps of external stuff blocking free self-development. That is the programme of enlightened rationalism from Spinoza to the latest (at times unconscious) disciples of Hegel. *Sapere aude*. What you know, that of which you understand the necessity – the rational necessity – you cannot, while remaining rational, want to be otherwise. For to want something to be other than what it must be is, given the premisses – the necessities that govern the world – to be *pro tanto* either ignorant or irrational. Passions, prejudices, fears, neuroses, spring from ignorance, and take the form of myths and illusions. To be ruled by myths, whether they spring from the vivid imaginations of unscrupulous charlatans who deceive us in order to exploit us, or from psychological or sociological causes, is a form of heteronomy, of being dominated by outside factors in a direction not necessarily willed by the agent. The scientific determinists of the eighteenth century supposed that the study of the sciences of nature, and the creation of sciences of society on the same model, would make the operation of such causes transparently clear, and thus enable individuals to recognize their own part in the working of a rational world, frustrating only when misunderstood. Knowledge liberates, as Epicurus taught long ago, by automatically eliminating irrational fears and desires.

Herder, Hegel, and Marx substituted their own vitalistic models of social life for the older, mechanical ones, but believed, no less than their opponents, that to understand the world is to be freed. They merely differed from them in stressing the part played by change and growth in what made human beings human. Social life could not be understood by an analogy drawn from mathematics or physics. One must also understand history, that is, the peculiar laws of continuous growth, whether by 'dialectical' conflict or otherwise, that govern individuals and groups, in their interplay with each other and with nature. Not to grasp this is, according to these thinkers, to fall into a particular kind of error, namely the belief that human nature is static, that its essential properties are the same everywhere and at all times, that it is governed by unvarying natural laws, whether they are conceived in theological or materialistic terms, which entails the fallacious corollary that a wise lawgiver can, in

principle, create a perfectly harmonious society at any time by appropriate education and legislation, because rational men, in all ages and countries, must always demand the same unaltering satisfactions of the same unaltering basic needs. Hegel believed that his contemporaries (and indeed all his predecessors) misunderstood the nature of institutions because they did not understand the laws – the rationally intelligible laws, since they spring from the operation of reason – that create and alter institutions and transform human character and human action. Marx and his disciples maintained that the path of human beings was obstructed not only by natural forces, or the imperfections of their own character, but, even more, by the workings of their own social institutions, which they had originally created (not always consciously) for certain purposes, but whose functioning they systematically came to misconceive[17], and which thereupon became obstacles in their creators' progress. He offered social and economic hypotheses to account for the inevitability of such misunderstanding, in particular of the illusion that such man-made arrangements were independent forces, as inescapable as the laws of nature. As instances of such pseudo-objective forces, he pointed to the laws of supply and demand, or of the institution of property, or of the eternal division of society into rich and poor, or owners and workers, as so many unaltering human categories. Not until we had reached a stage at which the spells of these illusions could be broken, that is, until enough men reached a social stage that alone enabled them to understand that these laws and institutions were themselves the work of human minds and hands, historically needed in their day, and later mistaken for inexorable, objective powers, could the old world be destroyed, and more adequate and liberating social machinery substituted.

We are enslaved by despots – institutions or beliefs or neuroses – which can be removed only by being analysed and understood. We are imprisoned by evil spirits which we have ourselves – albeit not consciously – created, and can exorcize them only by becoming conscious and acting appropriately: indeed, for Marx understanding *is* appropriate action. I am free if, and only if, I plan my life in accordance with my own will; plans entail rules; a rule does not oppress me or enslave me if I impose it on myself consciously, or accept it freely, having understood it, whether it was invented by me or by others, provided that it is rational, that is to say, conforms to the necessities of things. To understand why things must be as they must be is to will them to be so. Knowledge liberates not by offering us more open possibilities amongst which we can make our choice, but by preserving us from the frustration of attempting the impossible. To want necessary laws to be other than they are is to be prey to an irrational desire – a desire that what must be X should also be not X. To go further, and believe these laws to be other than what they necessarily are, is to be insane. That is the metaphysical heart of rationalism. The notion of liberty contained in it is not the 'negative' conception of a field (ideally) without obstacles, a vacuum in which nothing obstructs me, but the notion of self-direction or self-control. I can do what I will with my own. I am a rational being; whatever I can demonstrate to myself as being necessary, as incapable of being otherwise in a rational society – that is, in a society directed by rational minds, towards goals such as a rational being would have – I cannot, being rational, wish to sweep out of my way. I assimilate it into my substance as I do the laws of logic, of mathematics, of physics, the rule of art, the principles that govern everything of which I understand, and therefore will, the rational purpose, by which I can never be thwarted, since I cannot want it to be other than it is.

This is the positive doctrine of liberation by reason. Socialized forms of it, widely disparate and opposed to each other as they are, are at the heart of many of the nationalist, communist, authoritarian, and totalitarian creeds of our day. It may, in the course of its evolution, have wandered far from its rationalist moorings. Nevertheless, it is this freedom that, in democracies and in dictatorships, is argued about, and fought for, in many parts of the earth today. Without attempting to trace the historical evolution of this idea, I should like to comment on some of its vicissitudes.

V The Temple of Sarastro

Those who believed in freedom as rational self-direction were bound, sooner or later, to consider how this was to be applied not merely to a man's inner life, but to his relations with other members of his society. Even the most individualistic among them – and Rousseau, Kant, and Fichte certainly began as individualists – came at some point to ask themselves whether a rational life not only for the individual, but also for society, was possible, and if so, how it was to be achieved. I wish to be free to live as my rational will (my 'real self') commands, but so must others be. How am I to avoid collisions with their wills? Where is the frontier that lies between my (rationally determined) rights and the identical rights of

others? For if I am rational, I cannot deny that what is right for me must, for the same reasons, be right for others who are rational like me. A rational (or free) state would be a state governed by such laws as all rational men would freely accept; that is to say, such laws as they would themselves have enacted had they been asked what, as rational beings, they demanded; hence the frontiers would be such as all rational men would consider to be the right frontiers for rational beings. But who, in fact, was to determine what these frontiers were? Thinkers of this type argued that if moral and political problems were genuine – as surely they were – they must in principle be soluble; that is to say, there must exist one and only one true solution to any problem. All truths could in principle be discovered by any rational thinker, and demonstrated so clearly that all other rational men could not but accept them; indeed, this was already to a large extent the case in the new natural sciences. On this assumption, the problem of political liberty was soluble by establishing a just order that would give to each man all the freedom to which a rational being was entitled. My claim to unfettered freedom can prima facie at times not be reconciled with your equally unqualified claim; but the rational solution of one problem cannot collide with the equally true solution of another, for two truths cannot logically be incompatible; therefore a just order must in principle be discoverable – an order of which the rules make possible correct solutions to all possible problems that could arise in it. This ideal, harmonious state of affairs was sometimes imagined as a Garden of Eden before the Fall of Man, from which we were expelled, but for which we were still filled with longing; or as a golden age still before us, in which men, having become rational, will no longer be 'other-directed', nor 'alienate' or frustrate one another. In existing societies justice and equality are ideals which still call for some measure of coercion, because the premature lifting of social controls might lead to the oppression of the weaker and the stupider by the stronger or abler or more energetic and unscrupulous. But it is only irrationality on the part of men (according to this doctrine) that leads them to wish to oppress or exploit or humiliate one another. Rational men will respect the principle of reason in each other, and lack all desire to fight or dominate one another. The desire to dominate is itself a symptom of irrationality, and can be explained and cured by rational methods. Spinoza offers one kind of explanation and remedy, Hegel another, Marx a third. Some of these theories may perhaps, to some degree, supplement each other, others are not combinable. But they all assume that in a society of perfectly rational beings the lust for domination over men will be absent or ineffective. The existence of, or craving for, oppression will be the first symptom that the true solution to the problems of social life has not been reached.

This can be put in another way. Freedom is self-mastery, the elimination of obstacles to my will, whatever these obstacles may be – the resistance of nature, of my ungoverned passions, of irrational institutions, of the opposing wills or behaviour of others. Nature I can, at least in principle, always mould by technical means, and shape to my will. But how am I to treat recalcitrant human beings? I must, if I can, impose my will on them too, 'mould' them to my pattern, cast parts for them in my play. But will this not mean that I alone am free, while they are slaves? They will be so if my plan has nothing to do with their wishes or values, only with my own. But if my plan is fully rational, it will allow for the full development of their 'true' natures, the realization of their capacities for rational decisions 'for making the best of themselves' – as a part of the realization of my own 'true' self. All true solutions to all genuine problems must be compatible: more than this, they must fit into a single whole: for this is what is meant by calling them all rational and the universe harmonious. Each man has his specific character, abilities, aspirations, ends. If I grasp both what these ends and natures are, and how they all relate to one another, I can, at least in principle, if I have the knowledge and the strength, satisfy them all, so long as the nature and the purposes in question are rational. Rationality is knowing things and people for what they are: I must not use stones to make violins, nor try to make born violin players play flutes. If the universe is governed by reason, then there will be no need for coercion; a correctly planned life for all will coincide with full freedom – the freedom of rational self-direction – for all. This will be so if, and only if, the plan is the true plan – the one unique pattern which alone fulfils the claims of reason. Its laws will be the rules which reason prescribes: they will only seem irksome to those whose reason is dormant, who do not understand the true 'needs' of their own 'real' selves. So long as each player recognizes and plays the part set him by reason – the faculty that understands his true nature and discerns his true ends – there can be no conflict. Each man will be a liberated, self-directed actor in the cosmic drama. Thus Spinoza tells us that 'children, although they are coerced, are not slaves', because 'they obey orders given in their own interests', and that 'The subject of a true commonwealth is no slave, because the common interests must

include his own.' Similarly, Locke says 'Where there is no law there is no freedom', because rational laws are directions to a man's 'proper interests' or 'general good'; and adds that since such laws are what 'hedges us from bogs and precipices' they 'ill deserve the name of confinement', and speaks of desires to escape from such laws as being irrational, forms of 'licence', as 'brutish', and so on. Montesquieu, forgetting his liberal moments, speaks of political liberty as being not permission to do what we want, or even what the law allows, but only 'the power of doing what we ought to will', which Kant virtually repeats. Burke proclaims the individual's 'right' to be restrained in his own interest, because 'the presumed consent of every rational creature is in unison with the predisposed order of things'. The common assumption of these thinkers (and of many a schoolman before them and Jacobin and Communist after them) is that the rational ends of our 'true' natures must coincide, or be made to coincide, however violently our poor, ignorant, desire-ridden, passionate, empirical selves may cry out against this process. Freedom is not freedom to do what is irrational, or stupid, or wrong. To force empirical selves into the right pattern is no tyranny, but liberation.[18] Rousseau tells me that if I freely surrender all the parts of my life to society, I create an entity which, because it has been built by an equality of sacrifice of all its members, cannot wish to hurt any one of them; in such a society, we are informed, it can be nobody's interest to damage anyone else. 'In giving myself to all, I give myself to none', and get back as much as I lose, with enough new force to preserve my new gains. Kant tells us that when 'the individual has entirely abandoned his wild, lawless freedom, to find it again, unimpaired, in a state of dependence according to law', that alone is true freedom, 'for this dependence is the work of my own will acting as a lawgiver'. Liberty, so far from being incompatible with authority, becomes virtually identical with it. This is the thought and language of all the declarations of the rights of man in the eighteenth century, and of all those who look upon society as a design constructed according to the rational laws of the wise lawgiver, or of nature, or of history, or of the Supreme Being. Bentham, almost alone, doggedly went on repeating that the business of laws was not to liberate but to restrain: 'Every law is an infraction of liberty' – even if such 'infraction' leads to an increase of the sum of liberty.

If the underlying assumptions had been correct – if the method of solving social problems resembled the way in which solutions to the problems of the natural sciences are found, and if reason were what rationalists said that it was, all this would perhaps follow. In the ideal case, liberty coincides with law: autonomy with authority. A law which forbids me to do what I could not, as a sane being, conceivably wish to do is not a restraint of my freedom. In the ideal society, composed of wholly responsible beings, rules, because I should scarcely be conscious of them, would gradually wither away. Only one social movement was bold enough to render this assumption quite explicit and accept its consequences – that of the Anarchists. But all forms of liberalism founded on a rationalist metaphysics are less or more watered-down versions of this creed.

In due course, the thinkers who bent their energies to the solution of the problem on these lines came to be faced with the question of how in practice men were to be made rational in this way. Clearly they must be educated. For the uneducated are irrational, heteronomous, and need to be coerced, if only to make life tolerable for the rational if they are to live in the same society and not be compelled to withdraw to a desert or some Olympian height. But the uneducated cannot be expected to understand or co-operate with the purposes of their educators. Education, says Fichte, must inevitably work in such a way that 'you will later recognize the reasons for what I am doing now'. Children cannot be expected to understand why they are compelled to go to school, nor the ignorant – that is, for the moment, the majority of mankind – why they are made to obey the laws that will presently make them rational. 'Compulsion is also a kind of education.' You learn the great virtue of obedience to superior persons. If you cannot understand your own interests as a rational being, I cannot be expected to consult you, or abide by your wishes, in the course of making you rational. I must, in the end, force you to be protected against smallpox, even though you may not wish it. Even Mill is prepared to say that I may forcibly prevent a man from crossing a bridge if there is not time to warn him that it is about to collapse, for I know, or am justified in assuming, that he cannot wish to fall into the water. Fichte knows what the uneducated German of his time wishes to be or do better than he can possibly know them for himself. The sage knows you better than you know yourself, for you are the victim of your passions, a slave living a heteronomous life, purblind, unable to understand your true goals. You want to be a human being. It is the aim of the state to satisfy your wish. 'Compulsion is justified by education for future insight.' The reason within me, if it is to triumph, must

eliminate and suppress my 'lower' instincts, my passions and desires, which render me a slave; similarly (the fatal transition from individual to social concepts is almost imperceptible) the higher elements in society – the better educated, the more rational, those who 'possess the highest insight of their time and people' – may exercise compulsion to rationalize the irrational section of society. For – so Hegel, Bradley, Bosanquet have often assured us – by obeying the rational man we obey ourselves: not indeed as we are, sunk in our ignorance and our passions, weak creatures afflicted by diseases that need a healer, wards who require a guardian, but as we could be if we were rational; as we could be even now, if only we would listen to the rational element which is, *ex hypothesi*, within every human being who deserves the name.

The philosophers of 'Objective Reason', from the tough, rigidly centralized, 'organic' state of Fichte, to the mild and humane liberalism of T. H. Green, certainly supposed themselves to be fulfilling, and not resisting, the rational demands which, however inchoate, were to be found in the breast of every sentient being. But I may reject such democratic optimism, and turning away from the teleological determinism of the Hegelians towards some more voluntarist philosophy, conceive the idea of imposing on my society – for its own betterment – a plan of my own, which in my rational wisdom I have elaborated; and which, unless I act on my own, perhaps against the permanent wishes of the vast majority of my fellow citizens, may never come to fruition at all. Or, abandoning the concept of reason altogether, I may conceive myself as an inspired artist, who moulds men into patterns in the light of his unique vision, as painters combine colours or composers sounds; humanity is the raw material upon which I impose my creative will; even though men suffer and die in the process, they are lifted by it to a height to which they could never have risen without my coercive – but creative – violation of their lives. This is the argument used by every dictator, inquisitor, and bully who seeks some moral, or even aesthetic, justification for his conduct. I must do for men (or with them) what they cannot do for themselves, and I cannot ask their permission or consent, because they are in no condition to know what is best for them; indeed, what they will permit and accept may mean a life of contemptible mediocrity, or perhaps even their ruin and suicide. Let me quote from the true progenitor of the heroic doctrine, Fichte, once again: 'No one has … rights against reason.' 'Man is afraid of subordinating his subjectivity to the laws of reason. He prefers tradition or arbitrariness.' Nevertheless, subordinated he must be.[19] Fichte puts forward the claims of what he called reason; Napoleon, or Carlyle, or romantic authoritarians may worship other values, and see in their establishment by force the only path to 'true' freedom.

The same attitude was pointedly expressed by Auguste Comte, who asked 'If we do not allow free thinking in chemistry or biology, why should we allow it in morals or politics?' Why indeed? If it makes sense to speak of political truths – assertions of social ends which all men, because they are men, must, once they are discovered, agree to be such; and if, as Comte believed, scientific method will in due course reveal them; then what case is there for freedom of opinion or action – at least as an end in itself, and not merely as a stimulating intellectual climate, either for individuals or for groups? Why should any conduct be tolerated that is not authorized by appropriate experts? Comte put bluntly what had been implicit in the rationalist theory of politics from its ancient Greek beginnings. There can, in principle, be only one correct way of life; the wise lead it spontaneously, that is why they are called wise. The unwise must be dragged towards it by all the social means in the power of the wise; for why should demonstrable error be suffered to survive and breed? The immature and untutored must be made to say to themselves: 'Only the truth liberates, and the only way in which I can learn the truth is by doing blindly today, what you, who know it, order me, or coerce me, to do, in the certain knowledge that only thus will I arrive at your clear vision, and be free like you.'

We have wandered indeed from our liberal beginnings. This argument, employed by Fichte in his latest phase, and after him by other defenders of authority, from Victorian schoolmasters and colonial administrators to the latest nationalist or communist dictator, is precisely what the Stoic and Kantian morality protests against most bitterly in the name of the reason of the free individual following his own inner light. In this way the rationalist argument, with its assumption of the single true solution, has led by steps which, if not logically valid, are historically and psychologically intelligible, from an ethical doctrine of individual responsibility and individual self-perfection to an authoritarian state obedient to the directives of an *élite* of Platonic guardians.

What can have led to so strange a reversal – the transformation of Kant's severe individualism into something close to a pure totalitarian doctrine on the part of thinkers, some of whom claimed to be his disciples? This

question is not of merely historical interest, for not a few contemporary liberals have gone through the same peculiar evolution. It is true that Kant insisted, following Rousseau, that a capacity for rational self-direction belonged to all men; that there could be no experts in moral matters, since morality was a matter not of specialized knowledge (as the utilitarians and *philosophes* had maintained), but of the correct use of a universal human faculty; and consequently that what made men free was not acting in certain self-improving ways, which they could be coerced to do, but knowing why they ought to do so, which nobody could do for, or on behalf of, anyone else. But even Kant, when he came to deal with political issues, conceded that no law, provided that it was such that I should, if I were asked, approve it as a rational being, could possibly deprive me of any portion of my rational freedom. With this the door was opened wide to the rule of experts. I cannot consult all men about all enactments all the time. The government cannot be a continuous plebiscite. Moreover, some men are not as well attuned to the voice of their own reason as others: some seem singularly deaf. If I am a legislator or a ruler, I must assume that if the law I impose is rational (and I can only consult my own reason) it will automatically be approved by all the members of my society so far as they are rational beings. For if they disapprove, they must, *pro tanto*, be irrational; then they will need to be repressed by reason: whether their own or mine cannot matter, for the pronouncements of reason must be the same in all minds. I issue my orders, and if you resist, take it upon myself to repress the irrational element in you which opposes reason. My task would be easier if you repressed it in yourself; I try to educate you to do so. But I am responsible for public welfare, I cannot wait until all men are wholly rational. Kant may protest that the essence of the subject's freedom is that he, and he alone, has given himself the order to obey. But this is a counsel of perfection. If you fail to discipline yourself, I must do so for you; and you cannot complain of lack of freedom, for the fact that Kant's rational judge has sent you to prison is evidence that you have not listened to your own inner reason, that, like a child, a savage, an idiot, you are not ripe for self-direction or permanently incapable of it.[20]

If this leads to despotism, albeit by the best or the wisest – to Sarastro's temple in the *Magic Flute* – but still despotism, which turns out to be identical with freedom, can it be that there is something amiss in the premisses of the argument? that the basic assumptions are themselves somewhere at fault? Let me state them once more: first, that all men have one true purpose, and one only, that of rational self-direction; second, that the ends of all rational beings must of necessity fit into a single universal, harmonious pattern, which some men may be able to discern more clearly than others; third, that all conflict, and consequently all tragedy, is due solely to the clash of reason with the irrational or the insufficiently rational – the immature and undeveloped elements in life – whether individual or communal, and that such clashes are, in principle, avoidable, and for wholly rational beings impossible; finally, that when all men have been made rational, they will obey the rational laws of their own natures, which are one and the same in them all, and so be at once wholly law-abiding and wholly free. Can it be that Socrates and the creators of the central Western tradition in ethics and politics who followed him have been mistaken, for more than two millennia, that virtue is not knowledge, nor freedom identical with either? That despite the fact that it rules the lives of more men than ever before in its long history, not one of the basic assumptions of this famous view is demonstrable, or, perhaps, even true?

VI The One and the Many

I do not wish to say that individual freedom is, even in the most liberal societies, the sole, or even the dominant, criterion of social action. We compel children to be educated, and we forbid public executions. These are certainly curbs to freedom. We justify them on the ground that ignorance, or a barbarian upbringing, or cruel pleasures and excitements are worse for us than the amount of restraint needed to repress them. This judgment in turn depends on how we determine good and evil, that is to say, on our moral, religious, intellectual, economic, and aesthetic values; which are, in their turn, bound up with our conception of man, and of the basic demands of his nature. In other words, our solution of such problems is based on our vision, by which we are consciously or unconsciously guided, of what constitutes a fulfilled human life, as contrasted with Mill's 'cramped and warped', 'pinched and hidebound' natures. To protest against the laws governing censorship or personal morals as intolerable infringements of personal liberty presupposes a belief that the activities which such laws forbid are fundamental needs of men as men, in a good (or, indeed, any) society. To defend such laws is to hold that these needs are not essential, or that they cannot be satisfied without sacrificing other values which come higher – satisfy deeper needs – than individual freedom,

determined by some standard that is not merely subjective, a standard for which some objective status – empirical or *a priori* – is claimed.

The extent of a man's, or a people's, liberty to choose to live as they desire must be weighed against the claims of many other values, of which equality, or justice, or happiness, or security, or public order are perhaps the most obvious examples. For this reason, it cannot be unlimited. We are rightly reminded by R. H. Tawney that the liberty of the strong, whether their strength is physical or economic, must be restrained. This maxim claims respect, not as a consequence of some *a priori* rule, whereby the respect for the liberty of one man logically entails respect for the liberty of others like him; but simply because respect for the principles of justice, or shame at gross inequality of treatment, is as basic in men as the desire for liberty. That we cannot have everything is a necessary, not a contingent, truth. Burke's plea for the constant need to compensate, to reconcile, to balance; Mill's plea for novel 'experiments in living' with their permanent possibility of error, the knowledge that it is not merely in practice but in principle impossible to reach clear-cut and certain answers, even in an ideal world of wholly good and rational men and wholly clear ideas – may madden those who seek for final solutions and single, all-embracing systems, guaranteed to be eternal. Nevertheless, it is a conclusion that cannot be escaped by those who, with Kant, have learnt the truth that out of the crooked timber of humanity no straight thing was ever made.

There is little need to stress the fact that monism, and faith in a single criterion, has always proved a deep source of satisfaction both to the intellect and to the emotions. Whether the standard of judgment derives from the vision of some future perfection, as in the minds of the *philosophes* in the eighteenth century and their technocratic successors in our own day, or is rooted in the past – *la terre et les morts* – as maintained by German historicists or French theocrats, or neo-Conservatives in English-speaking countries, it is bound, provided it is inflexible enough, to encounter some unforeseen and unforeseeable human development, which it will not fit; and will then be used to justify the *a priori* barbarities of Procrustes – the vivisection of actual human societies into some fixed pattern dictated by our fallible understanding of a largely imaginary past or a wholly imaginary future. To preserve our absolute categories or ideals at the expense of human lives offends equally against the principles of science and of history; it is an attitude found in equal measure on the right and left wings in our days, and is not reconcilable with the principles accepted by those who respect the facts.

Pluralism, with the measure of 'negative' liberty that it entails, seems to me a truer and more humane ideal than the goals of those who seek in the great, disciplined, authoritarian structures the ideal of 'positive' self-mastery by classes, or peoples, or the whole of mankind. It is truer, because it does, at least, recognize the fact that human goals are many, not all of them commensurable, and in perpetual rivalry with one another. To assume that all values can be graded on one scale, so that it is a mere matter of inspection to determine the highest, seems to me to falsify our knowledge that men are free agents, to represent moral decision as an operation which a slide-rule could, in principle, perform. To say that in some ultimate, all-reconciling, yet realizable synthesis, duty *is* interest, or individual freedom *is* pure democracy or an authoritarian state, is to throw a metaphysical blanket over either self-deceit or deliberate hypocrisy. It is more humane because it does not (as the system builders do) deprive men, in the name of some remote, or incoherent, ideal, of much that they have found to be indispensable to their life as unpredictably self-transforming human beings.[21] In the end, men choose between ultimate values; they choose as they do, because their life and thought are determined by fundamental moral categories and concepts that are, at any rate over large stretches of time and space, a part of their being and thought and sense of their own identity; part of what makes them human.

It may be that the ideal of freedom to choose ends without claiming eternal validity for them, and the pluralism of values connected with this, is only the late fruit of our declining capitalist civilization: an ideal which remote ages and primitive societies have not recognized, and one which posterity will regard with curiosity, even sympathy, but little comprehension. This may be so; but no sceptical conclusions seem to me to follow. Principles are not less sacred because their duration cannot be guaranteed. Indeed, the very desire for guarantees that our values are eternal and secure in some objective heaven is perhaps only a craving for the certainties of childhood or the absolute values of our primitive past. 'To realise the relative validity of one's convictions', said an admirable writer of our time, 'and yet stand for them unflinchingly, is what distinguishes a civilised man from a barbarian.' To demand more than this is perhaps a deep and incurable metaphysical need; but to allow it to determine one's practice is a symptom of an equally deep, and more dangerous, moral and political immaturity.

Notes

1 I do not, of course, mean to imply the truth of the converse.

2 Helvétius made this point very clearly: 'The free man is the man who is not in irons, nor imprisoned in a gaol, nor terrorized like a slave by the fear of punishment … it is not lack of freedom not to fly like an eagle or swim like a whale.'

3 The Marxist conception of social laws is, of course, the best-known version of this theory, but it forms a large element in some Christian and utilitarian, and all socialist, doctrines.

4 'A free man', said Hobbes, 'is he that … is not hindered to do what he hath the will to do.' Law is always a 'fetter', even if it protects you from being bound in chains that are heavier than those of the law, say, some more repressive law or custom, or arbitrary despotism or chaos. Bentham says much the same.

5 This is but another illustration of the natural tendency of all but a very few thinkers to believe that all the things they hold good must be intimately connected, or at least compatible, with one another. The history of thought, like the history of nations, is strewn with examples of inconsistent, or at least disparate, elements artificially yoked together in a despotic system, or held together by the danger of some common enemy. In due course the danger passes, and conflicts between the allies arise, which often disrupt the system, sometimes to the great benefit of mankind.

6 See the valuable discussion of this in Michel Villey, *Leçons d'histoire de la philosophie du droit*, who traces the embryo of the notion of subjective rights to Occam.

7 Christian (and Jewish or Moslem) belief in the absolute authority of divine or natural laws, or in the equality of all men in the sight of God, is different from belief in freedom to live as one prefers.

8 Indeed, it is arguable that in the Prussia of Frederick the Great or in the Austria of Josef II men of imagination, originality, and creative genius, and, indeed, minorities of all kinds, were less persecuted and felt the pressure, both of institutions and custom, less heavy upon them than in many an earlier or later democracy.

9 'Negative liberty' is something the extent of which, in a given case, it is difficult to estimate. It might, prima facie, seem to depend simply on the power to choose between at any rate two alternatives. Nevertheless, not all choices are equally free, or free at all. If in a totalitarian state I betray my friend under threat of torture, perhaps even if I act from fear of losing my job, I can reasonably say that I did not act freely. Nevertheless, I did, of course, make a choice, and could, at any rate in theory, have chosen to be killed or tortured or imprisoned. The mere existence of alternatives is not, therefore, enough to make my action free (although it may be voluntary) in the normal sense of the word. The extent of my freedom seems to depend on (a) how many possibilities are open to me (although the method of counting these can never be more than impressionistic. Possibilities of action are not discrete entities like apples, which can be exhaustively enumerated); (b) how easy or difficult each of these possibilities is to actualize; (c) how important in my plan of life, given my character and circumstances, these possibilities are when compared with each other; (d) how far they are closed and opened by deliberate human acts; (e) what value not merely the agent, but the general sentiment of the society in which he lives, puts on the various possibilities. All these magnitudes must be 'integrated', and a conclusion, necessarily never precise, or indisputable, drawn from this process. It may well be that there are many incommensurable kinds and degrees of freedom, and that they cannot be drawn up on any single scale of magnitude. Moreover, in the case of societies, we are faced by such (logically absurd) questions as 'Would arrangement X increase the liberty of Mr A more than it would that of Messrs. B, C, and D between them, added together?' The same difficulties arise in applying utilitarian criteria. Nevertheless, provided we do not demand precise measurement, we can give valid reasons for saying that the average subject of the King of Sweden is, on the whole, a good deal freer today than the average citizen of Spain or Albania. Total patterns of life must be compared directly as wholes, although the method by which we make the comparison, and the truth of the conclusions, are difficult or impossible to demonstrate. But the vagueness of the concepts, and the multiplicity of the criteria involved, is an attribute of the subject-matter itself, not of our imperfect methods of measurement, or incapacity for precise thought.

10 'The ideal of true freedom is the maximum of power for all the members of human society alike to make the best of themselves', said T.H. Green in 1881. Apart from the confusion of freedom with equality, this entails that if a man chose some immediate pleasure – which (in whose view?) would not enable him to make the best of himself (what self?) – what he was exercising was not 'true' freedom: and if deprived of it, would not lose anything that mattered. Green was a genuine liberal: but many a tyrant could use this formula to justify his worse acts of oppression.

11 'A wise man, though he be a slave, is at liberty, and from this it follows that though a fool rule, he is in slavery', said St. Ambrose. It might equally well have been said by Epictetus or Kant.

12 'Proletarian coercion, in all its forms, from executions to forced labour, is, paradoxical as it may sound, the method of moulding communist humanity out of the human material of the capitalist period.' These lines by the Bolshevik leader Nikolai Bukharin, in a work which appeared in 1920, especially the term 'human material', vividly convey this attitude.

13 Kant's psychology, and that of the Stoics and Christians too, assumed that some element in man – the 'inner fastness of his mind' – could be made secure against

conditioning. The development of the techniques of hypnosis, 'brain washing', subliminal suggestion, and the like, has made this *a priori* assumption, at least as an empirical hypothesis, less plausible.

14 It is not perhaps far-fetched to assume that the quietism of the Eastern sages was, similarly, a response to the despotism of the great autocracies, and flourished at periods when individuals were apt to be humiliated, or at any rate ignored or ruthlessly managed, by those possessed of the instruments of physical coercion.

15 It is worth remarking that those who demanded – and fought for – liberty for the individual or for the nation in France during this period of German quietism did not fall into this attitude. Might this not be precisely because, despite the despotism of the French monarchy and the arrogance and arbitrary behaviour of privileged groups in the French state, France was a proud and powerful nation, where the reality of political power was not beyond the grasp of men of talent, so that withdrawal from battle into some untroubled heaven above it, whence it could be surveyed dispassionately by the self-sufficient philosopher, was not the only way out? The same holds for England in the nineteenth century and well after it, and for the United States today.

16 Or, as some modern theorists maintain, because I have, or could have, invented them for myself, since the rules are man-made.

17 In practice even more than in theory.

18 On this Bentham seems to me to have said the last word: 'Is not liberty to do evil, liberty? If not, what is it? Do we not say that it is necessary to take liberty from idiots and bad men, because they abuse it?' Compare with this a typical statement made by a Jacobin club of the same period: 'No man is free in doing evil. To prevent him is to set him free.' This is echoed in almost identical terms by British Idealists at the end of the following century.

19 'To compel men to adopt the right form of government, to impose Right on them by force, is not only the right, but the sacred duty of every man who has both the insight and the power to do so.'

20 Kant came nearest to asserting the 'negative' ideal of liberty when (in one of his political treatises) he declared that 'the greatest problem of the human race, to the solution of which it is compelled by nature, is the establishment of a civil society universally administering right according to law. It is only in a society which possesses the greatest liberty …– with … the most exact determination and guarantee of the limits of [the] liberty [of each individual] in order that it may co-exist with the liberty of others – that the highest purpose of nature, which is the development of all her capacities, can be attained in the case of mankind.' Apart from the teleological implications, this formulation does not at first appear very different from orthodox liberalism. The crucial point, however, is how to determine the criterion for 'the exact determination and guarantee of the limits' of individual liberty. Most modern liberals, at their most consistent want a situation in which as many individuals as possible can realize as many of their ends as possible, without assessment of the value of these ends as such, save in so far as they may frustrate the purposes of others. They wish the frontiers between individuals or groups of men to be drawn solely with a view to preventing collisions between human purposes, all of which must be considered to be equally ultimate, uncriticizable ends in themselves. Kant, and the rationalists of his type, do not regard all ends as of equal value. For them the limits of liberty are determined by applying the rules of 'reason', which is much more than the mere generality of rules as such, and is a faculty that creates or reveals a purpose identical in, and for, all men. In the name of reason anything that is non-rational may be condemned, so that the various personal aims which their individual imagination and idiosyncrasies lead men to pursue – for example aesthetic and other non-rational kinds of self-fulfilment – may, at least in theory, be ruthlessly suppressed to make way for the demands of reason. The authority of reason and of the duties it lays upon men is identified with individual freedom, on the assumption that only rational ends can be the 'true' objects of a 'free' man's 'real' nature.

I have never, I must own, understood what 'reason' means in this context; and here merely wish to point out that the *a priori* assumptions of this philosophical psychology are not compatible with empiricism: that is to say, with any doctrine founded on knowledge derived from experience of what men are and seek.

21 On this also Bentham seems to me to have spoken well: 'Individual interests are the only real interests … can it be conceived that there are men so absurd as to … prefer the man who is not to him who is; to torment the living, under pretence of promoting the happiness of them who are not born, and who may never be born?' This is one of the infrequent occasions when Burke agrees with Bentham; for this passage is at the heart of the empirical, as against the metaphysical, view of politics.

27

What's Wrong with Negative Liberty?

Charles Taylor

This is an attempt to resolve one of the issues that separate 'positive' and 'negative' theories of freedom, as these have been distinguished in Isaiah Berlin's seminal essay, 'Two Concepts of Liberty'.[1] Although one can discuss almost endlessly the detailed formulation of the distinction, I believe it is undeniable that there are two such families of conceptions of political freedom abroad in our civilisation.

Thus there clearly are theories, widely canvassed in liberal society, which want to define freedom exclusively in terms of the independence of the individual from interference by others, be these governments, corporations or private persons; and equally clearly these theories are challenged by those who believe that freedom resides at least in part in collective control over the common life. We unproblematically recognise theories descended from Rousseau and Marx as fitting in this category.

There is quite a gamut of views in each category. And this is worth bearing in mind, because it is too easy in the course of polemic to fix on the extreme, almost caricatural variants of each family. When people attack positive theories of freedom, they generally have some Left totalitarian theory in mind, according to which freedom resides exclusively in exercising collective control over one's destiny in a classless society, the kind of theory which underlies, for instance, official Communism. This view, in its caricaturally extreme form, refuses to recognise the freedoms guaranteed in other societies as genuine. The destruction of 'bourgeois freedoms' is no real loss of freedom, and coercion can be justified in the name of freedom if it is needed to bring into existence the classless society in which alone men are properly free. Men can, in short, be forced to be free.

Even as applied to official Communism, this portrait is a little extreme, although it undoubtedly expresses the inner logic of this kind of theory. But it is an absurd caricature if applied to the whole family of positive conceptions. This includes all those views of modern political life which owe something to the ancient republican tradition, according to which men's ruling themselves is seen as an activity valuable in itself, and not only for instrumental reasons. It includes in its scope thinkers like Tocqueville, and even arguably the J.S. Mill of *On Representative Government*. It has no necessary connection with the view that freedom consists *purely and simply* in the collective control over the common life, or that there is no freedom worth the name outside a context of collective control. And it does not therefore generate necessarily a doctrine that men can be forced to be free.

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On the other side, there is a corresponding caricatural version of negative freedom which tends to come to the fore. This is the toughminded version, going back to Hobbes, or in another way to Bentham, which sees freedom simply as the absence of external physical or legal obstacles. This view will have no truck with other less immediately obvious obstacles to freedom, for instance, lack of awareness, or false consciousness, or repression, or other inner factors of this kind. It holds firmly to the view that to speak of such inner factors as relevant to the issue about freedom, to speak for instance of someone's being less free because of false consciousness, is to abuse words. The only clear meaning which can be given to freedom is that of the absence of external obstacles.

I call this view caricatural as a representative portrait of the negative view, because it rules out of court one of the most powerful motives behind the modern defence of freedom as individual independence, viz., the post-Romantic idea that each person's form of self-realisation is original to him/her, and can therefore only be worked out independently. This is one of the reasons for the defence of individual liberty by among others J.S. Mill (this time in his *On Liberty*). But if we think of freedom as including something like the freedom of self-fulfilment, or self-realisation according to our own pattern, then we plainly have something which can fail for inner reasons as well as because of external obstacles. We can fail to achieve our own self-realisation through inner fears, or false consciousness, as well as because of external coercion. Thus the modern notion of negative freedom which gives weight to the securing of each person's right to realise him/herself in his/her own way cannot make do with the Hobbes/Bentham notion of freedom. The moral psychology of these authors is too simple, or perhaps we should say too crude, for its purposes.

Now there is a strange asymmetry here. The extreme caricatural views tend to come to the fore in the polemic, as I mentioned above. But whereas the extreme 'forced-to-be-free' view is one which the opponents of positive liberty try to pin on them, as one would expect in the heat of argument, the proponents of negative liberty themselves often seem anxious to espouse their extreme, Hobbesian view. Thus even Isaiah Berlin, in his eloquent exposition of the two concepts of liberty, seems to quote Bentham[2] approvingly and Hobbes[3] as well. Why is this?

To see this we have to examine more closely what is at stake between the two views. The negative theories, as we saw, want to define freedom in terms of individual independence from others; the positive also want to identify freedom with collective self-government. But behind this lie some deeper differences of doctrines.

Isaiah Berlin points out that negative theories are concerned with the area in which the subject should be left without interference, whereas the positive doctrines are concerned with who or what controls. I should like to put the point behind this in a slightly different way. Doctrines of positive freedom are concerned with a view of freedom which involves essentially the exercising of control over one's life. On this view, one is free only to the extent that one has effectively determined oneself and the shape of one's life. The concept of freedom here is an exercise-concept.

By contrast, negative theories can rely simply on an opportunity-concept, where being free is a matter of what we can do, of what it is open to us to do, whether or not we do anything to exercise these options. This certainly is the case of the crude, original Hobbesian concept. Freedom consists just in there being no obstacle. It is a sufficient condition of one's being free that nothing stand in the way.

But we have to say that negative theories *can* rely on an opportunity-concept, rather than that they necessarily do so rely, for we have to allow for that part of the gamut of negative theories mentioned above which incorporates some notion of self-realisation. Plainly this kind of view can't rely simply on an opportunity-concept. We can't say that someone is free, on a self-realisation view, if he is totally unrealised, if for instance he is totally unaware of his potential, if fulfilling it has never even arisen as a question for him, or if he is paralysed by the fear of breaking with some norm which he has internalised but which does not authentically reflect him. Within this conceptual scheme, some degree of exercise is necessary for a man to be thought free. Or if we want to think of the internal bars to freedom as obstacles on all fours with the external ones, then being in a position to exercise freedom, having the opportunity, involves removing the internal barriers; and this is not possible without having to some extent realised myself. So that with the freedom of self-realisation, having the opportunity to be free requires that I already be exercising freedom. A pure opportunity-concept is impossible here.

But if negative theories can be grounded on either an opportunity- or an exercise-concept, the same is not true of positive theories. The view that freedom involves at least partially collective self-rule is essentially grounded on an exercise concept. For this view (at least partly) identifies freedom with self-direction, i.e., the actual exercise of directing control over one's life.

But this already gives us a hint towards illuminating the above paradox, that while the extreme variant of positive freedom is usually pinned on its protagonists by their opponents, negative theorists seem prone to embrace the crudest versions of their theory themselves. For if an opportunity-concept is incombinable with a positive theory, but either it or its alternative can suit a negative theory, then one way of ruling out positive theories in principle is by firmly espousing an opportunity-concept. One cuts off the positive theories by the root, as it were, even though one may also pay a price in the atrophy of a wide range of negative theories as well. At least by taking one's stand firmly on the crude side of the negative range, where only opportunity concepts are recognised, one leaves no place for a positive theory to grow.

Taking one's stand here has the advantage that one is holding the line around a very simple and basic issue of principle, and one where the negative view seems to have some backing in common sense. The basic intuition here is that freedom is a matter of being able to do something or other, of not having obstacles in one's way, rather than being a capacity that we have to realise. It naturally seems more prudent to fight the Totalitarian Menace at this last-ditch position, digging in behind the natural frontier of this simple issue, rather than engaging the enemy on the open terrain of exercise-concepts, where one will have to fight to discriminate the good from the bad among such concepts; fight, for instance, for a view of individual self-realisation against various notions of collective self-realisation, of a nation, or a class. It seems easier and safer to cut all the nonsense off at the start by declaring all self-realisation views to be metaphysical hog-wash. Freedom should just be tough-mindedly defined as the absence of external obstacles.

Of course, there are independent reasons for wanting to define freedom tough-mindedly. In particular there is the immense influence of the anti-metaphysical, materialist, natural-science-oriented temper of thought in our civilisation. Something of this spirit at its inception induced Hobbes to take the line that he did, and the same spirit goes marching on today. Indeed, it is because of the prevalence of this spirit that the line is so easy to defend, forensically speaking, in our society.

Nevertheless, I think that one of the strongest motives for defending the crude Hobbes–Bentham concept, that freedom is the absence of external obstacles, physical or legal, is the strategic one above. For most of those who take this line thereby abandon many of their own intuitions, sharing as they do with the rest of us in a post-Romantic civilisation which puts great value on self-realisation, and values freedom largely because of this. It is fear of the Totalitarian Menace, I would argue, which has led them to abandon this terrain to the enemy.

I want to argue that this not only robs their eventual forensic victory of much of its value, since they become incapable of defending liberalism in the form we in fact value it, but I want to make the stronger claim that this Maginot Line mentality actually ensures defeat, as is often the case with Maginot Line mentalities. The Hobbes–Bentham view, I want to argue, is indefensible as a view of freedom.

To see this, let's examine the line more closely, and the temptation to stand on it. The advantage of the view that freedom is the absence of external obstacles is its simplicity. It allows us to say that freedom is being able to do what you want, where what you want is unproblematically understood as what the agent can identify as his desires. By contrast an exercise-concept of freedom requires that we discriminate among motivations. If we are free in the exercise of certain capacities, then we are not free, or less free, when these capacities are in some way unfulfilled or blocked. But the obstacles can be internal as well as external. And this must be so, for the capacities relevant to freedom must involve some self-awareness, self-understanding, moral discrimination and self-control, otherwise their exercise couldn't amount to freedom in the sense of self-direction; and this being so, we can fail to be free because these internal conditions are not realised. But where this happens, where, for example, we are quite self-deceived, or utterly fail to discriminate properly the ends we seek, or have lost self-control, we can quite easily be doing what we want in the sense of what we can identify as our wants, without being free; indeed, we can be further entrenching our unfreedom.

Once one adopts a self-realisation view, or indeed, any exercise-concept of freedom, then being able to do what one wants can no longer be accepted as a sufficient condition of being free. For this view puts certain conditions on one's motivation. You are not free if you are motivated, through fear, inauthentically internalised standards, or false consciousness, to thwart your self-realisation. This is sometimes put by saying that for a self-realisation view, you have to be able to do what you really want, or to follow your real will, or to fulfil the desires of your own true self. But these formulas, particularly the last, may mislead, by making us think that exercise concepts of freedom are tied to some particular metaphysic, in particular that of a higher and lower self. We shall see below that this is far from being the case,

and that there is a much wider range of bases for discriminating authentic and inauthentic desires.

In any case, the point for our discussion here is that for an exercise-concept of freedom, being free can't just be a question of doing what you want in the unproblematic sense. It must also be that what you want doesn't run against the grain of your basic purposes, or your self-realisation. Or to put the issue in another way, which converges on the same point, the subject himself can't be the final authority on the question whether he is free; for he cannot be the final authority on the question whether his desires are authentic, whether they do or do not frustrate his purposes.

To put the issue in this second way is to make more palpable the temptation for defenders of the negative view to hold their Maginot Line. For once we admit that the agent himself is not the final authority on his own freedom, do we not open the way to totalitarian manipulation? Do we not legitimate others, supposedly wiser about his purposes than himself, redirecting his feet on the right path, perhaps even by force, and all this in the name of freedom?

The answer is that of course we don't. Not by this concession alone. For there may also be good reasons for holding that others are not likely to be in a better position to understand his real purposes. This indeed plausibly follows from the post-Romantic view above that each person has his/her own original form of realisation. Some others, who know us intimately, and who surpass us in wisdom, are undoubtedly in a position to advise us, but no official body can possess a doctrine or a technique whereby they could know how to put us on the rails, because such a doctrine or technique cannot in principle exist if human beings really differ in their self-realisation.

Or again, we may hold a self-realisation view of freedom, and hence believe that there are certain conditions on my motivation necessary to my being free, but also believe that there are other necessary conditions which rule out my being forcibly led towards some definition of my self-realisation by external authority. Indeed, in these last two paragraphs I have given a portrait of what I think is a very widely held view in liberal society, a view which values self-realisation, and accepts that it can fail for internal reasons, but which believes that no valid guidance can be provided in principle by social authority, because of human diversity and originality, and holds that the attempt to impose such guidance will destroy other necessary conditions of freedom.

It is however true that totalitarian theories of positive freedom do build on a conception which involves discriminating between motivations. Indeed, one can represent the path from the negative to the positive conceptions of freedom as consisting of two steps: the first moves us from a notion of freedom as doing what one wants to a notion which discriminates motivations and equates freedom with doing what we really want, or obeying our real will, or truly directing our lives. The second step introduces some doctrine purporting to show that we cannot do what we really want, or follow our real will, outside of a society of a certain canonical form, incorporating true self-government. It follows that we can only be free in such a society, and that being free *is* governing ourselves collectively according to this canonical form.

We might see an example of this second step in Rousseau's view that only a social contract society in which all give themselves totally to the whole preserves us from other-dependence and ensures that we obey only ourselves; or in Marx's doctrine of man as a species-being who realises his potential in a mode of social production, and who must thus take control of this mode collectively.

Faced with this two-step process, it seems safer and easier to stop it at the first step, to insist firmly that freedom is just a matter of the absence of external obstacles, that it therefore involves no discrimination of motivation and permits in principle no second-guessing of the subject by any one else. This is the essence of the Maginot Line strategy. It is very tempting. But I want to claim that it is wrong. I want to argue that we cannot defend a view of freedom which doesn't involve at least some qualitative discrimination as to motive, i.e., which doesn't put some restrictions on motivation among the necessary conditions of freedom, and hence which could rule out second-guessing in principle.

There are some considerations one can put forward straight off to show that the pure Hobbesian concept won't work, that there are some discriminations among motivations which are essential to the concept of freedom as we use it. Even where we think of freedom as the absence of external obstacles, it is not the absence of such obstacles *simpliciter*. For we make discriminations between obstacles as representing more or less serious infringements of freedom. And we do this, because we deploy the concept against a background understanding that certain goals and activities are more significant than others.

Thus we could say that my freedom is restricted if the local authority puts up a new traffic light at an intersection close to my home; so that where previously I could cross as I liked, consistently with avoiding collision with

other cars, now I have to wait until the light is green. In a philosophical argument, we might call this a restriction of freedom, but not in a serious political debate. The reason is that it is too trivial, the activity and purposes inhibited here are not really significant. It is not just a matter of our having made a trade-off, and considered that a small loss of liberty was worth fewer traffic accidents, or less danger for the children, we are reluctant to speak here of a loss of liberty at all; what we feel we are trading off is convenience against safety.

By contrast a law which forbids me from worshipping according to the form I believe in is a serious below to liberty; even a law which tried to restrict this to certain times (as the traffic light restricts my crossing of the intersection to certain times) would be seen as a serious restriction. Why this difference between the two cases? Because we have a background understanding, too obvious to spell out, of some activities and goals as highly significant for human beings and others as less so. One's religious belief is recognised, even by atheists, as supremely important, because it is that by which the believer defines himself as a moral being. By contrast my rhythm of movement through the city traffic is trivial. We don't want to speak of these two in the same breath. We don't even readily admit that liberty is at stake in the traffic light case. For *de minimis non curat libertas*.

But this recourse to significance takes us beyond a Hobbesian scheme. Freedom is no longer just the absence of external obstacle *tout court*, but the absence of external obstacle to significant action, to what is important to man. There are discriminations to be made; some restrictions are more serious than others, some are utterly trivial. About many, there is of course controversy. But what the judgement turns on is some sense of what is significant for human life. Restricting the expression of people's religious and ethical convictions is more significant than restricting their movement around uninhabited parts of the country; and both are more significant than the trivia of traffic control.

But the Hobbesian scheme has no place for the notion of significance. It will allow only for purely quantitative judgements. On the toughest-minded version of his conception, where Hobbes seems to be about to define liberty in terms of the absence of physical obstacles, one is presented with the vertiginous prospect of human freedom being measurable in the same way as the degrees of freedom of some physical object, say a lever. Later we see that this won't do, because we have to take account of legal obstacles to my action. But in any case, such a quantitative conception of freedom is a non-starter.

Consider the following diabolical defence of Albania as a free country. We recognise that religion has been abolished in Albania, whereas it hasn't been in Britain. But on the other hand there are probably far fewer traffic lights per head in Tirana than in London. (I haven't checked for myself, but this is a very plausible assumption.) Suppose an apologist for Albanian Socialism were nevertheless to claim that this country was freer than Britain, because the number of acts restricted was far smaller. After all, only a minority of Londoners practise some religion in public places, but all have to negotiate their way through traffic. Those who do practise a religion generally do so on one day of the week, while they are held up at traffic lights every day. In sheer quantitative terms, the number of acts restricted by traffic lights must be greater than that restricted by a ban on public religious practice. So if Britain is considered a free society, why not Albania?

So the application even of our negative notion of freedom requires a background conception of what is significant, according to which some restrictions are seen to be without relevance for freedom altogether, and others are judged as being of greater and lesser importance. So some discrimination among motivations seems essential to our concept of freedom. A minute's reflection shows why this must be so. Freedom is important to us because we are purposive beings. But then there must be distinctions in the significance of different kinds of freedom based on the distinction in the significance of different purposes.

But of course, this still doesn't involve the kind of discrimination mentioned above, the kind which would allow us to say that someone who was doing what he wanted (in the unproblematic sense) wasn't really free, the kind of discrimination which allows us to put conditions on people's motivations necessary to their being free, and hence to second-guess them. All we have shown is that we make discriminations between more or less significant freedoms, based on discriminations among the purposes people have.

This creates some embarrassment for the crude negative theory, but it can cope with it by simply adding a recognition that we make judgements of significance. Its central claim that freedom just is the absence of external obstacles seems untouched, as also its view of freedom as an opportunity-concept. It is just that we now have to admit that not all opportunities are equal.

But there is more trouble in store for the crude view when we examine further what these qualitative discriminations are based on. What lies behind our judging

certain purposes/feelings as more significant than others? One might think that there was room here again for another quantitative theory; that the more significant purposes are those we want more. But this account is either vacuous or false.

It is true but vacuous if we take wanting more just to mean being more significant. It is false as soon as we try to give wanting more an independent criterion, such as, for instance, the urgency or force of a desire, or the prevalence of one desire over another, because it is a matter of the most banal experience that the purposes we know to be more significant are not always those which we desire with the greatest urgency to encompass, nor the ones that actually always win out in cases of conflict of desires.

When we reflect on this kind of significance, we come up against what I have called elsewhere the fact of strong evaluation, the fact that we human subjects are not only subjects of first-order desires, but of second-order desires, desires about desires. We experience our desires and purposes as qualitatively discriminated, as higher or lower, noble or base, integrated or fragmented, significant or trivial, good and bad. This means that we experience some of our desires and goals as intrinsically more significant than others: some passing comfort is less important than the fulfilment of our lifetime vocation, our *amour propre* less important than a love relationship; while we experience some others as bad, not just comparatively, but absolutely: we desire not to be moved by spite, or some childish desire to impress at all costs. And these judgements of significance are quite independent of the strength of the respective desires: the craving for comfort may be overwhelming at this moment, we may be obsessed with our *amour propre*, but the judgement of significance stands.

But then the question arises whether this fact of strong evaluation doesn't have other consequences for our notion of freedom, than just that it permits us to rank freedoms in importance. Is freedom not at stake when we find ourselves carried away by a less significant goal to override a highly significant one? Or when we are led to act out of a motive we consider bad or despicable?

The answer is that we sometimes do speak in this way. Suppose I have some irrational fear, which is preventing me from doing something I very much want to do. Say the fear of public speaking is preventing me from taking up a career that I should find very fulfilling, and that I should be quite good at, if I could just get over this 'hang-up'. It is clear that we experience this fear as an obstacle, and that we feel we are less than we would be if we could overcome it.

Or again, consider the case where I am very attached to comfort. To go on short rations, and to miss my creature comforts for a time, makes me very depressed. I find myself making a big thing of this. Because of this reaction I can't do certain things that I should like very much to do, such as going on an expedition over the Andes, or a canoe trip in the Yukon. Once again, it is quite understandable if I experience this attachment as an obstacle, and feel that I should be freer without it.

Or I could find that my spiteful feelings and reactions which I almost can't inhibit are undermining a relationship which is terribly important to me. At times, I feel as though I am almost assisting as a helpless witness at my own destructive behaviour, as I lash out again with my unbridled tongue at her. I long to be able not to feel this spite. As long as I feel it, even control is not an option, because it just builds up inside until it either bursts out, or else the feeling somehow communicates itself, and queers things between us. I long to be free of this feeling.

These are quite understandable cases, where we can speak of freedom or its absence without strain. What I have called strong evaluation is essentially involved here. For these are not just cases of conflict, even cases of painful conflict. If the conflict is between two desires with which I have no trouble identifying, there can be no talk of lesser freedom, no matter how painful or fateful. Thus if what is breaking up my relationship is my finding fulfilment in a job which, say, takes me away from home a lot, I have indeed a terrible conflict, but I would have no temptation to speak of myself as less free.

Even seeing a great difference in the significance of the two terms doesn't seem to be a sufficient condition of my wanting to speak of freedom and its absence. Thus my marriage may be breaking up because I like going to the pub and playing cards on Saturday nights with the boys. I may feel quite unequivocally that my marriage is much more important than the release and comradeship of the Saturday night bash. But nevertheless I wouldn't want to talk of my being freer if I could slough off this desire.

The difference seems to be that in this case, unlike the ones above, I still identify with the less important desire, I still see it as expressive of myself, so that I couldn't lose it without altering who I am, losing something of my personality. Whereas my irrational fear, my being quite distressed by discomfort, my spite – these are all things which I can easily see myself losing without any loss whatsoever to what I am. This is why I can see them as obstacles to my purposes, and hence to my freedom, even though they are in a sense unquestionably desires and feelings of mine.

Before exploring further what's involved in this, let's go back and keep score. It would seem that these cases make a bigger breach in the crude negative theory. For they seem to be cases in which the obstacles to freedom are internal; and if this is so, then freedom can't simply be interpreted as the absence of *external* obstacles; and the fact that I'm doing what I want, in the sense of following my strongest desire, isn't sufficient to establish that I'm free. On the contrary, we have to make discriminations among motivations, and accept that acting out of some motivations, for example irrational fear or spite, or this too great need for comfort, is not freedom, is even a negation of freedom.

But although the crude negative theory can't be sustained in the face of these examples, perhaps something which springs from the same concerns can be reconstructed. For although we have to admit that there are internal, motivational, necessary conditions for freedom, we can perhaps still avoid any legitimation of what I called above the second-guessing of the subject. If our negative theory allows for strong evaluation, allows that some goals are really important to us, and that other desires are seen as not fully ours, then can it not retain the thesis that freedom is being able to do what I want, that is, what I can identify myself as wanting, where this means not just what I identify as my strongest desire, but what I identify as my true, authentic desire or purpose? The subject would still be the final arbiter of his being free/unfree, as indeed he is clearly capable of discerning this in the examples above, where I relied precisely on the subject's own experience of constraint, of motives with which he can't identify. We should have sloughed off the untenable Hobbesian reductive-materialist metaphysics, according to which only external obstacles count, as though action were just movement, and there could be no internal, motivational obstacles to our deeper purposes. But we would be retaining the basic concern of the negative theory, that the subject is still the final authority as to what his freedom consists in, and cannot be second-guessed by external authority. Freedom would be modified to read: the absence of internal or external obstacle to what I truly or authentically want. But we would still be holding the Maginot Line. Or would we?

I think not, in fact. I think that this hybrid or middle position is untenable, where we are willing to admit that we can speak of what we truly want, as against what we most strongly desire, and of some desires as obstacles to our freedom, while we still will not allow for second-guessing. For to rule this out in principle is to rule out in principle that the subject can ever be wrong about what he truly wants. And how can he never, in principle, be wrong, unless there is nothing to be right or wrong about in this matter?

That in fact is the thesis our negative theorist will have to defend. And it is a plausible one for the same intellectual (reductive-empiricist) tradition from which the crude negative theory springs. On this view, our feelings are brute facts about us; that is, it is a fact about us that we are affected in such and such a way, but our feelings can't themselves be understood as involving some perception or sense of what they relate to, and hence as potentially veridical or illusory, authentic or inauthentic. On this scheme, the fact that a certain desire represented one of our fundamental purposes, and another a mere force with which we cannot identify, would concern merely the brute quality of the affect in both cases. It would be a matter of the raw feel of these two desires that this was their respective status.

In such circumstances, the subject's own classification would be incorrigible. There is no such thing as an imperceptible raw feel. If the subject failed to experience a certain desire as fundamental, and if what we meant by 'fundamental' applied to desire was that the felt experience of it has a certain quality, then the desire couldn't be fundamental. We can see this if we look at those feelings which we can agree are brute in this sense: for instance, the stab of pain I feel when the dentist jabs into my tooth, or the crawling unease when someone runs his fingernail along the blackboard. There can be no question of misperception here. If I fail to 'perceive' the pain, I am not in pain. Might it not be so with our fundamental desires, and those which we repudiate?

The answer is clearly no. For first of all, many of our feelings and desires, including the relevant ones for these kinds of conflicts, are not brute. By contrast with pain and the fingernail-on-blackboard sensation, shame and fear, for instance, are emotions which involve our experiencing the situation as bearing a certain import for us, as being dangerous or shameful. This is why shame and fear can be inappropriate, or even irrational, where pain and a frisson cannot. Thus we can be in error in feeling shame or fear. We can even be consciously aware of the unfounded nature of our feelings, and this is when we castigate them as irrational.

Thus the notion that we can understand all our feelings and desires as brute, in the above sense, is not on. But more, the idea that we could discriminate our fundamental desires, or those which we want to repudiate, by the quality of brute affect is grotesque. When I am

convinced that some career, or an expedition in the Andes, or a love relationship, is of fundamental importance to me (to recur to the above examples), it cannot be just because of the throbs, *élans* or tremors I feel; I must also have some sense that these are of great significance for me, meet important, long-lasting needs, represent a fulfilment of something central to me, will bring me closer to what I really am, or something of the sort. The whole notion of our identity, whereby we recognise that some goals, desires, allegiances are central to what we are, while others are not or are less so, can make sense only against a background of desires and feelings which are not brute, but what I shall call import-attributing, to invent a term of art for the occasion.

Thus we have to see our emotional life as made up largely of import-attributing desires and feelings, that is, desires and feelings which we can experience mistakenly. And not only can we be mistaken in this, we clearly must accept, in cases like the above where we want to repudiate certain desires, that we are mistaken.

For let us consider the distinction mentioned above between conflicts where we feel fettered by one desire, and those where we do not, where, for instance, in the example mentioned above, a man is torn between his career and his marriage. What made the difference was that in the case of genuine conflict both desires are the agent's, whereas in the cases where he feels fettered by one, this desire is one he wants to repudiate.

But what is it to feel that a desire is not truly mine? Presumably, I feel that I should be better off without it, that I don't lose anything in getting rid of it, I remain quite complete without it. What could lie behind this sense?

Well, one could imagine feeling this about a brute desire. I may feel this about my addiction to smoking, for instance – wish I could get rid of it, experience it as a fetter, and believe that I should be well rid of it. But addictions are a special case; we understand them to be unnatural, externally-induced desires. We couldn't say in general that we are ready to envisage losing our brute desires without a sense of diminution. On the contrary, to lose my desire for, and hence delectation in, oysters, mushroom pizza, or Peking duck would be a terrible deprivation. I should fight against such a change with all the strength at my disposal.

So being brute is not what makes desires repudiable. And besides, in the above examples the repudiated desires aren't brute. In the first case, I am chained by unreasoning fear, an import-attributing emotion, in which the fact of being mistaken is already recognised when I identify the fear as irrational or unreasoning. Spite, too, which moves me in the third case, is an import-attributing emotion. To feel spite is to see oneself and the target of one's resentment in a certain light; it is to feel in some way wounded, or damaged, by his success or good fortune, and the more hurt the more he is fortunate. To overcome feelings of spite, as against just holding them in, is to come to see self and other in a different light, in particular, to set aside self-pity, and the sense of being personally wounded by what the other does and is.

(I should also like to claim that the obstacle in the second example, the too great attachment to comfort, while not itself import-attributing, is also bound up with the way we see things. The problem is here not just that we dislike discomfort, but that we are too easily depressed by it; and this is something which we overcome only by sensing a different order of priorities, whereby small discomforts matter less. But if this is thought too dubious, we can concentrate on the other two examples.)

Now how can we feel that an import-attributing desire is not truly ours? We can do this only if we see it as mistaken, that is, the import or the good it supposedly gives us a sense of is not a genuine import or good. The irrational fear is a fetter, because it is irrational; spite is a fetter because it is rooted in a self-absorption which distorts our perspective on everything, and the pleasures of venting it preclude any genuine satisfaction. Losing these desires we lose nothing, because their loss deprives us of no genuine good or pleasure or satisfaction. In this they are quite different from my love of oysters, mushroom pizza and Peking duck.

It would appear from this that to see our desires as brute gives us no clue as to why some of them are repudiable. On the contrary it is precisely their not being brute which can explain this. It is because they are import-attributing desires which are mistaken that we can feel that we would lose nothing in sloughing them off. Everything which is truly important to us would be safeguarded. If they were just brute desires, we couldn't feel this unequivocally, as we certainly do not when it comes to the pleasures of the palate. True, we also feel that our desire to smoke is repudiable, but there is a special explanation here, which is not available in the case of spite.

Thus we can experience some desires as fetters, because we can experience them as not ours. And we can experience them as not ours because we see them as incorporating a quite erroneous appreciation of our situation and of what matters to us. We can see this again if

we contrast the case of spite with that of another emotion which partly overlaps, and which is highly considered in some societies, the desire for revenge. In certain traditional societies this is far from being considered a despicable emotion. On the contrary, it is a duty of honour on a male relative to avenge a man's death. We might imagine that this too might give rise to conflict. It might conflict with the attempts of a new regime to bring some order to the land. The government would have to stop people taking vengeance, in the name of peace.

But short of a conversion to a new ethical outlook, this would be seen as a trade-off, the sacrifice of one legitimate goal for the sake of another. And it would seem monstrous were one to propose reconditioning people so that they no longer felt the desire to avenge their kin. This would be to unman them.[4]

Why do we feel so different about spite (and for that matter also revenge)? Because the desire for revenge for an ancient Icelander was his sense of a real obligation incumbent on him, something it would be dishonourable to repudiate; while for us, spite is the child of a distorted perspective on things.

We cannot therefore understand our desires and emotions as all brute, and in particular we cannot make sense of our discrimination of some desires as more important and fundamental, or of our repudiation of others, unless we understand our feelings to be import-attributing. This is essential to there being what we have called strong evaluation. Consequently the half-way position which admits strong evaluation, admits that our desires may frustrate our deeper purposes, admits therefore that there may be inner obstacles to freedom, and yet will not admit that the subject may be wrong or mistaken about these purposes – this position doesn't seem tenable. For the only way to make the subject's assessment incorrigible in principle would be to claim that there was nothing to be right or wrong about here; and that could only be so if experiencing a given feeling were a matter of the qualities of brute feeling. But this it cannot be if we are to make sense of the whole background of strong evaluation, more significant goals, and aims that we repudiate. This whole scheme requires that we understand the emotions concerned as import-attributing, as, indeed, it is clear that we must do on other grounds as well.

But once we admit that our feelings are import-attributing, then we admit the possibility of error, or false appreciation. And indeed, we have to admit a kind of false appreciation which the agent himself detects in order to make sense of the cases where we experience our own desires as fetters. How can we exclude in principle that there may be other false appreciations which the agent does not detect? That he may be profoundly in error, that is, have a very distorted sense of his fundamental purposes? Who can say that such people can't exist? All cases are, of course, controversial; but I should nominate Charles Manson and Andreas Baader for this category, among others. I pick them out as people with a strong sense of some purposes and goals as incomparably more fundamental than others, or at least with a propensity to act as having such a sense so as to take in even themselves a good part of the time, but whose sense of fundamental purpose was shot through with confusion and error. And once we recognise such extreme cases, how do we avoid admitting that many of the rest of mankind can suffer to a lesser degree from the same disabilities?

What has this got to do with freedom? Well, to resume what we have seen: our attributions of freedom make sense against a background sense of more and less significant purposes, for the question of freedom/unfreedom is bound up with the frustration/fulfilment of our purposes. Further, our significant purposes can be frustrated by our own desires, and where these are sufficiently based on misappreciation, we consider them as not really ours, and experience them as fetters. A man's freedom can therefore be hemmed in by internal, motivational obstacles, as well as external ones. A man who is driven by spite to jeopardise his most important relationships, in spite of himself, as it were, or who is prevented by unreasoning fear from taking up the career he truly wants, is not really made more free if one lifts the external obstacles to his venting his spite or acting on his fear. Or at best he is liberated into a very impoverished freedom.

If through linguistic/ideological purism one wants to stick to the crude definition, and insist that men are equally freed from whom the same external obstacles are lifted, regardless of their motivational state, then one will just have to introduce some other term to mark the distinction, and say that one man is capable of taking proper advantage of his freedom, and the other (the one in the grip of spite, or fear) is not. This is because in the meaningful sense of 'free', that for which we value it, in the sense of being able to act on one's important purposes, the internally fettered man is not free. If we choose to give 'free' a special (Hobbesian) sense which avoids this issue, we'll just have to introduce another term to deal with it.

Moreover since we have already seen that we are always making judgements of degrees of freedom, based

on the significance of the activities or purposes which are left unfettered, how can we deny that the man, externally free but still stymied by his repudiated desires, is less free than one who has no such inner obstacles?

But if this is so, then can we not say of the man with a highly distorted view of his fundamental purpose, the Manson or Baader of my discussion above, that he may not be significantly freer when we lift even the internal barriers to his doing what is in line with this purpose, or at best may be liberated into a very impoverished freedom? Should a Manson overcome his last remaining compunction against sending his minions to kill on caprice, so that he could act unchecked, would we consider him freer, as we should undoubtedly consider the man who had done away with spite or unreasoning fear? Hardly, and certainly not to the same degree. For what he sees as his purpose here partakes so much of the nature of spite and unreasoning fear in the other cases, that is, it is an aspiration largely shaped by confusion, illusion and distorted perspective.

Once we see that we make distinctions of degree and significance in freedoms depending on the significance of the purpose fettered/enabled, how can we deny that it makes a difference to the degree of freedom not only whether one of my basic purposes is frustrated by my own desires but also whether I have grievously misidentified this purpose? The only way to avoid this would be to hold that there is no such thing as getting it wrong, that your basic purpose is just what you feel it to be. But there is such a thing as getting it wrong, as we have seen, and the very distinctions of significance depend on this fact.

But if this is so, then the crude negative view of freedom, the Hobbesian definition, is untenable. Freedom can't just be the absence of external obstacles, for there may also be internal ones. And nor may the internal obstacles be just confined to those that the subject identifies as such, so that he is the final arbiter; for he may be profoundly mistaken about his purposes and about what he wants to repudiate. And if so, he is less capable of freedom in the meaningful sense of the word. Hence we cannot maintain the incorrigibility of the subject's judgements about his freedom, or rule out second-guessing, as we put it above. And at the same time, we are forced to abandon the pure opportunity-concept of freedom.

For freedom now involves my being able to recognise adequately my more important purposes, and my being able to overcome or at least neutralise my motivational fetters, as well as my way being free of external obstacles. But clearly the first condition (and, I would argue, also the second) require me to have become something, to have achieved a certain condition of self-clairvoyance and self-understanding. I must be actually exercising self-understanding in order to be truly or fully free. I can no longer understand freedom just as an opportunity-concept.

In all these three formulations of the issue – opportunity- versus exercise-concept; whether freedom requires that we discriminate among motivations; whether it allows of second-guessing the subject – the extreme negative view shows up as wrong. The idea of holding the Maginot Line before this Hobbesian concept is misguided not only because it involves abandoning some of the most inspiring terrain of liberalism, which is concerned with individual self-realisation, but also because the line turns out to be untenable. The first step from the Hobbesian definition to a positive notion, to a view of freedom as the ability to fulfil my purposes, and as being greater the more significant the purposes, is one we cannot help taking. Whether we must also take the second step, to a view of freedom which sees it as realisable or fully realisable only within a certain form of society; and whether in taking a step of this kind one is necessarily committed to justifying the excesses of totalitarian oppression in the name of liberty; these are questions which must now be addressed. What is certain is that they cannot simply be evaded by a philistine definition of freedom which relegates them by fiat to the limbo of metaphysical pseudo-questions. This is altogether too quick a way with them.

Notes

1 *FEL*, pp. 118–72.
2 Ibid., p. 148, note 1.
3 Ibid., p. 164.
4 Compare the unease we feel at the reconditioning of the hero of Anthony Burgess's *A Clockwork Orange*.

28

A Third Concept of Liberty

Quentin Skinner

I

I take as my starting-point one of the claims most widely accepted in current discussions about the theory of liberty. There must be one overarching formula, we are told, under which all intelligible locutions about freedom can be subsumed.[1] The prevalence of this belief appears to be due in large part to the influence of a single classic article, Gerald MacCallum's 'Negative and Positive Freedom'.[2] Whenever the freedom of an agent is in question, MacCallum maintains, it will always be freedom from some element of constraint upon doing or becoming (or not doing or becoming) something.[3] Freedom is 'always one and the same triadic relation' between agents, constraints, and ends. To speak of the presence of freedom is always, in consequence, to speak of an absence: absence of constraint upon an agent from realising some goal or end. There is, in other words, only one concept of liberty.[4]

These observations bring me to the theorist of liberty in whose memory I have the honour to be speaking today. I did not know Sir Isaiah Berlin well, so I am not in a position to reminisce about him. But that does not seem to me a disadvantage, for Berlin was a professional thinker, and what matters about him is what he argued and thought. What he most influentially argued about – as no one here will need reminding – was the theory of freedom. It is accordingly on that topic that I propose to concentrate. I shall focus in particular on Berlin's most celebrated contribution to the debate, his essay – just republished in a handsome new edition – entitled 'Two Concepts of Liberty'.[5]

Let me state at once what I take to be the abiding merit of Berlin's text, which has recently and I am sure rightly been characterised as the most influential single essay in contemporary political philosophy.[6] By contrast with the conventional wisdom I began by citing, Berlin succeeds in showing – beyond doubt, it seems to me – that a strong distinction needs to be marked between two rival and incommensurable concepts of liberty. He succeeds in showing, in other words, that any attempt to bring together our particular judgements about freedom under a single theory or overarching formula will be foredoomed to failure.

As all the world knows, the manner in which Berlin draws the distinction in which he is primarily interested is by speaking of negative and positive freedom or liberty.[7] When he discusses negative liberty, he gives an account closely resembling the analysis that, according to MacCallum and his numerous followers, must be

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given of any claim about freedom if it is to be intelligible. To see, therefore, where Berlin has something challenging to add to the argument, we need to turn to his account of what he describes as positive liberty.

Berlin's attempt to mark off this separate concept is admittedly dogged by several false starts. He begins by suggesting that, whereas negative liberty is freedom *from* constraint, positive liberty is freedom *to* follow a certain form of life.[8] But this distinction cannot be used to disclose two different concepts of liberty, if only because all cases of negative liberty are at once cases in which I am free from constraint and, *eo ipso*, free to act should I choose. (If I assure you that you will not be impeded *from* leaving this lecture if you don't like it, I could equally well assure you that you will be free *to* leave.)[9] Berlin next suggests that the positive sense of the word refers to the idea of being one's own master as opposed to being acted upon by external forces.[10] But this too fails to isolate a separate concept of positive liberty. For the situation in which I am free to act in virtue of not being hindered by external forces is, according to Berlin's own analysis, that of someone in possession of their liberty in the ordinary negative sense.

It soon emerges, however, that Berlin's concern is not with the idea of being your own master. Rather he is interested in the very different notion (although he sometimes runs them together) of mastering your self. When he first employs this latter formula, he uses it to refer to the familiar thought – equally familiar to students of Plato and of Freud – that the obstacles to your capacity to act freely may be internal rather than external, and that you will need to free yourself from these psychological constraints if you are to act autonomously.[11] But this too fails to capture a separate concept of positive liberty. For while the notion of an internal obstacle extends the range of things that can count as constraints, we are still speaking about the need to get rid of an element of constraint if we are to act freely, and are still speaking in consequence about the idea of negative liberty.

The principal claim, however, that Berlin wishes to make about self-mastery proves to be a different and more convincing one. According to those who have wished to give a positive content to the idea of liberty, he suggests, the freedom of an agent consists in their having managed most fully to become themselves. Freedom is thus equated not with self-mastery but rather with self-realisation, and above all with self-perfection, with the idea (as Berlin expresses it) of my self at its best.[12] The positive concept is thus that, as Berlin finally summarises, 'whatever is the true goal of man … must be identical with his freedom'.[13]

If there is any one philosopher whom Berlin had in mind in formulating this definition, it must I think have been Bernard Bosanquet.[14] In *The Philosophical Theory of the State*, first published in 1899, Bosanquet speaks in so many words about the 'negative idea'[15] of being 'free from constraint'[16] and contrasts this juristic concept, as he calls it, with what he describes as the 'fuller' or 'positive' understanding of the term.[17] Furthermore, when Bosanquet proceeds to characterise the negative ideal as that of being preserved against trespass, and contrasts it with the positive view of the 'real' or 'ideal' self whose activity is identical with freedom, Berlin echoes his phraseology almost word for word.[18]

Behind Bosanquet's analysis, however, lies the overwhelming influence of T.H. Green.[19] As Bosanquet acknowledges in the chapter I have been quoting, he makes 'great use' of the analysis of freedom offered by Green in his *Principles of Political Obligation*, originally published in 1886. Green does not explicitly speak in that work (although he does elsewhere)[20] of 'positive' liberty, but he provides a subtler and more careful analysis than Bosanquet does of what might be meant by giving a positive content to the ideal. 'Real freedom,' according to Green, 'consists in the whole man having found his object'.[21] To attain freedom is thus to have attained 'harmony with the true law of one's being'.[22] To speak of the freedom of a man is to speak of 'the state in which he shall have realised his ideal of himself'.[23] Freedom is, in short, the name of an end-state; as Green concludes, it is 'in some sense the goal of moral endeavour'.[24]

It is hard nowadays to recapture how disquieting this analysis seemed to many English moral and political philosophers writing in the aftermath of World War I. L.T. Hobhouse, for example, whose critique of Hegel, Green and Bosanquet appeared in 1918, went so far as to declare that 'in the bombing of London' he had witnessed 'the visible and tangible outcome of a false and wicked doctrine'.[25] To anyone of Berlin's generation, however, these anxieties about Hegelian philosophy remained remarkably acute. One only has to think of the abusive and tendentious attack on Hegel mounted by Karl Popper in *The Open Society and its Enemies*.[26] Writing little more than a decade later, Berlin is I think registering many of the same anxieties in his analysis of positive liberty and the dangers to which it allegedly gives rise.

I do not wish, however, to press the historical point. My reason for quoting Green and Bosanquet is to lend further weight to what seems to me Berlin's most

important argument. As soon as one reflects on their line of thought, one sees that Berlin was right to insist that there is a coherent concept of liberty completely at odds with the negative idea of absence of constraint. As he rather grandly summarises, we find ourselves confronting 'not two different interpretations of a single concept, but two profoundly divergent and irreconcilable attitudes to the ends of life'.[27]

Berlin could with profit have carried this central argument of his essay much further. It seems to me a surprising fact about the Introduction to his *Four Essays on Liberty*, in which he replies to his critics, that he never refers to this neo-Hegelian understanding of freedom in responding to MacCallum's insistence that all intelligible locutions about liberty must conform to one and the same triadic scheme. To this objection Berlin merely returns the suggestion – which I have already shown to be confused – that some pleas for negative liberty must reflect a simpler dyadic structure, revealing as they do a desire to be liberated from some measure of constraint, but without any further desire to act in any particular way. What Berlin should have retorted, it seems to me, is that the positive conception of liberty he rightly isolates cannot be made to conform to the triadic structure on which MacCallum and his followers insist.[28] The crux of Bosanquet's argument – and even more clearly of Green's – is that the freedom of human agents consists in their having succeeded in realising an ideal of themselves. But this is not to speak of a condition in which someone is free to do or become something, as required by MacCallum's analysis. It is to speak of a condition in which someone has succeeded in becoming something. Freedom is not being viewed as absence of constraint on action; it is being viewed as a pattern of action of a certain kind.[29]

Berlin's argument can be carried a yet further step if we recognise that what underlies these theories of positive liberty is the belief that human nature has an essence, and that we are free if and only if we succeed in realising that essence in our lives.[30] This enables us to see that there will be as many different interpretations of positive liberty as there are different views about the moral character of humankind. Suppose, for example, you accept the Christian view that the essence of our nature is religious, and thus that we attain our highest ends if and only if we consecrate our lives to God. Then you will believe that, in the words of Thomas Cranmer, the service of God 'is perfect freedom'. Or suppose you accept the Aristotelian argument that man is a political animal, the argument restated as a theory of freedom by Hannah Arendt in *Between Past and Future*.[31] Then you will believe that, as Arendt maintains, 'freedom … and politics coincide' and that 'this freedom is primarily experienced in action'.[32] More specifically, you will believe that, as Charles Taylor adds, 'freedom resides at least in part in collective control over the common life', because the exercise of such control is the form of activity in which the essence of our humanity is most fully realised.[33]

Faced with these equations between freedom and certain forms of life, how can MacCallum and his followers hope to rescue their contention that all intelligible claims about liberty must be claims about absence of constraint? As far as I can see, their only recourse will be to suggest that the arguments I have cited from Green and Bosanquet are not intelligible as claims about liberty; that they must either be muddled or be talking about something else. As Berlin excellently points out, however, there is no difficulty in seeing how the neo-Hegelians took their thesis, without any incoherence, to be one about human freedom.[34] The claim they are advancing is that if and only if we actually follow the most fulfilling way of life shall we overcome the constraints and obstacles to our realisation of our full potential, and thereby realise our ideal of ourselves. The living of such a life alone frees us from such contraints and, by making us fully ourselves, makes us fully free. Liberty consists in following that way of life in which, all passion spent, we finally achieve harmony with our nature.

I am not endorsing the truth of these claims, merely their intelligibility. I happen to agree with Berlin that there are many different ends that we can equally well pursue. Perhaps he was unduly anxious about the authoritarian implications of rejecting this commitment,[35] but I also happen to agree with him that those who imagine that human nature has an essence, and thereby hold that there is just one goal to which we all ought to commit ourselves, tend to bully or at least to behave self-righteously towards those of more pluralist allegiances. However, I have no need to lapse in this way into autobiography. It is enough for me, just as it is enough for Berlin, to display the coherence of the neo-Hegelian analysis. That in itself is sufficient to dispose of the prevailing belief that there is only one concept of liberty.

II

As the title of his essay indicates, Berlin's chief concern is to contrast the positive ideal of freedom as self-perfection with what he describes, following much

precedent, as negative liberty. As we have seen, by negative liberty Berlin means absence of constraint, and the specific interpretation he believes must be given to the concept of constraint is that it must consist in some act of interference, by some external agency, with the capacity of another agent to pursue 'possible choices and activities'.[36] These obstacles or hindrances need not be intentional, for Berlin allows that they may be the result of – as opposed to being deliberately caused by – the actions of others. But his fundamental contention is that the absence which marks the presence of liberty must always be absence of interference. As he puts it in his clearest summary, 'the criterion of oppression is the part that I believe to be played by other human beings, directly or indirectly, with or without the intention of doing so, in frustrating my wishes. By being free in this sense I mean not being interfered with by others. The wider the area of non-interference the wider my freedom.'[37]

While this is a familiar vision of human liberty, it is a matter of no small difficulty to state it with precision, and it is worth noting that Berlin's statement embodies a valuable qualification often omitted in more recent accounts.[38] Berlin adds that I am unfree 'if I am prevented by others from doing *what I could otherwise do*'.[39] I may be physically obstructed in such a way that an action within my powers becomes impossible to perform. Or I may be subjected to such a degree of coercion that the action is rendered, in Jeremy Bentham's phrase, ineligible. But in either case my loss of freedom stems, as Berlin puts it, from 'the deliberate interference of other human beings within the area in which I could otherwise act'.[40]

I do not wholly agree with Berlin's formulation, for I do not see why this disempowerment need be the work specifically of human agencies. If I had been prevented by a blizzard from arriving to deliver this lecture, it would make perfect sense on Berlin's own basic understanding of freedom as absence of interference to say that my freedom had been curtailed.[41] But this is a quibble. What seems to me particularly valuable about Berlin's way of stating the case is his insistence that lack of freedom must be categorically distinguished from lack of ability, and that the right way to mark this distinction is to say that we lack freedom only when an action within our powers has been rendered impossible or ineligible.

Berlin's way of articulating this distinction is strongly reminiscent of Hobbes's analysis of free action in his *Leviathan* of 1651. Hobbes compares the predicament of two men who are unable to leave a room: one possesses the power to leave, but has been 'restrained, with walls, or chayns' and thereby disempowered; the other straightforwardly lacks the ability, because he is 'fastned to his bed by sicknesse'.[42] According to Hobbes's analysis, the first man is unfree to leave, but the second is neither free nor unfree; he is simply unable. The reason, Hobbes explains, is that the idea of free action presupposes the idea of deliberating between alternatives.[43] But it makes no sense to deliberate as to whether to perform an action we already know to be beyond our powers. Hence Hobbes's definition of human freedom: 'a free man' is someone who '*in those things, which by his strength and wit he is able to do, is not hindred to doe what he has a will to*'.[44]

Contrast this understanding with the view, currently prevalent, that we need to distinguish between the formal and the effective possession of negative liberty. One of the examples Berlin gives in distinguishing lack of freedom from inability is the case of a man who cannot read because he is blind. If we apply the distinction between formal and effective freedom, we arrive at the view that the blind man is formally free to read, because no one is interfering with him in this pursuit.[45] But he is not effectively free, since he is not in a position to make use of his formal liberty.[46]

Berlin's more Hobbesian approach enables us to see that this kind of analysis results at best in confusion and at worst in a kind of mockery of freedom. There are two contrasting points to be brought out here. One is that, on Berlin's account, the blind man is neither formally nor effectively free to read. As Berlin insists, I am free only if I am capable of exercising an ability, should I choose, without interference. But the predicament of the blind man is that he is incapable of exercising the ability to read under any circumstances. The contrasting point is that, on Berlin's account, the blind man is neither formally nor effectively unfree to read. To be unfree is to have been rendered incapable of exercising an ability I possess. But the blind man has not in this way been disempowered; he is simply not in possession of the relevant ability.

Although Berlin's analysis of negative liberty is exceptionally acute and valuable, it nevertheless seems to me to suffer from a serious limitation of coverage. This weakness, moreover, is one that it shares with almost every other recent statement of the theory of negative liberty that I have come across. This being so, the nature of the weakness seems to me well worth trying to identify and remedy, and this is the task to which I shall devote myself in the rest of these remarks.

When Berlin first introduces his view of negative liberty, he rightly observes that 'this is what the classical English political philosophers meant' by freedom, and he specifically refers us to Hobbes's definition in *Leviathan*.[47] What Berlin misses, however, is the fiercely polemical character of Hobbes's analysis. When Hobbes announces, in words that Berlin echoes closely, that our liberty consists of nothing more than 'absence of externall Impediments' to the exercise of our powers,[48] he is attempting at the same time to discredit and supersede a rival and strongly contrasting understanding of negative liberty. This rival theory had risen to prominence in English public debate in the early decades of the seventeenth century, and it appeared to Hobbes to be extremely dangerous as well as hopelessly confused.

I can best bring out the significance of Hobbes's critique if I try to answer a question raised by Berlin in the Introduction to his revised edition of 'Two Concepts of Liberty'. He asks when the idea of freedom as nothing other than non-interference was first explicitly formulated, and what prompted its rise to its present hegemonial prominence.[49] I would answer that it is very hard to find an explicit statement of such a theory any earlier than Hobbes's in *Leviathan*, and that what prompted him to articulate it was his sense of the need to respond to the 'Democratical Gentlemen',[50] as he called them, who had deployed their very different theory to promote the cause of Parliament against the crown and to legitimise the execution of King Charles I.

Hobbes's counter-revolutionary challenge eventually won the day. To cite Berlin's own litany, we find his basic line of argument taken up by David Hume, Jeremy Bentham, to some degree by John Stuart Mill, and even more closely (Berlin could have added) by Henry Sidgwick.[51] This great tradition of classical utilitarianism proved impressively successful at occupying the entire conceptual space, thereby managing to dismiss any rival interpretations of liberty as either pernicious or confused. As a result of this profound and enduring ideological success, the alternative vision of negative liberty that Hobbes originally set out to discredit has virtually sunk from sight. What I now want to do is to try to lift it back to the surface.

As I have indicated, the theory in question formed part of the armoury of the Parliamentarians in their disputes with the crown in the opening decades of the seventeenth century. Critics of the royal prerogative began to argue that, to the extent that they were obliged to live in dependence on the power of the king, and obliged in consequence to rely on his goodwill for the continuation of their rights and liberties, they were living in a state of servitude. They insisted, in other words, that freedom is restricted not only by actual interference or the threat of it, but also by the mere knowledge that we are living in dependence on the goodwill of others.[52] These writers are not making the obvious point that the possibility of such arbitrary interference renders our liberty less robust or secure. They are arguing that a mere awareness of living under an arbitrary power – a power capable of interfering in our activities without having to consider our interests – serves in itself to limit our liberty.[53] Knowing that we are free to do or forbear only because someone else has chosen not to stop us is what reduces us to servitude.

The immediate inspiration for this way of thinking appears to have stemmed from a number of Medieval common-law texts, above all those of Bracton and Littleton. These were the authorities that Sir Edward Coke and his followers in the early Stuart Parliaments loved to invoke, and proceeded to quote with so much reverence that they acquired an authority they had never before enjoyed and have never subsequently lost. Henry de Bracton in his *De Legibus et Consuetudinibus Angliae* of *c*. 1260 distinguishes in his opening chapter between free persons and slaves, and proceeds to define as a slave anyone who 'lives in subjection to the dominion of someone else'.[54] Sir Thomas Littleton's fifteenth-century treatise, *Un lyver de exposicion de parcell de les tenures*,[55] draws a very similar set of distinctions between freemen, villeins, and slaves, and repeats that a slave is someone whose lack of liberty is such that his person – and not merely, as with a villein, his property – is *sub potestate*, within the power or at the mercy of someone else.

The most striking feature of these definitions (although later common lawyers did their best to ignore the fact) is that they owe their phraseology entirely to the analysis of freedom and slavery at the outset of the *Digest* of Roman law. There we are first informed that 'the fundamental division within the law of persons is that all men and women are either free or are slaves'.[56] Next we are given a formal definition of slavery. 'Slavery is an institution of the *ius gentium* by which someone is, contrary to nature, subjected to the dominion of someone else'.[57] This in turn is held to yield a definition of individual liberty. If everyone in a civil association is either bond or free, then a *civis* or free citizen must be someone who is not under the dominion of anyone else, but is *sui iuris*, capable of acting in their own right.[58] It likewise follows that what it means for someone to lack the status of a free citizen must be for that person not to be *sui iuris*

but instead to be *sub potestate*, under the power or subject to the will of someone else.[59]

By the time these distinctions were summarised in Justinian's *Codex*, they had been the common coin of Roman political theory for generations. They had been popularised in particular by the great sequence of historians – Sallust, Livy, Tacitus – who had traced the subversion of the republican *civitas libera* and its collapse into the servitude of the principate.[60] This being so, it is a fact of singular importance that it was in the generation immediately prior to the disputes between crown and Parliament in the early seventeenth century that all their works were translated into English for the first time. Henry Savile's version of Tacitus's *Histories* and *Agricola* appeared in 1591, with Richard Grenewey's rendering of the *Annals* and *Germania* following in 1598.[61] Two years later Philemon Holland issued his enormous folio containing the whole of the extant sections of Livy's *History*,[62] while in 1608 Thomas Heywood published his translations of Sallust's *Bellum Catilinae* and *Bellum Iugurthinum*.[63]

If you turn to any of these authorities, you will find it argued once again that what it means to possess your liberty is, as Livy puts it, not to be subject to the power of anyone else. When, for example, Livy describes the surrender of the Collatines to the people of Rome, he stresses that they were able to take this decision because (in the words of Holland's translation) they were 'in their owne power', and hence 'at libertie to doe what they will'.[64] The same view emerges still more clearly from the later passage in which Livy discusses the efforts of the Greek cities to restore their good relations with Rome. To enter into such negotiations, one of their spokesmen is made to say, presupposes the possession of 'true libertie', that condition in which a people 'is able to stand alone and maintain it selfe, and dependeth not upon the will and pleasure of others'.[65]

It was this understanding of political liberty that a number of spokesmen in Parliament began to deploy in criticism of the crown in the early decades of the seventeenth century. One aspect of their campaign has of course been extensively discussed, and forms the cornerstone of the traditional 'whig' explanation for the outbreak of the English Civil War in 1642. They repeatedly accused the government, most conspicuously in the Petition of Right of 1628, of forcibly interfering with a number of fundamental rights and liberties. Charles I was charged with compelling and requiring his people to make loans to him, and with imprisoning and even executing subjects without due cause being shown.[66] These actions were taken to constitute an obvious violation of rights and liberties, since they involved (in the words of the Petition) molesting large numbers of subjects contrary to the laws and franchise of the land.[67]

None of the spokesmen I am considering ever doubted that these acts of oppression undermined their freedom as subjects. As I have intimated, however, they were more concerned with a very different argument about the relations between their liberties and the royal prerogative. The further claim they advance is that such acts of violence are merely the outward manifestations of a deeper affront to liberty. The underlying principle to which they object is that, in times of necessity, the crown possesses a prerogative right, and hence a discretionary power, to imprison without trial and impose levies without parliamentary consent. The objection they develop is that, if the crown is the bearer of any such prerogatives, this is as much as to say that our property and personal liberties are held not 'of right' but merely 'of grace', since the crown is claiming that it can take them away without injustice at any time.

As these democratical gentlemen make clear, what troubles them is the view of rights implied by this understanding of the prerogative. To maintain that our basic rights and liberties are subject to being taken away with impunity is to declare that they do not have the status of rights; it is to say that they are mere licences or privileges. This is the insight that prompts them to reach for their Bracton – and indeed their Livy and Tacitus. To accept, they retort, that we hold our rights and liberties at discretion is to accept that we are living in subjection to the will of the king. But to admit that we are living in such a state of dependence is to admit that we are living not as free citizens but as slaves. The mere knowledge that the crown possesses such prerogatives serves in itself to undermine our liberty and leave us in servitude.

These arguments were vigorously deployed in the debates of 1628 about the right to imprison without cause shown. As Edward Littleton proclaimed, the effect of this prerogative is to make what he describes as 'personall libertye' dependent on the will of the king, so permitting the 'invasion' of the most fundamental freedom 'established & confirmed by the whole State'.[68] Richard Cresheld, another common lawyer, agreed that if the crown is permitted such a right, then we 'become bondage'. To which he added, referring directly to the definition of slavery in the *Digest*, that this condition 'I am sure is contrary to and against the law of nature'.[69] Later in the session Henry Sherfield, yet another lawyer, made the same point by way of distinguishing between

freemen, villeins and slaves. 'If the King may imprison a freeman without a cause', then 'he is in worse case than a villein,' for a villein at least enjoys personal liberty, whereas 'to be imprisoned without cause, that is a thraldom'.[70] Speaking in support, Sir John Eliot agreed that without this 'common right of the subject' we are nothing better than bondmen.[71] Summarising at the end of the session, Sir Roger North put it to the Commons that their principal duty was to question these prerogatives: we must 'save ourselves and them that sent us from being slaves'.[72]

The belief that dependence undermines liberty was even more extensively invoked in the numerous debates about the alleged prerogative right to impose levies without consent of Parliament. The argument was first prominently deployed in the session of 1610. Thomas Wentworth opened the debate by declaring that, unless this prerogative is questioned, we might as well be sold for slaves.[73] Later he went on to add that, if we allow this prerogative 'of imposing, even upon our lands and goods', the effect will be to leave us 'at the mercy' of the king.[74] Sir Thomas Hedley in his great speech about the liberties of subjects agreed that such a prerogative places the property of free subjects 'in the absolute power and command of another'.[75] As they both insist, however, to live at the mercy or under the absolute power of another is what it means to live in slavery. Hedley reminded the Commons that Cicero ('though an heathen yet a wise man') and Tacitus had both drawn exactly this distinction between freedom and servitude. If you 'take away the liberty of the subject in his profit or property' then 'you make a promiscuous confusion of a freeman and a bound slave'.[76]

The same issue was later to resurface with a vengeance in the Parliaments of Charles I. Sir Dudley Digges returned to the argument at the outset of the debate over the Forced Loan in 1628. We are told, he observes, that 'he is no great monarch' who cannot take 'whatsoever he will'. But any king who 'is not tied to the laws' and thereby rules by his arbitrary will is nothing better than 'a king of slaves'.[77] The same argument was restated yet again in the wake of Charles I's extension of Ship Money into a general levy in the 1630s. Perhaps the most influential attack came from Henry Parker, who emerged at this juncture as by far the most formidable and influential defender of the parliamentary cause. To coincide with the assembling of the Long Parliament. Parker published his tract entitled *The Case of Shipmony briefly discoursed* in November 1640.[78] He begins by recurring to the Roman Law view of what it means to live in servitude. 'Where the meere will of the Prince is law' we can expect 'no mediocrity or justice' and 'wee all see that the thraldome of such is most grievous, which have no bounds set to their Lord's discretion'.[79] Parker is clear that the mere existence of such powers is what reduces us to slavery. 'It is enough that we all, and all that we have, are at his discretion,' for where all law is 'subjecte to the King's meer discretion,' there 'all liberty is overthrowne'.[80] With these considerations in mind, Parker turns to the case of Ship Money. If we accept that the king has a right to impose this levy, so that 'to his sole indisputable judgement it is left to lay charges as often and as great as he pleases', this will 'leave us the most despicable slaves in the whole world'.[81] The reason is that this will leave us in a condition of total dependence on the king's goodwill. But as Parker rhetorically asks, if we have no alternative but to 'presume well of our Princes', then 'wherein doe we differ in condition from the most abject of all bondslaves?'[82]

These were serious enough assaults on the foundations of the royal prerogative, but the moment at which they finally provoked a fatal crisis came in the opening months of 1642. When the House of Commons brought forward a proposal early in February to take control of the Militia, Charles I made it clear that he would veto any such legislation by exercising his so-called prerogative of the Negative Voice. Parliament then took the revolutionary step of claiming that, at least in times of emergency, it must possess the right to legislate even in the absence of the royal assent. The reason why this must be so, a number of spokesmen now declared, is that the alternative is national servitude. If the crown can block any legislation with the Negative Voice, this will reduce Parliament – which represents the whole people of England – to a state of complete dependence on the will of the king. But if we are condemned to living under such a constitution, this will reduce the freeborn English to a nation of slaves.

Henry Parker again came to the fore at this climacteric moment, arguing exactly this case in the most important of all the defences of the Parliamentary cause, his *Observations upon some of his Majesties late Answers and Expresses* of July 1642.[83] The existence of the Negative Voice, Parker now maintains, has the effect of subjecting the whole nation 'to as unbounded a regiment of the Kings meere will, as any Nation under Heaven ever suffered under'. For 'what remains, but that all our lawes, rights, & liberties, be either no where at all determinable, or else onely in the Kings breast?'[84] With this prerogative, the king 'assumes to himselfe a share in the

legislative power' so great as to open up 'a gap to as vast and arbitrary a prerogative as the Grand Seignior has' in Constantinople.[85] For he assumes to himself a power to 'take away the being of Parliament meerely by dissent'.[86] But if we permit the King 'to be the sole, supream competent Judge in this case, we resigne all into his hands, we give lifes, liberties, Laws, Parliaments, all to be held at meer discretion' and thereby consign ourselves to bondage.[87]

Charles I had complained in his *Answer to the XIX Propositions* that without the Negative Voice he would be reduced from the status of 'a King of *England*' to a mere 'Duke of *Venice*'.[88] Parker daringly picks up the objection as a means of clinching his argument about national servitude. 'Let us look upon the Venetians, and other such free Nations', he retorts, and ask ourselves why it is that they are 'so extreamly jealous over their Princes'. It is because they fear 'the sting of Monarchy', which stems (as Livy had said) from the power of monarchs to 'dote upon their owne wills, and despise publike Councels and Laws'.[89] The jealousy of the Venetians arises, in other words, from their recognition that under a genuine monarchy they would be reduced to slavery. It is 'meerely for fear of this bondage' that they prefer their elected Dukes to the rule of hereditary kings.[90]

Parker was not the first to put forward this claim about the Negative Voice,[91] but his *Observations* offered the most confident statement of the case, and undoubtedly helped to make this neo-Roman argument pivotal to the rhetoric of the ensuing civil war. We encounter the same argument in virtually all the defences of the parliamentary decision to take up arms in the autumn of 1642.[92] They regularly insist that, if the king is permitted a Negative Voice, 'this whole Kingdome shall consist only of a King, a Parliament, and Slaves'.[93] We encounter the argument again in Parliament's own call to arms of August 1642, in which we are told that the Malignant Party advising the king now aspires 'to destroy his Parliament and good people by a Civill War; and, by that meanes to bring ruine, confusion, and perpetuall slavery upon the surviving part of a then wretched Kingdome'.[94] Finally, we encounter the same argument yet again at the conclusion of the war, when it is wheeled out once more to justify not merely the regicide but the abolition of the monarchy. The charge against Charles I at his trial was that he had sought 'to erect, and uphold in himself an unlimited and Tyrannical power to rule *according to his Will*', a course of action designed not merely 'to overthrow the Rights and Liberties of the People' but 'to take away, and make void the foundations thereof'.[95] The Act of March 1649 abolishing the office of king duly confirmed that monarchy is 'dangerous to the liberty, safety, and public interest of the people', adding that in England the effect of the prerogative has been 'to oppress and impoverish and enslave the subject'.[96] It was at this moment that an apoplectic Hobbes picked up his pen.[97]

III

It would be unfair to Berlin to imply that he fails to notice the tradition that conceptualises the idea of negative liberty not as absence of interference but as absence of dependence. It seems worth underlining this observation, if only because of how his work has been handled by those philosophers who have begun to revive this alternative way of thinking about the concept of human freedom. By far the most important of these writers has been Philip Pettit, who initially presented the argument in his *Republicanism* (1997) and has since elaborated it in *A Theory of Freedom* (2001).[98] Pettit's work is of outstanding importance, and I am deeply indebted to it, but I cannot agree with him when he contends that the effect of Berlin's argument has been to 'conceal from view' the theory that, as Pettit phrases it, negative liberty consists in non-domination, not in non-interference.[99]

It is true that Berlin fails to present the argument about non-domination with the same historical specificity as he brings to bear on the other two concepts he examines, and that he never singles out any particular theorist or movement capable of being associated with this alternative standpoint. Given, however, that he was writing at the height of the debate about decolonialisation, he could scarcely have been unaware that nations as well as individuals often claim to be unfree when they are condemned to social or political dependence. Berlin devotes considerable attention at the end of his essay to what he describes as the resulting 'search for status',[100] and he explicitly asks himself whether it might not 'be natural or desirable to call the demand for recognition and status a demand for liberty in some third sense'.[101]

Having raised the question, however, Berlin confidently answers that no such third concept of liberty can be coherently entertained. To speak of social or political dependence as lack of liberty, he writes, is to confound freedom with other concepts in a manner at once misleading and confused.[102] Stating his grounds for this conclusion, he goes on to enunciate his most general claim about the concept of liberty. He insists that it is true not merely of any coherent account of negative

freedom, but of any concept of freedom whatever, that it must embody, at least as a minimum, the idea of absence of interference. If we are to speak of restrictions on liberty, we must be able to point to some intruder, some act of trespass, some actual impediment or hindrance to the exercise by an agent of their powers at will.[103] As Berlin summarises, 'the essence of the notion of liberty, in both the "positive" and the "negative" senses, is the holding off of something or someone – of others who trespass on my field'.[104]

We can perhaps bring out more clearly what is at stake here by putting the argument the other way round. We can ask, that is, what it is that we cannot coherently claim, according to this reading, about the concept of negative liberty. We cannot claim that a mere awareness of living in a state of social or political dependence has the effect of restricting our options and thereby limiting our freedom. If we are to speak of constraints on liberty, we must be able to point to some identifiable act of hindrance, the aim or consequence of which was to impede or interfere with us in the exercise of our powers.

It is precisely this assumption, however, that the writers I am considering reject. The distinctive claim they defend is that a mere awareness of living in dependence on the goodwill of an arbitrary ruler *does* serve in itself to restrict our options and thereby limit our liberty.[105] The effect is to dispose us to make and avoid certain choices, and is thus to place clear constraints on our freedom of action, even though our ruler may never interfere with our activities or even show the least sign of threatening to interfere with them.[106]

It is of course true that the form of constraint on which these writers concentrate is self-constraint. They envisage that those living in a state of dependence will reflect on their predicament and generally decide on a course of action involving some measure of self-censorship. But the same is no less true of agents who act in the face of coercive threats. They too review their options and generally choose a course of action different from the one they would otherwise have pursued. The agent's sense of constraint is mediated in the two cases in the same way. It follows that, if we are prepared to grant that freedom can be limited by coercion,[107] we cannot exclude that it may also be limited by servitude, or at least not on the grounds that the constraint involved is merely self-constraint.

The exploration of this argument became one of the leading preoccupations of the classical writers I have singled out. If we return to Sallust, and above all to Tacitus, we find them offering an agonised analysis of the psychological impact of slipping into a state of subjection to arbitrary power. It was this analysis that in turn exercised perhaps the most formative influence on the democratical gentlemen who went on to challenge the government of Charles I and to institute the first and only English republic. So far.

As the classical writers stress, there are two contrasting ways in which you will be constrained by your awareness of living in dependence on the goodwill of an arbitrary prince. You will find in the first place that there are many things you are not free to say or do. As Sallust and Tacitus both emphasise, you will need above all to make sure that you avoid saying or doing anything that might be construed by your ruler as an act of emulation or reproach. Sallust explains the need for this caution in a passage from the *Bellum Catilinae* that the English republican writers of the seventeenth century loved to cite.[108] In the words of Heywood's translation of 1608, 'absolute Princes are alwaies more jealous of the good, then of the badde, because another mans Vertue (as they take it) is a diminution of their respectivenesse, and therefore dangerous'.[109] The moral is that, if you are a person of great talent or virtue living under such a prince, you will have no option but to keep those qualities hidden from view as much as possible. You will otherwise be only too likely to discover that, as Savile puts it in translating Tacitus's description of the reign of Nero, such qualities can be 'the readie broade way to most assured destruction'.[110]

Sallust and Tacitus are even more concerned about the long-term psychological impact of this form of self-constraint. When a whole nation is inhibited from exercising its highest talents and virtues, these qualities will begin to atrophy and the people will gradually sink into an abject condition of torpor and sluggishness. Tacitus draws the moral when speaking about the German tribe of the Tencteri and their failed uprising against Rome. In the words of Savile's translation, 'even wilde beasts shut up forget their accustomed valour and vertue'.[111] Sallust in the *Bellum Catilinae* had already drawn the corollary in another passage frequently cited by the English republican writers of the seventeenth century. If we are to enable 'everie man to estimate his owne worth, and to hammer his head on high disseigns', we must be sure to establish and uphold a 'free state', a form of government under which all forms of discretionary or arbitrary power are eliminated.[112]

The other way in which you will find yourself constrained by living under an unaccountable power is that you will lack the freedom to abstain from saying and

doing certain things. When confronted by an absolute ruler and required to offer counsel and advice, you will find yourself constrained to agree with whatever he says and to endorse whatever policies he already wishes to pursue. Tacitus dramatises the predicament in his *Annals* when describing the conduct of the political classes under Tiberius, and his tone of withering contempt is finely caught in Grenewey's translation of 1598:

> But those times were so corrupted with filthie flatterie: that not only the chiefest of the citie were forced in that servile maner to keepe their reputation; but all such as had beene Consuls; the greatest part of such as had bin Pretors; & also many pedary Senators rose up & strove, who should propound things most base and abject. It is written, that as *Tiberius* went out of the Curia, he was woont to saie in Greeke. O men ready to servitude! as though he, who could of all things least suffer publicke libertie; did yet abhorre such base and servile submission: falling by little and little from unseemely flatteries, to lewder practises.[113]

As Tacitus makes clear, the senators were in no way acting under coercion or threat. The mere recognition of their dependence was enough to make them do whatever they felt was expected of them.

It is of course true that, even in such a state of servitude, you retain some freedom of manoeuvre, at least as long as you are not directly threatened or forced. Tacitus in his account of Tiberius's descent into tyranny sardonically praises those who refused to accept that their liberty had been completely undermined. One remaining if drastic option will always be to evade the tyrant's attention altogether, as Tacitus reports of Arruntius at the end of the reign:

> I foresee (said he) a heavier servitude; and therfore I will flie as well from that which is alreadie past, as that which is at hand. Speaking these things as it had bin in the maner of a Prophesie, he cut his vaines.[114]

A further if less heroic option is to try to say as little as possible, as Tacitus reports of Piso, the high priest:

> About the same time *L. Piso* high Priest died a naturall death, which was a rare matter in those times in a man of so great nobilitie: He never of himself propounded any matter which smelled of flatterie or base minds; & if he were forced thereto, he used great moderation in doing it.[115]

As Tacitus makes vividly clear, however, the Roman senatorial class overwhelmingly took the view that, once Augustus had established himself in absolute control, they had no option but to submit to whatever he asked of them, as a result of which 'the Consuls, the Senators, and Gentlemen ranne headlong into servitude'.[116]

As before, what chiefly interests Sallust and Tacitus are the long-term psychological consequences of enduring a life of so much anxiety and uncertainty. The principle on which they insist is that servitude inevitably breeds servility. Sallust in his *Bellum Iugurthinum* puts the argument into the mouth of Memmius in his denunciation of the Roman plebs for submitting to the domination of the nobility. He mocks them for their 'slavish patience', for allowing themselves to live 'as a scorne to the Pride of a few' and for remaining 'corrupted with the same sloth and cowardice'.[117] Tacitus similarly takes a sour pleasure in describing the constantly increasing slavishness of the Roman people under the principate. He draws Book I of his *Histories* to a close with an account of the speech in which the emperor Otho, after the fall of Nero, announced his decision to go to war. 'The commons after their flattering fashion receyved the speech with cryes and acclamations without either measure or trueth, contending to passe one another in applause and wishes, as if it had beene to Caesar the Dictator, or the Emperour Augustus; neither for feare nor for love, but onely upon a delight in servility.'[118]

These arguments were endlessly invoked by the democratical gentlemen of seventeenth-century England. They too were much preoccupied by the dangerous implications of the fact that arbitrary rulers are inevitably surrounded by servile flatterers, and have little hope of hearing frank advice. But their main anxiety was that, under such rulers, no one will perform any deeds requiring public spirit or courageous and great-hearted qualities. As they liked to put it, the final effect of living under absolutism is that everyone becomes dispirited, discouraged, disheartened, and finally dejected and debased.

We already find Sir Thomas Hedley speaking in exactly these terms in his great speech to the House of Commons in 1610:

> If the liberty of the subject be in this point impeached, that their lands and goods be any way in the king's absolute power to be taken from them, then they are (as hath been said) little better than the king's bondmen, which will so discourage them, and so abase and deject their minds, that they will use little care

> and industry to get that which they cannot keep and so will grow poor and base-minded like to the peasants in other countries.[119]

The same moral is drawn in still more minatory tones by Henry Parker at the outset of his *Observations* in 1642:

> This is therefore a great and fond errour in some Princes to strive more to be great over their people, then in their people, and to ecclipse themselves by impoverishing, rather then to magnifie themselves by infranchising their Subjects. This we see in France at this day, for were the Peasants there more free, they would be more rich and magnanimous, and were they so, their King were more puissant.[120]

From these beginnings we can date one of the most enduring and vainglorious legacies of the classical belief that deeds of greatness can be expected only from those who live in so-called free states. The proof of this, we are assured, can be seen in the lives of the European peasantry or, still more clearly, among the subjects of the Sultan at Constantinople. They have become so discouraged and dispirited by the experience of living under arbitrary power that they have become totally supine and base, and nothing can now be expected of them.

IV

You might agree with everything I have so far said and still want to deny that I have isolated a third *concept* of liberty. Whether you think I have done so will obviously depend on your sense of what it means to possess a concept and of how concepts are best individuated. Berlin's response to this question emerges only implicitly from his 'Two Concepts of Liberty', but it seems to me that, if I have understood his view correctly, it is one that we have good reason to endorse. His answer appears to be that, if a given descriptive term can be coherently used with more than one range of reference, so that it can be used to pick out more than one distinct phenomenon or state of affairs, then the term may be said to express more than one concept.

If that is your concept of a concept, then you will agree that I have identified a third concept of liberty. But I have no wish to press the point. A better way of summarising my position would be to say that, while I agree with Berlin that there are two concepts of liberty, one positive and the other negative, I do not agree with his further assumption that, whenever we speak about negative liberty, we must be speaking about absence of interference. It seems to me that, as I have tried to show, we have inherited two rival and incommensurable theories of negative liberty, although in recent times we have generally contrived to ignore one of them.

It is only fair to acknowledge, however, that these conclusions have already been dismissively criticised. According to the most recent of my critics, we need to begin by recognising that, in questioning the view that negative liberty consists in non-interference, what I am claiming in effect is that it consists of 'resilient non-interference'.[121] To speak of such resilience, I am then assured, can only be to speak of certain constitutional safeguards that serve to ensure 'an especially high probability of high degrees of non-interference being maintained over time'.[122] This reading allows the inference that I am merely offering 'a useful set of empirical hypotheses' about how liberty in the ordinary sense of non-interference 'is best to be maximised'.[123] I am far from having shown that 'an *alternative conception* of liberty' is at work.[124]

If I were indeed talking about resilient non-interference (a phrase I have never used) there might be some justification for these somewhat patronising remarks. But I am not talking about resilient non-interference, nor indeed about interference or non-interference of any kind. I am talking about the predicament of those who recognise that they are living in subjection to the will of others, and I am following my classical and early-modern authorities in claiming that the mere fact of living in such a predicament has the effect of placing limits on our liberty. If freedom is construed as absence of interference, this is unquestionably to speak of an alternative theory of liberty, since it is to claim that freedom can be restricted and constrained in the absence of any element of interference or even any threat of it.[125]

This contrast can be restated in a different way, and one that perhaps serves more effectively to counter those who have insisted that, as another of my critics has recently put it, 'there is no interesting disagreement' between those who espouse the two purportedly different theories of negative liberty.[126] One undoubted disagreement between them (although it is not for me to say whether it is 'interesting') is that they hold rival views about the underlying concept of autonomy. Those who believe that liberty is nothing other than absence of interference are committed to the view that the will is autonomous so long as it is neither threatened nor coerced.[127] By contrast, those who embrace

the neo-Roman argument deny that the will can be autonomous unless it is also free from dependence on the will of anyone else.

So far I have given the impression that Berlin offers a relatively neutral appraisal of the rival merits of negative and positive liberty. But this is far from being the case. Berlin's essay represents a belated but recognisable contribution to a long-standing debate about the merits of philosophical Idealism that had continued to resonate in the Oxford of his youth. H.A. Prichard and J.P. Plamenatz had relentlessly criticised T.H. Green in the 1930s, arguing that his views of freedom, obligation and rights were all extremely dubious and confused.[128] But A.D. Lindsay had kept alive the debate by republishing Green's *Lectures* in 1941 with an admiring Introduction in which he had spoken sympathetically of Green's belief that empiricist philosophy and utilitarian psychology 'had to be fought all along the line'.[129]

As Berlin makes clear, he firmly aligned himself with those who wanted to put such figures as Lindsay in their place. Liberal political theory, Berlin insists, must be grounded after all on empiricist and utilitarian premises, not on the philosophies of Hegel and Kant.[130] As we have seen, those espousing the opposite point of view had earlier been denounced for accepting an argument that had led to World War I. By the time Berlin was writing, their successors had laid themselves open to a no less melodramatic attack. They were now assailed for adopting a concept of freedom that directly associated them, as Berlin himself declares, with the outlook of 'the latest nationalist or Communist dictator'.[131]

As this judgement suggests, Berlin's essay is strongly marked by the geopolitical and ideological divisions of the 1950s. Berlin believes that, while the positive understanding of liberty may have had lofty and even noble origins, it has wandered so far from its liberal beginnings that it has come to rest 'at the heart of many of the nationalist, Communist, authoritarian, and totalitarian creeds of our day'.[132] His essay is a warning as much as an exposition, and he finds it correspondingly important to insist that, as he proclaims at the end, the concept of negative liberty offers 'a truer and more humane ideal than the goals of those who seek in the great disciplined, authoritarian structures the ideal of "positive" self-mastery by classes, or peoples, or the whole of mankind'.[133]

What are we to make of this valedictory profession of faith? When Berlin asks himself which of the two concepts he has explicated is the 'truer' one, the question strikes me as ambiguously phrased. He may have it in mind to ask, in the manner of Habermas, which of the two concepts is truer to our deepest human interests and purposes. But if that is his question, then I cannot see that it has a determinate answer. Perhaps the idea of liberty as absence of interference was truer to the society in which he himself was writing, in which the ideal of freedom as self-perfection had come to be widely seen as a religious and collectivist nightmare from which the 'free world' had thankfully awoken. But in earlier periods the same ideal had been a dream, not a nightmare, and in many western societies of the present time there are new movements of religious faith in which the positive concept of liberty may well appear to answer to far deeper purposes than the negative idea of merely having as much elbow-room as we desire. The question of which concept best answers to our purposes will always depend on what account – if any – we believe should be given of the normative character of human nature. But this is a question that our theologians as well as philosophers have been debating for centuries, and it does not seem at all likely that they will manage in the near future to reach a final agreement.

When Berlin asks about the true concept of liberty, however, he may instead mean to ask which is the true or right way of analysing the terms by which the concept is expressed. But if this is his question, then it seems to me even clearer that it has no determinate answer. As I have tried to intimate throughout this lecture, the belief that we can somehow step outside the stream of history and furnish a neutral definition of such words as *libertas*, freedom, autonomy and liberty is an illusion well worth giving up. With terms at once so deeply normative, so highly indeterminate, and so extensively implicated in such a long history of ideological debate, the project of understanding them can only be that of trying to grasp the different roles they have played in our history and our own place in that narrative. But the more we undertake this kind of study, the more we see that there is no neutral analysis of any such keywords to be given. The history is all there is.

I must try not to end, however, by sounding as dogmatic as my critics, especially as it would be ironic to speak dogmatically about (of all things) liberty. I much prefer the tone of tolerance that Berlin, in his best moments, seems to strike so effortlessly. Speaking of our historical and philosophical debates about freedom, he brings his own analysis to a close on a deliberately anti-rhetorical note. He is content to end by observing – and here I am happy to echo him – that in thinking about the concept of liberty 'I am well aware of how much more needs to be done'.[134]

Notes

1 For different versions of this 'coherentist' approach see. for example. Rawls (1971), pp. 201–5; MacCallum (1972); Day (1983); Megone (1987); Narveson (1988), pp. 18–21; Swanton (1992); Carter (1999); Swift (2001), pp. 51–89.
2 See MacCallum (1972: originally published 1967).
3 MacCallum (1972), p. 176.
4 For this very strong way of putting the point, see for example Day (1983), p. 18; Swift (2001), p. 53.
5 See Berlin (2002). This edition incorporates Harris (2002), a valuable survey of the critical literature on Berlin's 'Two Concepts' lecture.
6 Swift (2001), p. 51.
7 Although the terms *freedom* and *liberty* are obviously not interchangeable, Berlin clearly thought of them as sufficiently synonymous for his purposes. Ignatieff (1998), p. 222, neatly captures Berlin's expression of this commitment when (speaking into a taperecorder) he first gave a title to his lecture: 'Two Concepts of Freedom – no … of Liberty'. I have followed Berlin in using the terms as if they are synonyms.
8 Berlin (2002), p. 178.
9 Here I dissent from Gray (1984), p. 326 (and Gray (1995), p. 18 where the point is repeated), who sides with Berlin against MacCallum in supposing that the term 'liberty' can sometimes refer to a merely dyadic relationship.
10 Berlin (2002), p. 178.
11 Traditionally this argument has been couched in the form of the claim that our passions enslave us. On the metaphors associated with the workings of the passions see James (1997), pp. 11–14.
12 Berlin (2002), p. 179.
13 See Berlin (2002), p. 180 and cf. Berlin (2002), p. 37: 'freedom was identified … with the realisation of the real self'. It is thus a misunderstanding of the idea of self-mastery to assume (as does Carter (1999), p. 148) that it can be equated with the idea of internal constraints on liberty.
14 Although Berlin (2002) mentions Hegel's positive theory of freedom (p. 196), he refers more specifically to the British Idealists (p. 194n) and singles out Green (pp. 180 n, 196) as well as Bradley and Bosanquet (p. 196).
15 Bosanquet (1910), p. 124.
16 Ibid., p. 134.
17 Ibid., p. 136.
18 See ibid., pp. 125, 127, 141 and cf. Berlin (2002), pp. 179, 180, 204.
19 Nicholson (1990), p. 199 convincingly argues (against the interpretation in Hobhouse, 1918) that 'Bosanquet is repeating Green's ideas with only a little reworking and extension of them'.
20 See, for example, Green (1991), p. 21 and the discussion in Roberts (1984), pp. 251–2.
21 Green (1986), pp. 228–9.
22 Ibid., p. 240.
23 Ibid., p. 241.
24 Ibid., p. 242.
25 Hobhouse (1918), p. 6. On Hobhouse's view of Green and Bosanquet see Collini (1979), pp. 66, 142–3 and the valuable chapter in Bellamy (1992), pp. 9–57.
26 See Popper (1995), pp. 257–310. (Popper's study originally appeared in 1945.)
27 Berlin (2002), p. 212.
28 Here I am indebted to Baldwin (1984).
29 Berlin's clearest statement of this distinction occurs in the Introduction to the revised edition of his 'Two Concepts' essay. See Berlin (2002), p. 35, where he speaks of negative liberty as 'opportunity for action' by contrast with the positive idea of liberty as 'action itself'. Geuss (1995), pp. 97–8 helpfully discriminates between two different understandings of liberty as self-realisation: (1) I am free to the extent that my actions most fully realise my purposes; (2) I am free to the extent that I am able to recognise myself in the actions I perform. As Geuss observes, (2) is very hard to grasp, and Berlin confines himself to (1).
30 A point powerfully brought out in Taylor (1979), pp. 180–3.
31 For an analysis of Arendt's view of freedom as citizenship see Beiner (1984).
32 Arendt (1968); pp. 149, 151.
33 Taylor (1979), p. 175. On Taylor as a critic of Berlin see the valuable discussion in Spitz (1995), pp. 106–21.
34 Berlin (2002), pp. 178–81.
35 For convincing arguments to this effect see Macfarlane (1966), Taylor (1979), Swift (2001), pp. 77–87.
36 See Berlin (2002), pp. 32, his final and perhaps most considered definition. Gray (1995), pp. 15–16 lays particular emphasis on the fact that, according to this account, the agent who is said to be at liberty is always someone whose choice among options is unimpeded by others. This leads him to relate Berlin's analysis to that of Benn and Weinstein (1971), who likewise treat liberty as the non-restriction of options, by contrast with the narrower idea of being able to choose between alternatives.
37 Berlin (2002), p. 170.
38 For references to some of these contrasting accounts see below, nn. 45 and 46.
39 Berlin (2002), p. 169. Italics added.
40 Ibid.
41 Hobbes (1996), ch. 21, p. 146 offers a strong statement of this commitment when he claims that there is no difference between saying of the body of a man while imprisoned, and of a body of water while 'kept in by banks', that they are 'not at Liberty'. For a recent endorsement see Parent (1974), p. 149, from whom I take the example of being rendered unfree by a blizzard.
42 Hobbes (1996), ch. 21, p. 146.
43 Hobbes (1996), ch. 6, p. 44. This Hobbesian point is excellently brought out in Swanton (1992), pp. 58–60, 91–5. Benn and Weinstein (1971) defend a strong version of this

commitment when they claim that it makes sense to speak of an agent as free to pursue a given option only if the option itself is a possible object of reasonable choice.

44 Hobbes (1996), ch. 21, p. 146.

45 For an analysis along exactly these lines, arguing that a person who is crippled [*sic*] is nevertheless free to dance, see Gert (1972) and cf. the similar analysis in Oppenheim (1981), pp. 82–8.

46 See, for example, van Parijs (1995), Swift (2001), pp. 55–9 and the discussion in Pettit (1997), p. 76 and note. It might seem that Sen, in his classic discussion of freedom and development, also agrees that to lack power is to lack liberty. See, for example, Sen (1999), pp. 15, 20, 24. But in the examples he considers Sen is always concerned with people who have in fact been disempowered by identifiable agencies, and the moral force of his argument stems from his account of how their freedom can be enlarged by empowering them. Furthermore, one of Sen's great achievements has been to show that, even where it may appear obvious that certain people simply lack power, it frequently turns out on closer analysis that they have in fact been disempowered by a failure to remedy conditions that could easily have been remedied.

47 Berlin (2002), p. 170 and note.

48 Hobbes (1996), ch. 14, p. 91 and ch. 21, p. 145. I have further discussed Hobbes's theory of liberty in Skinner (2002b), pp. 209–37.

49 Berlin (2002), pp. 32–3.

50 Hobbes (1969), p. 26.

51 Sidgwick (1897). pp. 45–7 refers to Hobbes and follows his argument with particular closeness. It goes without saying, however, that a full exploration of this tradition of thought would need to take account of the fact that these thinkers likewise make use of the neo-Hobbesian theory for their own polemical purposes.

52 Special thanks to Ingmar Persson for pressing me to emphasise that it is not the mere fact of our dependence, but this fact combined with our awareness of it, that has the effect of restricting our liberty.

53 Note the implicit definition here of arbitrariness. A power is arbitrary if the person wielding it is capable of interfering with others, with impunity, solely on the basis of his or her own *arbitrium* or will, and hence with no obligation to take into account the interests of those subject to the interference.

54 Bracton (1968–77), vol. 2, p. 30: '*Quid est servitus*. Est quidem servitus … qua quis dominio alieno … subicitur.'

55 This is the title found in the earliest extant manuscript. See Cambridge University Library MS Mm. v. 2, fos. 2–77, at fo. 2^{r}.

56 Mommsen and Krueger (eds.) (1985), I. V. 3. 35: 'Summa itaque de iure personarum divisio haec est, quod omnes homines aut liberi sunt aut servi'. (Note that, in this and subsequent quotations from the *Digest*, I have made my own translations.)

57 Ibid., I. V. 4. 35: 'Servitus est constitutio iuris gentium, qua quis dominio alieno contra naturam subicitur'.

58 Ibid., I. VI. 1. 36: 'Some persons are in their own power, some are subject to the power of others, such as slaves, who are in the power of their masters'. ['quaedam personae sui iuris sunt, quaedam alieno iuri subiectae sunt … in potestate sunt servi dominorum …']

59 Berlin (2002), p. 33 maintains that we find no clear formulation of the concept of negative liberty in the ancient world. Perhaps there was no concept of liberty as non-interference, and perhaps there was no concept of a right. As my quotations show, however, there was undoubtedly a clear (and immensely influential) concept of negative liberty as absence of dependence.

60 See Wirszubski 1968, pp. 1–30.

61 See Tacitus (1591) and Tacitus (1598) and cf. Peltonen (1995), pp. 124–35 on these translations and their influence.

62 See Livy (1600) and on Holland's translation see Peltonen (1995), pp. 135–6.

63 Sallust (1608).

64 Livy (1600), p. 28.

65 Livy (1600), p. 907.

66 Gardiner (1906), pp. 66, 67.

67 Ibid., p. 69.

68 Cambridge University Library MS Ii. 5. 32, fos. 218^{r}–221^{v}: 'Mr Littletons Argument concerning the personall libertye of the Subject', a speech delivered on 4 April 1628. Quotations from fos. 218^{r-v} and 221^{v}.

69 Johnson et al. (eds.) (1977a), p. 149.

70 Ibid., pp. 189, 208.

71 Ibid. (1977b), p. 6.

72 Ibid., p. 269.

73 Foster (1966), II, p. 83; cf. Sommerville (1999), p. 97.

74 Ibid., II, p. 108.

75 Foster (1966), II. p. 196. For an analysis of Hedley's speech see Peltonen (1995), pp. 220–8.

76 Ibid., II, p. 192.

77 Johnson et al. (eds.) (1977a), p. 66.

78 For the attribution, and an account of the context in which this tract appeared, see Mendle (1995), pp. 32–50.

79 [Parker] (1999), vol. 1, p. 98.

80 Ibid., pp. 110, 112.

81 Ibid., p. 108.

82 Ibid., p. 109.

83 For the attribution, and an account of the context in which this tract appeared, see Mendle (1995), pp. 70–89.

84 [Parker] (1933), pp. 175–6.

85 Ibid., pp. 182–3.

86 Ibid., p. 187.

87 [Parker] (1933), pp. 209–10.

88 Charles I (1999), p. 167.

89 [Parker] (1933), p. 192.

90 Ibid., p. 192.

91 It is already adumbrated, for example, in the parliamentary Remonstrance of 26 May 1642. See Husbands *et al*. (1643); pp. 263–4.

92 On the repeated contrast in these tracts between freedom and national servitude see Skinner (2002a); pp. 338–42.
93 *Reasons* (1642), p. 14.
94 Husbands *et al*. (1643), p. 509.
95 *Charge* (1649), pp. 3–4.
96 Gardiner (ed.) (1906), p. 385.
97 For the detailed evidence suggesting that Hobbes began writing *Leviathan* only in the course of 1649 see Skinner (2002b), pp. 15–20.
98 See Pettit (1997) and Pettit (2001). While Pettit (1997) was his first full-scale presentation of the case, it had been preceded by numerous important articles. For a list see Pettit (1997), pp. 315–16.
99 See Pettit (1997), pp. 19, 41. A further question is whether the idea of freedom as non-domination (which I assume to be more or less equivalent to absence of dependence) is a strictly negative concept of liberty. Pettit (1997), p. 51 suggests that it may embody positive as well as negative elements. But this commitment appears to depend on treating positive liberty as an ideal of autonomy rather than self-perfection. As I have already tried to make clear in Skinner (1998), my own conviction is that the concept is a wholly negative one. But for further doubts see Woolcock (1998), p. 47 and Brown (2001).
100 Berlin (2002), p. 200.
101 Ibid., p. 204.
102 Ibid., pp. 200, 204.
103 Ibid., p. 204.
104 Ibid., p. 204. The formulation in Berlin (1969), p. 158 is slightly different.
105 If we are to speak of dependence as a source or form of constraint, it cannot be the case that we *know* that our absolute ruler will never in fact interfere. For in that case we are not under any constraint. This is not to say, however, that the probability of interference must rise above a certain level for liberty to be constrained. If there is the slightest probability of interference, we are under some corresponding pressure and our liberty will to that degree be constrained. For those who like formulae, it could perhaps be said that the pressure equals the probability of interference multiplied by its anticipated degree of harmfulness.
106 Gray (1984). p. 327 rightly stresses Berlin's interest in 'the conception of social freedom as possessing a certain social status', but adds that this conception 'seems hard, if not impossible, to accommodate within MacCallum's triadic analysis'. It is perhaps worth underlining that, as my own account makes clear, there is no difficulty about this accommodation. The liberty enjoyed by citizens of free states, by contrast with slaves, is that citizens are free *from* the constraint of dependence *to* pursue their own chosen ends.
107 It is important to register, however, that by no means all contemporary theorists of liberty have been willing to grant that coercion limits liberty. The contention in Hobbes (1996), p. 146 to the effect that 'Feare, and Liberty are consistent' has been echoed and developed by a number of recent writers. See, for example, Parent (1974). Steiner (1974–5), Taylor (1982), pp. 142–8 and the discussion in Swanton (1992), pp. 67–9.
108 John Milton, for example, closely paraphrases it in Milton (1991), p. 3, puts it on the title-page of Milton (1962) and quotes it in Milton (1962), p. 501.
109 See also Tacitus (1591), p. 256: 'the manhood and fierce courage of the subject pleaseth not much the jelous Soverayne'.
110 Tacitus (1591), p. 2.
111 Tacitus (1598), p. 217.
112 Sallust (1608), p. 17 [*recte* p. 7].
113 Tacitus (1598), p. 84.
114 Ibid., p. 139.
115 Ibid., p. 125.
116 Tacitus (1598), p. 3.
117 Sallust (1608), p. 29.
118 Tacitus (1591), p. 51.
119 Foster (ed.) (1966), pp. 194–5.
120 [Parker] (1933), p. 168.
121 Carter (1999), p. 237 claims that this phrase, which he takes from Pettit (1993), offers 'an interesting conceptual clarification' of my own view of negative liberty. As I argue above, however, it appears to go with the very theory of negative liberty I reject. It needs to be stressed, moreover, that Pettit himself has abandoned this formula in his recent work. He now prefers to contrast liberty as non-interference with liberty as non-domination. See Pettit (1997), pp. 21, 41 and Pettit (2001), pp. 132–44. I have been much influenced by this shift in his thinking, which aligns his theory closely with my own account (and that of my ancient and early-modern authorities) of the predicament of living in dependence on the power of another.
122 Carter (1999), p. 239.
123 Ibid., pp. 238–9. For the same contention see Patten (1996), p. 29. Patten's article offers some helpful criticisms of my earlier work on this issue. As I note in Skinner (1998), p. 70 n., however, I have since changed my mind. I am no longer arguing simply about the conditions necessary for maximising negative liberty, but about how to construe the concept itself.
124 Carter (1999), p. 239. See also Ferejohn (2001), esp. pp. 85–6 for the related objection, interestingly developed as a critique of Pettit's analysis of non-domination, that this account produces an analysis not of liberty but merely of security, a distinct and more equivocal value.
125 I deliberately speak of a rival theory of liberty here, rather than following Carter in speaking of a rival conception. It has become usual to follow John Rawls (as Carter is here doing) in distinguishing between different *concepts* and

different *conceptions* (of liberty, justice, and so forth). I am not wholly clear, however, what difference this distinction is supposed to mark, and for me it is in any case enough to say that I have isolated a theory of negative liberty at once different from – and indeed a rival to – the theory that liberty consists in absence of interference.

126 Patten (1996), pp. 27, 36.

127 See, for example, Swanton (1992), p. 124, denying that autonomy is limited by lack of independence.

128 See Plamenatz (1938), pp. 62–81, 89–97 and Prichard (1949) (reprinting work done in the 1930s), pp. 54–86, 120–8.

129 Lindsay (1941), p. ix.

130 Berlin (2002), pp. 178–81, 191–200.

131 Ibid., p. 198.

132 Ibid., pp. 190, 198.

133 Ibid., p. 216.

134 Ibid., p. 54.

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29

Libertarian Paternalism

Richard H. Thaler and Cass R. Sunstein

Many economists are libertarians and consider the term "paternalistic" to be derogatory. Most would think that the phrase libertarian paternalism is an oxymoron. The modest goal of this essay is to encourage economists to rethink their views on paternalism. We believe that the anti-paternalistic fervor expressed by many economists is based on a combination of a false assumption and at least two misconceptions. The false assumption is that people always (usually?) make choices that are in their best interest. This claim is either tautological, and therefore uninteresting, or testable. We claim that it is testable and false – indeed, obviously false.

The first misconception is that there are viable alternatives to paternalism. In many situations, some organization or agent *must* make a choice that will affect the choices of some other people. The point applies to both private and public actors. Consider the problem facing the director of a company cafeteria who discovers that the order in which food is arranged influences the choices people make. To simplify, consider three alternative strategies: (1) she could make choices that she thinks would make the customers best off; (2) she could make choices at random; or (3) she could maliciously choose those items that she thinks would make the customers as obese as possible. Option 1 appears to be paternalistic, which it is, but would anyone advocate options 2 or 3?

The second misconception is that paternalism always involves coercion. As the cafeteria example illustrates, the choice of which order to present food items does not coerce anyone to do anything, yet one might prefer some orders to others on paternalistic grounds. Would many object to putting the fruit before the desserts at an elementary school cafeteria if the outcome were to increase the consumption ratio of apples to Twinkies? Is this question fundamentally different if the customers are adults? If no coercion is involved, we think that some types of paternalism should be acceptable to even the most ardent libertarian. We call such actions *libertarian paternalism*.

In our understanding, a policy counts as "paternalistic" if it is selected with the goal of influencing the choices of affected parties in a way that will make those parties better off. We intend "better off" to be measured as objectively as possible, and we clearly do not always equate revealed preference with welfare. That is, we emphasize the possibility that in some cases individuals make inferior choices, choices that they would change if they had complete information, unlimited cognitive abilities, and no lack of willpower. Once it is understood that some organizational decisions are inevitable, that a form of paternalism cannot be avoided, and that the alternatives to paternalism (such as choosing options to

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make people sick, obese, or generally worse off) are unattractive, we can abandon the less interesting question of whether to be paternalistic or not and turn to the more constructive question of how to choose among paternalistic options.[1]

I Are Choices Rational?

The presumption that individual choices should be free from interference is usually based on the assumption that people do a good job of making choices, or at least that they do a far better job than third parties could do. As far as we can tell, there is little empirical support for this claim. Research by psychologists and economists over the past three decades has raised questions about the rationality of the judgments and decisions that individuals make. People do not exhibit rational expectations, fail to make forecasts that are consistent with Bayes' rule, use heuristics that lead them to make systematic blunders, exhibit preference reversals (that is, they prefer A to B *and* B to A) and make different choices depending on the wording of the problem (for many examples, see the two recent collections of papers by Daniel Kahneman and Amos Tversky [2000] and by Thomas Gilovich et al. [2002]). Furthermore, in the context of intertemporal choice, people exhibit dynamic inconsistency, valuing present consumption much more than future consumption. In other words, people have self-control problems (see the other papers in this session [James Choi et al., 2003b; Ted O'Donoghue and Matthew Rabin, 2003] for details and references).

Many economists are skeptical of some of these findings, thinking that people may do a better job of choosing in the "real world" than they do in the laboratory. However, studies of actual choices for high stakes reveal many of the same problems. For example, the Surgeon General reports that 61 percent of Americans are either overweight or obese. Given the adverse effects obesity has on health, it is hard to claim that Americans are eating optimal diets.

Another illustration comes from the domain of savings behavior. Shlomo Benartzi and Thaler (2002) investigate how much investors like the portfolios they have selected in their defined-contribution savings plans. Employees volunteered to share their portfolio choices with the investigators (by bringing a copy of their most recent statement to the lab). They were then shown the probability distributions of expected retirement income for three investment portfolios just labeled A, B, and C. Unbeknownst to the subjects, the three portfolios were their own and portfolios mimicking the average and median choices of their fellow employees. The distributions of expected returns were computed using the software of Financial Engines, the financial information company founded by William Sharpe. On average, the subjects rated the average portfolio equally with their own portfolio, and they judged the median portfolio to be significantly more attractive than their own. Indeed, only 20 percent of the subjects preferred their own portfolio to the median portfolio. Apparently, people do not gain much by choosing investment portfolios for themselves.

II Is Paternalism Inevitable?

As the cafeteria line example discussed above illustrates, planners are forced to make some design choices. A simple and important example is the selection of a "default option" to determine what happens if an agent fails to choose for himself. In a fully rational world such design choices would have little effect (at least in high-stakes situations) because agents would simply choose the best option for them regardless of the default. However, numerous experiments illustrate that there is a very strong "status quo" bias (see William Samuelson and Richard Zeckhauser, 1988; Kahneman et al., 1991). The existing arrangement, whether set out by private institutions or by government, tends to stick.

One illustration of this phenomenon comes from studies of automatic enrollment in 401 (k) employee savings plans. Most 401(k) plans use an opt-in design. When employees first become eligible to participate in the 401(k) plan, they receive some plan information and an enrollment form that must be completed in order to join. Under the alternative of automatic enrollment, employees receive the same information but are told that unless they opt out, they will be enrolled in the plan (with some default options for savings rates and asset allocation). In companies that offer a "match" (the employer matches the employee's contributions according to some formula, often a 50-percent match up to some cap), most employees eventually do join the plan, but enrollments occur much sooner under automatic enrollment. For example, Brigitte Madrian and Dennis

Shea (2001) found that initial enrollments jumped from 49 percent to 86 percent, and Choi et al. (2002) found similar results for other companies.

Should the adoption of automatic enrollment be considered paternalistic? And, if so, should it therefore be seen as a kind of officious meddling with employee preferences? We answer these questions yes and no respectively. If the employer thinks (correctly, we believe) that most employees would prefer to join the 401 (k) plan if they took the time to think about it and did not lose the enrollment form, then by choosing automatic enrollment they are acting paternalistically. They are attempting to steer employees' choices in directions that will promote employees' welfare. But since no one is forced to do anything, we think this steering should be considered unobjectionable to libertarians. The employer must choose some set of rules, and either plan affects employees' choices. No law of nature says that, in the absence of an affirmative election by employees, zero percent of earnings will go into a retirement plan. Because both plans alter choices, neither one can be said, more than the other, to count as a form of objectionable meddling.

Quick-minded readers might be tempted to think that there is a way out of this dilemma. Employers could avoid choosing a default if they *required* employees to make a choice, either in or out. But some thought reveals that this is not at all a way out of the dilemma; rather, it is simply another option among many that the employer can elect. In fact, Choi et al. (2003a) find that this rule increases enrollments (relative to the opt-in rule) though by not as much as automatic enrollment. Furthermore, the very requirement that employees make a choice has a paternalistic element. Many employees do not want to have to make a choice (and would choose not to have to do so). Should employers really force them to choose?

Why, exactly, does the setting of defaults have such large effects? With respect to savings, the designated default plan apparently carries a certain legitimacy for many employees, perhaps because it seems to have resulted from some conscious thought about what makes most sense for most people. But there is a separate explanation, involving inertia. For any employee, a change from any status quo entails time and effort, and many people seem to prefer to avoid both of these, especially if they are prone to procrastination. When default rules are "sticky" and affect choices as a result, inertia might be the major reason.

For present purposes, the choice among these various explanations does not much matter. The point is only that paternalism, in the form of effects on individual choices, is often unavoidable. When paternalism seems absent, it is usually because the starting point appears so natural and obvious that its preference-shaping effects are invisible to most observers. But those effects are nonetheless there. Of course, it is usually good not to block choices, and we do not mean to defend non-libertarian paternalism here. But in an important respect, the anti-paternalistic position is incoherent.

III Beyond the Inevitable (but Still Libertarian)

The inevitability of paternalism is most clear when the planner has to choose default rules. It is reasonable to ask whether the planner should go beyond the inevitable. Take the cafeteria example discussed above. Putting the fruit before the desserts is a fairly mild intervention. A more intrusive step would be to place the desserts in another location altogether, so that diners have to get up and get a dessert after they have finished the rest of their meal. This step raises the transactions costs of eating dessert, and according to a standard economic analysis the proposal is unattractive: it seems to make dessert-eaters worse off and no one better off. But once self-control costs are incorporated, we can see that some diners would prefer this arrangement, namely, those who would eat a dessert if it were put in front of them but would resist temptation if given a little help. To the extent that the dessert location is not hard to find, and no choice is forbidden, this approach meets libertarian muster.

In the domain of employee savings, Thaler and Benartzi (2004) have proposed a method of increasing contributions to 401 (k) plans that also meets the libertarian test. Under this plan, called Save More Tomorrow, employees are invited to sign up for a program in which their contributions to the savings plan are increased annually whenever they get a raise. Once employees join the plan, they stay in until they opt out or reach the maximum savings rate in the plan. In the first company to use this plan, the employees who joined increased their savings rates from 3.5 percent to 11.6 percent in a little over two years (three raises). Very few of the employees who join the plan drop out. This is successful libertarian paternalism in action.

IV How to Choose: The Toolbox of the Libertarian Paternalist

How should sensible planners (a category we mean to include anyone who must design plans for others, from human-resource directors to bureaucrats to kings) choose among possible systems, given that some choice is necessary? We suggest two approaches to this problem.

If feasible, a comparison of possible rules should be done using a form of cost–benefit analysis. The goal of a cost–benefit study would be to measure the full ramifications of any design choice. To illustrate, take the example of automatic enrollment. Under automatic enrollment some employees will join the plan who otherwise would not. Presumably, some are made better off (especially if there is an employer match), but some may be made worse off (e.g., those who are highly liquidity-constrained). If the issue were just enrollment, we would guess that the gains would exceed the losses. We base this guess partly on revealed choices. Most employees do join the plan eventually, and very few who are automatically enrolled opt out when they figure out what has happened to them. We also judge that the costs of having too little saved up for retirement are typically greater than the costs of having saved too much.

In many cases, however, the planner will be unable to make a direct inquiry into welfare, either because too little information is available or because the costs of doing the analysis are not warranted. The committed anti-paternalist might say, in such cases, that people should simply be permitted to choose as they see fit. We hope that we have said enough to show why this response is unhelpful. What people choose often depends on the starting point, and hence the starting point cannot be selected by asking what people choose. In these circumstances, the libertarian paternalist would seek indirect proxies for welfare: methods that test whether one or another approach is welfare-promoting without relying on unreliable guesswork about that question. We suggest three possible methods.

First, the libertarian paternalist might select the approach *that the majority would choose if explicit choices were required and revealed*. Useful though it is, this market-mimicking approach raises its own problems. Perhaps the majority's choices would be insufficiently informed. Perhaps those choices, in fact, would not promote the majority's welfare. Al least as a presumption, however, it makes sense to follow those choices if the planner knows what they would be. A deeper problem is that the majority's choices might themselves be a function of the starting point or the default rule. If so, the problem of circularity dooms the market-mimicking approach. But in some cases, at least, the majority is likely to go one way or the other regardless of the starting point; and to that extent, the market-mimicking strategy seems quite workable.

Second, the libertarian paternalist might select the approach *that would force people to make their choices explicit*. This approach might be chosen if the market-mimicking strategy fails, either because of the circularity problem or because the planner does not know which approach would in fact be chosen by the majority. We have seen the possibility of forced choices in the context of retirement plans; it would be easy to find other examples. Here too, however, there is a risk that the choices that are actually elicited will be inadequately informed or will not promote welfare. In the case of retirement plans, for example, forced choices have been found to produce higher participation rates than requiring opt-ins, but lower rates than requiring opt-outs. If it is likely that automatic enrollment is welfare-promoting, perhaps automatic enrollment should be preferred over forced choices. The only suggestion is that, where the social planner is unsure how to handle the welfare question, he might devise a strategy that requires people to choose.

Third, the libertarian paternalist might select the approach *that minimizes the number of opt-outs*. For example, very few employees opt out of the 401 (k) plan when they are automatically enrolled, though many opt in under the standard enrollment procedure. This is an *ex post* inquiry into people's preferences, in contrast to the *ex ante* approach favored by the market-mimicking strategy. With those numbers, there is reason to think that automatic enrollment is better, if only because more people are sufficiently satisfied to leave it in place.

V Conclusion

Our goal here has been to defend libertarian paternalism, an approach that preserves freedom of choice but that authorizes both private and public institutions to steer people in directions that will promote their welfare. Some kind of paternalism is likely whenever such institutions set out arrangements that will prevail unless people affirmatively choose otherwise. In these circumstances, the goal should be to avoid random, arbitrary, or harmful effects and to produce a situation that is likely to promote people's welfare, suitably defined.

Note

1 Readers interested in this topic should also consult Colin Camerer et al. (2001) for an illuminating discussion of related issues. That paper shares with the papers in this session the common goal of devising policies that help some agents who are making some mistake, while minimizing the costs imposed on others.

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30

Political Liberalism and Religion: On Separation and Establishment

Cécile Laborde

The question of the proper place of religion in the liberal state has gained increasing prominence in Rawlsian political philosophy. In *A Theory of Justice*, Rawls posited that religious liberty was the most basic of the basic liberties and, in *Political Liberalism*, he set out to show that sincere religious belief was not incompatible with principled commitment to the liberal state.[1] Should, however, the liberal state be a state of separation (of state and religion) or of recognition and establishment (of religion by the state)? On this matter, political liberals disagree. This article seeks to explain the nature of this disagreement. I first show that political liberalism, as a theory of justice, is *inconclusive* about the public place of religion. Both separation and establishment (or, more plausibly, a combination of the two) can theoretically meet the demands of liberal justice. I then turn to the core issue of the separation–establishment debate, which asks whether the liberal state can legitimately attach itself to religious symbols. I suggest that (what I call) 'orthodox' political liberalism is *indeterminate* about the symbolic dimensions of the public place of religion. By contrast, a citizenship-centred, 'republican' conception of political liberalism decisively rules out symbolic establishment. Political liberal defences of the separation of church and state, such as Martha Nussbaum's recent eulogy of US Establishment Clause jurisprudence, implicitly rely on such a republican, citizenship-centred conception of political liberalism.[2] The article sets out such a conception, and highlights the role it plays in arguments about the public place of religion.

I Political Liberalism, Public Reasons and The Separation-Establishment Debate

What, exactly, can political liberalism tell us about the separation–establishment debate? To clarify the issues at stake, let me begin by considering four ideal-typical models of the public place of religion:

(A) *Militant Separation*: Inadequate protection of religious freedoms; official support and promotion of scepticism or atheism by the state; secularist anti-religious state.

(B) *Modest Separation*: Adequate protection of religious freedoms; no official support of religion(s) by the

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state; no public funding of religious education and no state aid to religious groups.

(C) *Modest Establishment*: Adequate protection of religious freedoms; official support of religion(s) by the state; public funding of religious education and state aid to religious groups.

(D) *Full Establishment*: Inadequate protection of religious freedoms; official support and promotion of religious orthodoxy by the state; theocratic anti-secular state.

(A) and (D) are incompatible with liberalism because, *ex definitionem*, they only offer inadequate protection to religious freedoms. In such regimes, the state would, for example, forbid adherence to certain religions, promote the truth of one religion, or make access to full citizenship dependent on religious belief or unbelief. Such regimes would be ruled out by liberal principles. The more difficult issue is whether liberal principles mandate modest separation (B) or modest establishment (C) both of which, *ex definitionem*, offer adequate protection to religious freedoms.[3] In recent years, political philosophers have disagreed on this point. Some have argued that liberalism – and in particular Rawlsian political liberalism – is incompatible with (even modest) establishment, and others that it is incompatible with (even modest) separation. Evidently, they cannot both be right. In the first section of the article, I argue that they are both wrong, for a similar reason. This is that while political liberalism can conclusively rule out (A) and (D), it cannot conclusively rule out (B) or (C), and is therefore potentially compatible with both (or any intermediary model).

Before I develop this argument, a preliminary clarification is in order. Why should political liberalism be taken as a *prima facie* plausible theoretical framework for conceptualising the public place of religion? First, political liberalism holds the promise of responding to what Rawls calls 'the fact of pluralism'.[4] It seeks to ground the legitimacy of the liberal state on its ability to justify its use of coercive power to all (reasonable) citizens under conditions of moral and religious pluralism. Thus political liberalism is a species of justificatory liberalism, which attempts to identify reasons that all citizens could reasonably accept (or could not reasonably reject).[5] These are called by Rawls *public* reasons: they must not be derived from (and be exclusively understandable from the perspective of) the diverse and conflicting comprehensive doctrines held by citizens. Thus a public reason is a reason that appeals to purely political, non-comprehensive values and ideals, which all citizens can be expected to endorse as part of the shared political conception of justice. Second, Rawls's more specific elaboration of this justificatory liberalism is primarily concerned with the relationship between religious belief and the liberal state. Drawing on the seventeenth- and eighteenth-century tradition of thought about religious conflict, Rawls argued that one of the most 'firmly held public convictions' in liberal society is that citizens have a basic interest in being able freely to endorse and pursue their own conceptions of the good. Not surprisingly, therefore, religious liberty is a paradigmatic liberal freedom – 'the most basic' of Rawls's basic liberties.[6] For if citizens were to deny equal religious liberty to all, they would misunderstand the moral value of religious conscience, and they would have to appeal to values and principles derived from their comprehensive doctrines (for example, the truth of one religion or the truth of atheism) that other citizens could reasonably reject. Given the centrality of religious belief to Rawls's political liberalism, and given the role played by public reason in the justification of the basic liberties, it can therefore be said, as a preliminary hypothesis, that the public place of religion archetypically falls under the 'constitutional essentials and matters of basic justice', which, according to Rawls, are to be subjected to the constraints of public reason.[7] Thus:

(PLR): The Political Liberal Argument about the Public Place of Religion

1. The public place of religion is a constitutional essential and a matter of basic justice.
2. Constitutional essentials and principles of justice must be justifiable to all citizens by appeal to public reasons.

When engaged in public reasoning about constitutional essentials and matters of justice, such as those concerning the public place of religion, citizens are under a moral obligation to draw on public reasons, that is, on reasons which do not appeal to the truth of controversial comprehensive doctrines. These doctrines can be theological (comprehensive and religious) or secularist (comprehensive and non-religious). If fundamental principles are to be justifiable to all reasonable citizens under conditions of pluralism, therefore, they cannot be derived from *either* theological *or* secularist conceptions of the good. Critics of establishment have concentrated and expanded on the former clause, and critics of separation have focused on the latter.

A The Argument for Separation: PLR(s)

The ideal of separation between church and state is seen by many as central to the liberal tradition.[8] Many liberals assume that religion is something which citizens should freely practice in private and social life, and which should not be the concern of the state. In the strongest version of the argument, the two clauses are interrelated: freedom of religion *requires* institutional separation between church and state. For example, it is a key tenet both of American and of French constitutional case-law that the principles of 'non-establishment' (church-state separation or *laïcité*) and 'free exercise' (religious liberty) are intimately connected.[9] How can this be justified? Consider a possible political liberal case for separation:

PLR(s): The Political Liberal Argument for Separation

(1) The public place of religion is a constitutional essential and a matter of basic justice.
(2) Constitutional essentials and principles of justice must be justified to all citizens by appeal to public reasons.
(3s) Establishment can only be justified by non-public, religious, reasons.
(4s) Therefore, establishment cannot be justified to all citizens.

The argument proceeds negatively, by showing that the reasons brought forward in favour of establishment do not meet the criteria of public reason. This is because they draw on the intrinsic value of one (or more) religion(s), or on the value of religion over non-religion, and to this extent violate what has been called the 'neutrality' requirement of liberalism.[10] Establishment, therefore, is a *prima facie* unjustifiable use of the state's coercive power. We find an exemplary exposition of this line of argument in the work of American philosopher Robert Audi. Although not a self-proclaimed political liberal, Audi is one author to have explicitly connected public reason, liberal values, and separation between religion and the state. So for my purposes here, the structure of Audi's argument closely mirrors that of political liberalism. Enquiring what kind of reasons can justifiably be invoked by citizens in public debate about the use of state coercion, Audi specifically singles out religious reasons as epistemically problematic. This is because they are not easily 'accessible' and 'intelligible' to citizens of a different faith or of no faith. Suitably 'secular' views are those 'whose normative force does not evidentially depend on the existence of God or on theological considerations, or on the pronouncements of a person or institution *qua* religious authority'.[11] State entanglement with religion cannot be justified through reasons accessible to all citizens. In particular, establishment would entail privileging one religion over others or – in the case of multi-faith establishment – privileging religion as such. Therefore the liberal state should be committed to what Audi calls 'institutional separation'.[12] It should be agnostic towards the truth of religion, and avoid any entanglement with its institutional expressions. Numerous, if less systematic, examples of this kind of reasoning can also be found in French writings about the constitutional value of *laïcité*.[13]

How are we to evaluate the argument for separation? As anticipated, I will argue that PLR(s) fails as a critique of modest establishment (C). Undeniably, PLR(s) succeeds as a critique of full establishment (D): a state which fails to respect the basic freedom of conscience of dissidents and non-believers will not pass the test of public reason. But it is unclear that a state of modest establishment would be decisively ruled out by the requirement of public justifiability. This is because (3s) does not hold: modest establishment *can* be justified by appeal to public reasons. A state can support religious activities and practices, not because it endorses and affirms the good that they pursue, but in the name of the public values of religious freedom or equality between citizens. As an illustration of the first case, consider prisoners and military personnel who, because they live in state-controlled, enclosed spaces, cannot exercise the religious liberties available to other citizens in freely-constituted civilian religious associations. Adequate protection of this personnel's freedom of conscience can create an obligation on the part of the state to provide and fund chaplaincy services (or equivalent) in such institutions – as is indeed the case in constitutionally separationist countries such as France and the United States.[14] As an illustration of the second case, consider private associations providing secular benefits (hospitals, adoption agencies, drug rehabilitation centres) that are considered legitimate recipients of public funds. Can there be good public reasons for excluding faith-based associations from such funding, or would such exclusion fall foul of the anti-discriminatory principle of egalitarian liberalism? Interestingly, here too, both French and American constitutional law have rejected the strong version of the separation thesis and conceded that the ban on the direct funding of religion does not forbid

state support for the non-religious (social or cultural) purposes of faith-based organisations.[15] So there can be good public reasons for state support of religion, in cases when such support furthers the public values of freedom of conscience and/or equality. A state of modest establishment may be justifiable in public reason, if adequate protection of freedom of religion is interpreted as requiring positive assistance by the state, or if equality between believers of different religions is interpreted as mandating even-handed support of all by the state. So, while a state of 'single-faith' establishment would be ruled out in public reason as being incompatible with equality, a state of 'multi-faith' establishment is compatible with political liberalism.[16] To conclude, mere appeal to public reasons is not sufficient to rule out establishment. The argument against separation suffers from a similar flaw, as the next section will show.

B The Argument for Establishment: PLR(e)

The political liberal argument against separation takes its inspiration from Rawls's insistence, in *Political Liberalism*, that secularist doctrines are on a par with religious doctrines: they are similarly 'comprehensive' and 'controversial', and violate the demand of public reason.[17] Thus, in his effort to show that the liberal state could be endorsed by religious citizens, Rawls excluded secularist views (comprehensive anti-religious views) as justificatory reasons. He even went further, by explicitly allowing that religious (and other comprehensive) views could be included in public debate under certain circumstances. This was in response to the worry that the demand that citizens only appeal to public reasoning was too burdensome for those citizens who lived such a 'religiously integrated existence'[18] that they could not separate their political commitments from their religious beliefs. Under what he called, respectively, the 'inclusive' and the 'wide' view of public reason, Rawls conceded that citizens could legitimately use religious language to condemn such evils as slavery, segregation, or war, since their views could have been expressed (in the first case) or could in due course be translated (in the second case) in terms of the public values of freedom and equality.[19] Rawls's revised interpretation of public reason, therefore, made significant concessions to the more inclusivist positions of his critics.[20]

What follows, in institutional terms, from this interpretation of Rawlsian political liberalism? Setting aside Rawls's own pronouncements on the value of the 'separation between church and state' (which in part reflects his endorsement of well-entrenched US constitutional values), a number of authors, mostly in Europe, have drawn on Rawlsian political liberal resources to criticise the separationist state and the rampant secularist philosophy that underpins it, especially in militantly *laïque* countries such as France.[21] Intriguingly, we could call the argument for separation PLR(s) the 'Franco-American' argument, and the argument for establishment PLR(e) the 'Anglo-European' argument. For PLR(e) can be said to formalise the public place of religion in countries such as the Netherlands, Denmark, Germany and the United Kingdom. Let me now spell it out more formally.

PLR(e): The Political Liberal Argument for Establishment

(1) The public place of religion is a constitutional essential and a matter of basic justice.
(2) Constitutional essentials and principles of justice must be justified to all citizens by appeal to public reasons.
(3e) Separation can only be justified by non-public, secularist, reasons.
(4e) Therefore, separation cannot be justified to all citizens.

On the 'Anglo-European' view, the separation of church and state is the institutional expression of the exclusion of religious belief from the public sphere, and of the secularist assumption that religions must have no place in public life and must be confined to the private sphere. Far from a common-ground judgement, which could be endorsed by all citizens, this amounts to the imposition of a substantively secularist philosophy on religious believers. A political liberal state – the argument continues – cannot be a separationist state because such a state is biased towards non-religious citizens.[22] How are we to address this critique? I suggest that, to be plausible, it must be based on at least one of three distinct claims about Rawlsian political liberalism, none of which is, on reflection, tenable.

The first claim is that separation can only be justified by non-public reasons and, in particular, *secularist* reasons – comprehensive and non-religious. Yet this is not correct: public reasons can be secular without being secularist. Although Rawls did not use this terminology, it is an implication of his conception of public reasons that they will be secular: non-religious yet non-comprehensive. For reasons to be relevantly public, it is a necessary (though, admittedly, not a sufficient) condition that

they be secular. This is because no religious reason can reasonably be considered as acceptable or accessible to all citizens.[23] Even in the cases where religious views are allowed in Rawlsian public debate (under the wide and the inclusive view of public reason), they must be translated into public reasons if they are to form the basis of any constitutional agreement. Neither religious nor secularist doctrines can ground the public, political conception of justice: the latter must, of necessity, be a secular, non-religious conception. It must, more generally, be non-comprehensive – in this case, broadly agnostic towards the truth of religion. The onus is on religious believers to explain why, in a society characterised by wide and profound ethical pluralism, their own conception of the legitimate basis of political authority should prevail.

Critics of separation might then retort – and this is the second claim – that the emphasis on secular reasoning places excessive strains of commitment onto religious believers. Whatever public justification is offered for separation is likely not to provide them with a good reason to endorse it. Yet Rawls pointed out that religious believers could find resources, *within their own comprehensive doctrines*, for endorsing the liberal state – this is what he called 'full individual justification'. He hoped for an 'overlapping consensus' (or what Audi calls a 'theo-ethical equilibrium') between liberal principles and religious ideals.[24] This suggests that the principle of separation itself, while publicly defended by appeal to purely secular reasons can, *in addition*, be privately endorsed by citizens for different comprehensive reasons – for example, by reference to the Christian injunction to 'render to Caesar the things that are Caesar's, and to God the things that are God's'. Therefore (3e) does not hold: separation can be *endorsed* from the perspective of religious doctrines, even though it must be publicly *justified* through public reasons, which are not secularist but secular.

But what of the third claim, that separation advantages non-religious over religious citizens, and is therefore not neutral between them? Even though the separationist state is not justified by appeal to secularist principles, atheists and agnostics are, in practice, more likely than devoted religious believers to flourish under it. Two responses are available to liberals. The first says that this misconstrues the kind of neutrality to which the political liberal state appeals. Political liberals are committed to neutrality *of grounds*, not neutrality *of consequence*.[25] Rawls himself admitted that the institutions and laws of the liberal state will likely have a corrosive effect on the integrity of religious existence,[26] yet insisted that what matters is the proper justification of laws, not their effects. A second, more conciliatory response is open to liberals, though. It would concede that the justification of institutional arrangements and laws should not be wholly insensitive to their differential impact. If a particular arrangement, albeit justified by appeal to a good public reason, has the effect of forcing people to act against their conscience, then justificatory liberals must accept that neutrality of justification requires attention to differential impact.[27] So, the argument that the principles of separation – 'no state aid to religious organisations', 'no public funding for religious education' – put religious citizens at a serious disadvantage, in a way that can plausibly be interpreted as violating basic freedom of conscience or civic equality, is admissible in public reason. Undoubtedly, there are cases where the state of modest separation (B) burdens free religious exercise, and when the burden is disproportionate, a case can be made for accommodation.[28] Still, accommodation differs from establishment insofar as it is an exception to a *prima facie* rule of no special support for religion by the state. A state of modest separation can accommodate certain religious demands, by introducing reasoned and limited exceptions to a generally justified principle of no support. Therefore, PLR(e) does not succeed in decisively ruling out modest separation.

I conclude that neither PLR(s) nor PLR(e) follow from PLR: modest separation, just as modest establishment, is compatible with political liberalism. In particular, as I have suggested, a state of modest establishment that takes seriously the principle of equality between citizens – multi-faith establishment – and a state of separation which takes seriously the demands of religious conscience – accommodationist separation – can both meet liberal desiderata.[29] So political liberalism is inconclusive about the public place of religion. While liberal philosophers can give us an indication of the kind of considerations that would be admissible in public reason, they cannot tell us, *in abstracto*, which are likely to be victorious. Is this a surprising finding? In the next section, I explain why it is not.

II Justice and Religion: The Inconclusiveness of Public Reason

Political liberalism, as a theory of justice, is *inconclusive* about the public place of religion. Inconclusiveness refers to the fact that citizens exercising public reason

may hold a range of competing reasonable views, none of which is decisive in the matter at hand.[30] Liberal public reason can accommodate a range of reasonable views about the public place of religion and can, more specifically, support (B), (C), and several intermediary models. So what PLR can establish, at most, is an agreement on constitutional essentials, which will be limited to generalities about what constitutes an 'adequate' protection of religious freedom (the state should not forbid adherence to certain religions, the state should not promote the truth of one religion, and so forth).[31] This rules out (A) and (D). But beyond that, citizens in a political liberal state can reasonably disagree about (B) and (C). As the previous section has established, it is not the case that the political liberal suspicion of 'untranslatable' religious arguments directly grounds the separationist state; nor is it the case that its non-comprehensive, anti-secularist basis directly justifies 'religion-friendly' establishment. There is no direct relationship of entailment between the normative reasons allowed in public debate and the public place of religion (the institutional framework of state-religion relations). A state can support religions without *ipso facto* affirming their truth; and a state can maintain a 'wall of separation' with religions without *ipso facto* endorsing secularist values. The political values of freedom of conscience, equality between citizens, and so forth, can be appealed to in support of either arrangement. This means that, even if the public place of religion is considered as a matter of *justice* (say, as an interpretation of the nature and scope of basic religious freedoms), the theory does not generate one rightful solution. This is the case in debates about whether the protection of religious freedoms requires the state to provide religious instruction in public schools; to fund faith-based charitable activities; to subsidize the religious education of children in private schools; or to allow religious believers to exempt themselves from the application of generally justified laws when these unreasonably burden their conscience. In deciding these complex questions, citizens will reasonably disagree about the relative importance of such fundamental values as freedom of religion and (more generally) of conscience, non-discrimination, equal opportunities, parents' and children's rights, 'compelling state interests' and so forth, in relation to the specific instances where state intervention (or abstention) in matters of religion has to be publicly justified in the particular society where the issue arises.

Political liberalism, then, is compatible with profound, protracted, yet reasonable disagreement, even about matters of justice. These disagreements will manifest themselves both *within* and *across* different political societies. As Micah Schwartzman has recently argued, 'although liberals have been reticent to accept it, … reasonable disagreement based on inconclusiveness is something to be expected within the normal politics of a liberal democratic society'.[32] He goes on to suggest that political liberalism is a dualist political theory. As a constitutionalist doctrine, political liberalism provides some content to public reason by conclusively justifying constitutional essentials and abstract principles of justice. As a democratic doctrine, it more modestly provides a framework for reasoned deliberations between citizens: a framework for the resolution of their disagreements about justice.[33] In addition, we can expect that citizens in differently situated societies will come to different conclusions about what justice requires in *their* societies. Different countries, depending on their circumstances, can legitimately opt for accommodationist separation (a state of separation that takes seriously the demands of conscience), or multi-faith establishment (a state of establishment which takes seriously the principle of equality between citizens of different faiths).

The inconclusiveness result is entailed by the meta-theoretical structure of political liberalism, and is supported by a number of remarks by Rawls himself. As early as in *A Theory of Justice*, Rawls introduced the idea that a full conception of justice could only be specified through a four-stage sequence, whereby citizens are provided with more and more relevant facts about their society before they choose a constitution. Rawls went on to stress that, as the stages become less abstract, the opportunity for indeterminacy grows, and he concluded that 'justice is to that extent likewise indeterminate. Institutions within the permitted range are equally just, meaning that they could be chosen: they are compatible with all the constraints of the theory'.[34] Furthermore, while he insisted, in *Political Liberalism*, that the content of public reason (in any given society) should be fixed, he conceded that it was not the job of the philosopher to fix it: 'political liberalism does not try to fix public reason once and for all, in the form of one favoured conception of justice'.[35] Even more significantly for our purposes, in a footnote to 'The idea of public reason revisited', Rawls also accepted the specific criticism, put to him by Kent Greenawalt, that such important matters as state aid to faith schools are not settled by agreement on First Amendment constitutional essentials, which can be subjected to differing interpretations.[36] A reasonable balance

of values, Rawls also conceded by reference to an early debate between James Madison and Patrick Henry, could theoretically be put forward in public reason to justify a state of establishment.[37] Therefore, Rawls accepted that public reason is compatible with B *and* C. The idea that different societies might legitimately endorse different conceptions of justice was further affirmed in *The Law of Peoples*.[38] While Rawls's primary concern there was to draw a distinction between 'liberal' and 'decent' societies,[39] he also accepted, *in passim*, that 'liberal societies may differ widely in many ways: for example, some are far more egalitarian than others'.[40] In sum, Rawls's political liberalism exhibits a dualist structure: on the one hand, it identifies broad conditions of constitutional legitimacy; and on the other, it allows for a high level of context-dependent political inconclusiveness, even about principles of justice.

The dualist structure of political liberalism is often overlooked, although it has important implications for the relationship between philosophical theorizing and democratic deliberation.[41] Yet an even more significant conclusion has emerged from the last two sections: when citizens are engaged in deliberations about the just place of religion in their institutions and policies, the choice facing them is unlikely to be a stark choice between two mutually exclusive alternatives of 'separation' and 'establishment'. As commentators on the US Establishment Clause have recently observed, what matters is not separation (or establishment) as such but, rather, the extent to which certain institutions and policies advance other ideals, such as state neutrality, or what Christopher Eisgruber and Lawrence Sager call 'equal liberty'.[42] Separation and establishment are defensible, not as ends in themselves, but only insofar as they protect or promote ideals of liberal justice. And as liberal justice requires sometimes less, and sometimes more, intervention of the state into religious affairs, just states are likely to exhibit a complex mix of separation-inspired and establishment-inspired policies. As far as justice is concerned, then, we must agree with Eisgruber and Sager that the 'wall of separation' between state and church is a misleading metaphor, when what matters is the justice of distributive arrangements according to principles such as that of equal liberty. Yet there is another dimension to the debate about the public place of religion, whose terms are better captured by the separation-establishment paradigm. It is the question of the legitimacy of state-promoted religious *symbols*, to which I shall now turn.

III Religious Symbols: The Indeterminacy of Public Reason

So far, I have assumed that the question of the public place of religion is to be subjected to public reason because (as *per* (1) in the political liberal argument set out above) it concerns a 'constitutional essential and matter of basic justice'. But is (1) true? Are all disagreements about the public place of religion about principles of Rawlsian *justice*? Justice, according to Rawls, applies to the basic structure of society and concerns the distribution of rights and opportunities through which the coercive power of the state is exercised in accordance with principles of freedom and equality.[43] As Brian Barry and Thomas Scanlon have pointed out, this suggests that while the scriptures of public reasoning must apply to such crucial matters as tax and property law, they do not apply to areas such as cultural policy, where the action of the state is not coercive.[44] Call this the orthodox Ralwsian view. Now, it should be clear that political controversies about establishment and separation are not all about the justification of state coercion and the levels of public funds that should be diverted towards religious activities, according to principles of justice. Consider the following features of modest establishment, which are routinely associated with model (C), yet do not seem to raise issues of justice on the orthodox view:

(i) The head of state is the head of the National Church (for example, England and Wales).
(ii) Non-mandatory school prayers are organised daily in state schools.
(iii) Religious symbols such as crucifixes are exhibited in public spaces (for example, Quebec's National Assembly).
(iv) State funerals (such as of heads of state) are organised by the Catholic Church (for example, France).
(v) Officials swear an oath or Pledge of Allegiance affirming religious belief (for example, USA).

The point of these examples is to isolate a class of cases which can plausibly be seen not to involve state coercion of the kind that orthodox Rawlsians worry about as a matter of justice. In the case of (i), it has been argued that Anglican establishment in England and Wales does not entail more than 'venial departures'[45] from the principle of fair treatment of all citizens: members of the established church are not substantively

advantaged over other citizens. In the case of (ii), schools do not forcibly inculcate the truth of religion, but merely expose children to religious faith and devotional practice in ways that cannot be said unfairly to infringe the religious conscience of dissenting children and parents, as participation in school prayer is not mandatory and therefore not coercive. In the case of (iii) and (iv), religious symbols and settings have often been emptied of their specifically religious significance, acting as reminders of national historical tradition rather than as doctrinal injunction. In the case of (v), pledges and oaths have an ecumenical, deistic nature, and religious references only provide added ceremonial solemnity to important official acts. These examples suggest that it is possible, in principle, to isolate a class of cases which go to the heart of the public place of religion and the separation-establishment debate, yet which do not concern liberal justice. These policies are not coercive; they involve too trivial amounts of taxation to raise significant issues about the fairness of public fund allocation; and they are compatible with the full exercise of religious rights by all citizens. Therefore, Daniel Brudney is essentially correct to suggest that what he calls 'non-coercive establishment' does not raise issues of (orthodox) Rawlsian justice.[46]

This is in contrast to other establishment policies – such as state funding of religious schools, the provision of religious instruction in public schools, and public subsidies towards faith-based initiatives – which affect fundamental principles such as freedom of conscience or equality between citizens, are coercive in the relevant sense, and raise issues of distributive justice. These matters should be decided in public reason (but, I showed, the theory of political liberalism is *inconclusive* about them). Turning now to non-coercive (or, as I prefer to call them, 'non-justice-based' or 'symbolic') instances of state recognition of religion, I suggest that orthodox political liberalism is *indeterminate* about them. So the claim is that while public reason is inconclusive – open-ended – about the justice-based dimensions of the public place of religion, it is indeterminate – silent – about its non-justice dimensions.[47] Public reason is indeterminate because these dimensions do not fall under its purview. Consider the following two variations of (B) and (C):

(B*) *Modest separation*: Adequate protection of religious freedoms; no official support of religion(s) by the state; no public funding of religious education and no state aid to religious groups, *unless justified by reference to basic principles of justice*.

(C*) *Modest establishment*: Adequate protection of religious freedoms; official support of religion(s) by the state; public funding of religious education and state aid to religious groups, *when this is neither justified nor prohibited by reference to basic principles of justice*.

Under (B*), the state maintains a wall of separation with religion, unless state intervention is justified by reference to principles of justice. Under (C*), the state supports religion even if this is not justified by appeal to principles of justice (though not in violation of them). *Ex hypothesis* both (B*) and (C*) are just states by orthodox political liberal standards. (B*) refuses, and (C*) accepts, the symbolic and non-justice-based recognition of religion. Both models formalise the intuition that there is a class of cases of state-religion relations which do not raise issues of justice. Citizens will, of course, reasonably disagree about which cases properly belong to that class – much of public debate on this issue will likely be on the subject of whether and which policies of establishment or separation infringe justice. But we can safely assume that non-justice-infringing cases exist, and are very commonly at the heart of political and legal controversies about the public place of religion. As (B*) and (C*) do not raise issues of justice, the constraints of public reason do not apply to them, and orthodox political liberalism is silent – indeterminate – about them. This means that citizens deliberating about (C*)-like cases are not constrained by the demands of public reason, and may legitimately appeal to non-public reasons, such as the specific beliefs held by the majority. Consequently, nothing in orthodox political liberalism prevents a religious majority from entrenching its symbols within the state, provided members of religious minorities are otherwise treated as free and equal citizens (according to principles of justice). A political liberal state can give symbolic preference to one religion – as long as the preference is purely symbolic. Likewise, nothing prevents a majority of religious citizens from entrenching religious symbols (of an ecumenical, deistic nature) within the state, provided that all others are otherwise treated as free and equal citizens. A political liberal state can attach itself to multi-faith religious symbols. Orthodox political liberalism is compatible with (C*): symbolic establishment is permissible within liberal distributive justice, because it does not directly affect it.

IV Religious Symbols: The Republican Political Liberal View

Some political liberals will likely find the conclusion of the last section unpalatable. For example, recent interpreters of the US Establishment Clause jurisprudence, such as Martha Nussbaum, have argued that a political liberal state should avoid the symbolic recognition of religion, insofar as it is committed to the ideal of equality. To make her case, however, Nussbaum draws on an interpretation of the US constitutional tradition which is far richer, and far less justice-centred, than the orthodox political liberal view implies. Drawing on the writings of founders such as James Madison and Roger Williams, she argues that establishment threatens 'a symbolic politics that acknowledge equality and does not create ranks and orders of citizens …: even if [non-adherents] are not coerced, the implication is that they exist at the sufferance of the dominant group, not as citizens of equal worth in their own right'.[48] 'What Madison saw … is that a failure of respect in the symbolic domain is like an insult, a slap in the face and, moreover, it is the sort of slap in the face that a noble gives to a vassal, one that both expresses and constitutes a hierarchy of ranks'.[49] It is precisely this hierarchical relation that has been powerfully described and captured in republican theorist Philip Pettit's interpretation of domination, as the subordinate position suffered by those who cannot look at others 'in the eye'.[50] Nussbaum draws an explicit connection between the political liberal ideal of equal respect, republican non-domination and modest separation when she writes, 'insofar as [modest separation] is a good idea, it is good because of the way it supports equal respect, preventing the public realm from establishing a religious doctrine that denigrates or marginalizes some group of citizens'.[51] The risk she warns against is that state-promoted religious symbols will contribute to the disparagement of minority members by imposing on them a second class status of symbolic citizenship.

What are the distinctive features of this *republican* interpretation of political liberalism, and how does it differ from orthodox political liberalism?[52] Under the orthodox political liberal interpretation of (2), only constitutional essentials and principles of justice are subjected to the constraints of public reasoning. In republican political liberalism, by contrast, the scope of public reason is construed broadly. It goes beyond the distribution of traditional primary goods such as income and education, to cover civic status, recognition and citizenship.[53] As a result, the republican political liberal view is more determinate *and* more conclusive than the orthodox view about the choice between (B*) and (C*). Under republican political liberalism, state-promoted religious symbols naturally fall under the purview of public reason *and* are problematic for the aim of including of all citizens within the state. The argument against (C*) would go as follows: 'it is true (as orthodox political liberals would insist) that symbolic establishment is not coercive, in the sense that it does not stop anyone from practising his or her religion or from living a fully secular life. But it nevertheless sends a message that some are not full members of the political community, that they cannot enter the public square on equal terms with others, and this will make it difficult for them fully to identify with their political institutions.' This argument – which paraphrases Nussbaum's – is acceptable in public reason, as it appeals not to comprehensive views about the good (or bad) of religion, but to political values. The relevant political values, however, are not directly derived from the justice-based principles of freedom of conscience or equality before the law. Rather, they appeal to a conception of citizenship which postulates that all citizens should be able not to feel alienated by their political institutions in light of their deepest beliefs, and that institutions should, consequently, be framed with that aim in mind.[54]

This points to a richer, republican account of the demands of political liberalism than the orthodox view canvassed above. This account – which we saw was implicitly present in Nussbaum's work – broadly follows two moves inherent in Rawls's political liberalism.[55] First, public reason is more *determinate* about state-promoted religious symbols because it covers not only distributive justice, but also questions of civic status, symbolic recognition and citizenship, insofar as these matter to the legitimacy and stability of the liberal state. The question of the stability of the just state was at the heart of Rawls's reformulation of a more *political* liberalism than the one canvassed in *A Theory of Justice*. Starting from a conception of the person as a citizen, Rawls sought to identify the kinds of dispositions and virtues which would make liberal states 'stable for the right reasons'.[56] Political liberal citizens have a strong and robust public identity, which helps them articulate, and abide by, mutually acceptable fair terms of cooperation. Interestingly, Rawls had no quarrel with the political ideals underpinning what he called 'classical republicanism' – the idea that the civic dispositions and the political virtues (the willingness to participate in political institutions and the ability to identify with them) are

essential to the maintenance of just institutions.[57] The political liberal theory of legitimacy requires such 'instrumental republicanism'[58] and the robust defence of citizenship that it entails. Insofar as state-promoted religious symbols affect individuals' sense of citizenship, and their ability to support their political institutions, they will come under the purview of public reason. Note, however, that the ideals of political legitimacy and citizenship by themselves do not support (B*) over (C*). That is because, if republican citizenship were only instrumental to the maintenance of just institutions, it would be sufficient that a majority of (but not all) citizens identify with their institutions. So, in a society where a majority of citizens are religiously-minded, a state of establishment (C*) could plausibly be defended as more legitimate, and more stable, than (B*).

We can resist this conclusion, however, by stressing the second dimension of republican political liberalism, namely, its egalitarianism. On this view, the egalitarian underpinnings of Rawlsian distributive justice extend, *a fortiori*, to Rawlsian conceptions of citizenship and legitimacy. For authors such as Joshua Cohen, Rawls's political liberalism implies a *democratic* society: a society where citizens see one another as equals and are treated as equals by the state.[59] Political institutions have a crucial role to play in entrenching and representing the *equal status* of citizens; and equal civic status requires not simply formally equal rights, but also some form of symbolic recognition (or at least absence of misrecognition) by the state. In *A Theory of Justice*, Rawls suggested that the 'social bases of self-respect' are one of the primary goods that should be distributed equally among citizens.[60] It is not enough for the state to offer a legal guarantee of equal rights and distributive fairness: it is also important that, in its non-coercive, non-legal actions, it treats all citizens with appropriate respect and consideration. It is precisely this kind of reasoning that underpins US liberals' egalitarian interpretation of the Establishment Clause. It appears in Justice O'Connor's articulation of the 'Endorsement Test' – an acknowledged influence on Nussbaum's defence of the symbolic neutrality of the state. The test postulates that the state's symbolic entanglement with religion is wrong insofar as it undermines the equal civic status of citizens.[61] If a state attaches itself too closely to the symbols of one or more religion(s), this is equivalent (in the eyes of dissidents) to the state 'endorsing' religion in ways that deny civic recognition to non-adherents to the faith. It would 'send a message to non-adherents that they are outsiders, nor full members of the political community, and an accompanying message to adherents that they are insiders, favoured members of the political community …'[62] So, even though (C*) does not endorse religion in the strict sense (it does not affirm its truth), it nonetheless undermines the ideal of a political community of equals by privileging certain sections of the citizenry, albeit symbolically, over others. In this way, the state's symbolic acts and speech affect the status of citizenship, as they enhance or diminish the sense of self-respect that citizens derive from being able to identify with their political institutions.[63]

In sum, republican political liberalism does not merely expand the scope of public reason to include within it questions of legitimacy and citizenship *as well as* justice. Rather, it expands the notion of justice itself – the subject of public reason – and asserts that justice is not simply about the justification of state coercion and the distribution of basic rights and opportunities, but that it is also about the fair distribution of more intangible forms of social recognition – the Rawlsian 'social bases of self-respect'. The separation-establishment debate is one – but not the only – area of public life to which this hitherto under-developed republican dimension of Rawls's theory can be fruitfully applied. It helps us understand why, on what I called the 'Franco-American' view, the symbolic establishment of religion is wrong, even if – as advocates of the 'Anglo-European' view point out – it does not violate any religious freedom.

Notes

1 John Rawls, *A Theory of Justice*, rev. edn. (Oxford: Oxford University Press, 1972), p. 206; *Political Liberalism*, 2nd edn. (New York: Columbia University Press, 1996).

2 Martha Nussbaum, *Liberty of Conscience* (New York: Basic Books, 2008).

3 Two remarks on terminology are necessary here. First, for the purposes of this article, I do not specify further what an 'adequate' and an 'inadequate' protection of religious freedoms would be. I simply need to posit that the distinction makes sense (even if it is contested) and that both a state of separation and a state of establishment can offer adequate protection of religious freedoms. Second, I am aware that the term 'establishment' is not entirely satisfactory, as it usually refers to an institutionalized system of state-conferred advantages onto one church or religious group. Insofar as such establishment would entail inadequate

protection of non-members of the established religion, it would be incompatible with liberalism and would collapse into (D). But there are liberal forms of establishment – which are such either because they are 'multi-faith', or because they are only purely symbolic and do not confer any substantive advantage on the publicly recognized religion. Both these cases will be discussed below. Throughout, I seek to use the term 'establishment' as neutrally and descriptively as possible, as the only available antonym of 'separation'.

4 Rawls, *Political Liberalism*, p. xxv.

5 Other writers in this tradition include Robert Audi, Bruce Ackerman, Gerald Gaus, Charles Larmore, Amy Gutmann, Thomas Nagel, and Tim Scanlon. See Gerald Gaus, *Justificatory Liberalism* (Oxford: Oxford University Press, 1996). In contrast to Gaus, who further distinguishes between justificatory and political liberalism, the latter can be seen as a version of the former for the purposes of my argument here.

6 As Rawls put it, 'the question of equal liberty of conscience is settled. It is one of the fixed points of our considered judgments of justice' (Rawls, *A Theory of Justice*, p. 206.)

7 Rawls, *Political Liberalism*, pp. 227–30.

8 Ronald Dworkin, *A Matter of Principle* (Cambridge, MA: Harvard University Press, 1985), p. 181. John Rawls, 'The idea of public reason revisited', *The Law of Peoples* (Cambridge, MA: Harvard University Press, 1999), pp. 129–80 at pp. 167–7. Will Kymlicka, *Multicultural Citizenship* (Oxford: Oxford University Press, 1995), pp. 3, 111.

9 Kent Greenawalt, *Religion and the Constitution*, vols. 1–2 (Princeton, NJ: Princeton University Press, 2008). Micheline Milot, *La laïcité* (Ottawa: Novalis, 2008).

10 On neutrality, see, for example, Ronald Dworkin, *A Matter of Principle*; Will Kymlicka, 'Liberal individualism and liberal neutrality', *Ethics*, 99 (1989), 883–905; Jeremy Waldron 'Legislation and moral neutrality', *Liberal Rights* (Cambridge: Cambridge University Press, 1993), pp. 143–67; Eric Mack, 'Liberalism, neutralism, and rights', *Religion, Morality and the Law*, ed. J. R. Pennock and J. W. Chapman (New York: New York University Press, 1988), pp. 46–70; Peter de Marneffe, 'Liberalism, liberty and neutrality', *Philosophy and Public Affairs*, 19 (1990), 253–74; Bruce Ackerman 'What is neutral about neutrality?', *Ethics*, 93 (1983), 372–90; Robert E. Goodin and Andrew Reeve, eds, *Liberal Neutrality* (London: Routledge, 1989); Saladin Meckled-Garcia 'Toleration and neutrality: incompatible ideals?', *Res Publica*, 7 (2001), 293–313; Colin Macleod, 'Liberal neutrality or liberal tolerance?', *Law and Philosophy*, 16 (1997), 529–59.

11 Robert Audi, 'The place of religious argument in a free and democratic society', *San Diego Law Review*, 30 (1993), 677–702; 'Liberal democracy and the place of religion in politics', *Religion in the Public Square*, ed. Robert Audi and Nicholas Wolterstorff (Lanham, MD: Rowman and Littlefield, 1997), pp. 1–66. For the view that nonreligious reasons are not *per se* more accessible and intelligible than religious reasons, and that unless a special consideration is adduced to exclude religious views, a plausible principle of restraint would have to apply to many nonreligious views, see Kent Greenawalt, *Private Consciences and Public Reasons* (New York: Oxford University Press, 1995), p. 102. For other defences of 'inclusivist' positions, see Paul Weithman, *Religion and the Obligations of Citizenship* (Cambridge: Cambridge University Press, 2002); Christopher Eberle, *Religions Conviction in Liberal Politics* (Cambridge: Cambridge University Press, 2002); Nicholas Wolterstorff, 'Why we should reject what liberalism tells us about speaking and acting in public for religious reasons', *Religion and Contemporary Liberalism*, ed. Paul Weithman (Notre Dame, IN: University of Notre Dame Press, 1997), pp. 162–81; Philip Quinn, 'Political liberalisms and their exclusions of the religious', *Proceedings and Addresses of the American Philosophical Association*, 69 (1995), 35–56; Michael Perry, *Religion in Politics: Constitutional and Moral Perspectives* (Oxford: Oxford University Press, 1997).

12 Robert Audi, 'The separation of church and state and the obligations of citizenship', *Philosophy and Public Affairs*, 18 (1989), 259–96.

13 Cécile Laborde, 'Secular philosophy and Muslim headscarves in schools', *Journal of Political Philosophy*, 13 (2005), 305–29.

14 Greenawalt, *Religion and the Constitution*, vol. 2, ch. 12. Alain Boyer, *Le droit des religions en France* (Paris: Presses Universitaire de France, 1993).

15 On the French case, see Jean-Pierre Machelon, *Les relations des cultes avec les pouvoirs publics* (Paris: La Documentation Française, 2006), pp. 19–36; on the US case, see Greenawalt, *Religion and the Constitution*, vol. 2, ch. 18.

16 The case for multi-faith establishment has been articulated by British sociologist Tariq Modood; see, notably, his *Multiculturalism: A Civic Idea* (Cambridge: Polity, 2007). Modood points out that most European countries (France being an ambiguous exception) are 'moderate secular states' which, in practice, have developed extensive forms of formal and informal establishment of religion and therefore should, to be fair and self-consistent, extend those institutional forms of recognition to new groups such as Muslims. For critical discussions of this approach, which notably interrogate the relationship between ideal and non-ideal theorizing with respect to existing state-church settlements, see Sune Laegaard, 'Moderate secularism and multicultural equality', *Politics*, 28 (2008), 160–8 and Cécile Laborde, 'Secularism and fair treatment for Muslims', *Multiculturalism and Moral Conflict*, ed. M. Dimova-Cookson and P. M. R. Stirk (London: Routledge, 2010), pp. 131–47.

17 Rawls, 'The idea of public reason revisited', pp. 143, 148.

18 Weithman, *Religion and the Obligations of Citizenship*, 152–5.

19 Rawls, *Political Liberalism*, pp. 247–9, li–lii; 'The idea of public reason revisited', pp. 152–6.

20 On inclusivist critiques of public reason, see note 11 above.

21 Catherine Audard, *Qu'est-ce que le libéralisme? Éthique, Politique et Société* (Paris: Gallimard, 2009), ch. 9; Veit Bader, 'Religious pluralism: secularism or priority for democracy?', *Political Theory*, 27 (1999), 597–633. Véronique Munoz-Dardé, 'Le partage des raisons', *Revue de Philosophie Economique*, 7 (2001), 81–110, at p. 98 n. 24.

22 For an engaging critique along these lines, see Rex Ahdar and Ian Leigh, *Religious Freedom in the Liberal State* (Oxford: Oxford University Press, 2005).

23 For the purposes of this article, I simply assume this to be true, though more work needs to be done on what exactly a 'religious' reason is. See my 'Justificatory Secularism', *Religion in a Liberal State: Cross-Disciplinary Reflections*, ed. G. D'Costa, M. Evans, T. Modood and J. Rivers (Cambridge: Cambridge University Press, 2013).

24 Rawls, 'The idea of public reason revisited', pp. 151 n. 46, 166 n. 75, 170 n. 82–3; Audi, *Religious Commitment and Secular Reason*, pp. 135–9.

25 Rawls, *Political Liberalism*, pp. 192–4. Will Kymlicka, 'Liberal individualism and liberal neutrality', *Ethics*, 99 (1989), 883–905 at p. 884.

26 Rawls 'The idea of public reason revisited', p. 149.

27 Jonathan Quong, 'Cultural exemptions, expensive tastes, and equal opportunities', *Journal of Applied Philosophy*, 23 (2006), 55–73.

28 Nancy Rosenblum, ed., *Obligations of Citizenship and Demands of Faith* (Princeton, NJ: Princeton University Press, 2000).

29 Accommodationist separation and multi-faith establishment may be difficult to distinguish in practice, yet they are justified by appeal to different principles concerning the prima facie legitimacy of state support of religion. Note that, on my construal, they share the view that religious belief (by opposition to other beliefs and commitments) should be seen as special – either because it should be specially protected from state entanglement (as in (B)) or because it should be specially supported by the state (as in (C)). For a different position, namely that advocates of the 'moderate secular state' and defenders of the 'moderate religious state' (in Dworkin's preferred terminology) disagree about their respective assessment of the 'specialness' of religious belief, as opposed to other beliefs and principles, see Ronald Dworkin, 'Religion and dignity', *Is Democracy Possible Here? Principles for a New Public Debate* (Princeton, NJ: Princeton University Press, 2006), pp. 52–89. Dworkin defines the moderate secular state as a state which does not see religion as special.

30 Gaus, *Justificatory Liberalism*, pp. 151ff. See also Micah Schwartzman, 'The completeness of public reason', *Politics, Philosophy and Economics*, 3 (2004), 191–220.

31 Kent Greenawalt, *Private Consciences and Public Reasons* (New York: Oxford University Press, 1995), p. 114.

32 Schwartzman, 'The completeness of public reason', pp. 198, 201.

33 Schwartzman further suggests that Rawlsian political liberalism could be seen as a tripartite theory – he adds another level, that of ordinary policy-making, where public reason does not apply at all.

34 Rawls, *A Theory of Justice*, p. 201. I prefer to talk about 'inconclusiveness' rather than 'indeterminacy' in this context.

35 Rawls, 'The idea of public reason revisited', p. 142.

36 Ibid., p. 147 n. 35.

37 Ibid., pp. 164–5.

38 Cf. Rawls' remarks: 'democratic societies will differ in the specific doctrines that are influential and active within them – as they differ in the western democracies of Europe, the United States, Israel, and India' (ibid., p. 132) and 'since these ideas can be interpreted in various ways, we get different formulations of the principle of justice and different contents of public reason' (ibid., p. 141).

39 The distinction is problematic because it unjustifiably thins out the minimum set of basic liberties or human rights that all societies are required to respect. For criticisms of *The Law of Peoples* along these lines, see Charles Beitz, 'Rawls's law of peoples', Ethics, 110 (#4) (2000), 669–96; Simon Caney, 'Cosmopolitanism and the law of peoples', *Journal of Political Philosophy*, 10 (2002), 95–123.

40 Rawls, *The Law of Peoples*, p. 84.

41 Samuel Freeman, 'Deliberative democracy: a sympathetic comment', *Philosophy and Public Affairs*, 29 (2000), 371–418. See also Joshua Cohen, 'A more democratic liberalism', *Michigan Law Review*, 92 (1994), 1503–46.

42 Christopher Eisgruber and Lawrence Sager, *Religious Freedom and the Constitution* (Cambridge, MA: Harvard University Press, 2007), ch. 1.

43 Note that this definition of justice is broader than Rawls's reference (in *Political Liberalism*) to 'constitutional essentials and matters of justice', where the latter only refer to basic social entitlements. By contrast, the conception of justice appealed to in *A Theory of Justice* is more general: Rawls's two principles of justice incorporate both civil rights and liberties (including such constitutional essentials as freedom of conscience and freedom of speech) and the 'difference principle', which is a principle of social redistribution. Thus I take 'constitutional essentials and matters of basic justice' to overlap with the more capacious definition of justice canvassed in *A Theory of Justice*. I will from now on refer to the latter, unless otherwise specified.

44 Brian Barry, *Justice as Impartiality* (Oxford: Oxford University Press, 1995), pp. 144–5. T. M. Scanlon, 'Rawls on justification', in *The Cambridge Companion to Rawls*, ed. S. Freeman (Cambridge: University Press, 2002), pp. 139–167, at pp. 162–3.

45 The expression is Barry's, *Justice as Impartiality*, p. 165 n 1.

46 Daniel Brudney, 'On noncoercive establishment', *Political Theory*, 33 (2005), 812–39.

47 On the difference between indeterminacy and inconclusiveness, see Gaus, *Justificatory Liberalism*, pp. 151ff.; Schwartzman, 'The completeness of public reason', pp. 191–220.

48 Nussbaum, *Liberty of Conscience*, pp. 227, 225.
49 Ibid., p. 227.
50 Philip Pettit, *Republicanism* (Oxford: Oxford University Press, 1997), p. 87 passim. For more on republican non-domination and the public place of religion, see Cécile Laborde, *Critical Republicanism: The Hijab Controversy and Political Philosophy* (Oxford: Oxford University Press, 2008).
51 Nussbaum, *Liberty of Conscience*, p. 11.
52 For other republican interpretations of political liberalism, see Andrés de Francisco, 'A republican interpretation of the late Rawls', *Journal of Political Philosophy*, 14 (2006), 270–88; Anthony Simon Laden, 'Republican moments in political liberalism', *Revue Internationale de Philosophie*, 60 (#237) (2006), 339–66; Catherine Audard, *John Rawls* (Montreal: McGill-Queen's University Press, 2007), pp. 214–23.
53 An alternative, coercion-based view of the 'broad scope' of public reason is offered by Jonathan Quong who argues *both* that the scope of public reason should be construed broadly *and* that it still concerns distributive justice. See Jonathan Quong, 'The scope of public reason', *Political Studies*, 52 (2004), 233–50. What Quong offers is a broad view of the scope of distributive justice – where justice is affected by most, if not all, policy decisions, by virtue of the latter being inevitably coercive. On this view, a state-promoted religious symbol could be seen to be coercive, insofar as objectors will incur a state-inflicted punishment (typically, a fine) if they remove it. And because it is coercive, it must be justified in public reason.
54 This assumes that state-endorsed religious symbols are intrinsically more alienating (or alienating in an objectively more worrying way) than state-endorsed non-religious practices, beliefs and symbols, whether of particular cultural activities, philosophical values or political programmes. This is only understandable in light of the traditional liberal and western 'singling out' of religion as an object of special 'two-way protection': protection of the state from religion, and of religion from the state, to use Amy Gutmann's expression from *Identity in Democracy* (Princeton, NJ: Princeton University Press, Princeton, 2003), pp. 158–9. This liberal assumption about the 'specialness' of religious belief and affiliation, by contrast to others beliefs and practices, has not yet, in my view, been adequately supported and defended.
55 I am grateful to Jonathan Quong and Alan Patten for pressing me to elaborate on this interpretation of Rawls.
56 Rawls, *Political Liberalism*, p. xxxvii.
57 Rawls, *Theory of Justice*, p. 144.
58 For an analysis of this 'instrumental republicanism', and its compatibility with liberalism, see Alan Patten, 'The republican critique of liberalism', *British Journal of Political Science*, 26 (1996), 25–44.
59 Joshua Cohen, 'For a democratic society', *The Cambridge Companion to Rawls*, ed. S. Freeman (Cambridge: Cambridge University Press, 2003), pp. 86–138.
60 Rawls, *Theory of Justice*, pp. 178, 440, 534. It is not clear, however, how Rawls himself envisaged that the 'social bases of self-respect' be distributed. In fact, he presented the argument from self-respect and the need for recognition as an argument for the justification of formally equal rights. In a liberal state, it is through the public affirmation of equal rights, notably of conscience, that the 'recognition of the worth all citizens attach to their way of life' (*Political Liberalism*, p. 319) is achieved. On the role played by the ideal of self-respect in justifying the priority of liberty, see R. S. Taylor, 'Rawls's defense of the priority of liberty: a Kantian reconstruction', *Philosophy and Public Affairs*, 31 (2003), 246–71. On Rawls's argument for equal liberty instead of the 'fair value' of equal liberties, see Norman Daniels, 'Equal liberty and unequal worth of liberty', *Reading Rawls*, ed. N. Daniels (New York: Basic Books, 1975), pp. 253–81. On the link between self-respect and a richer ideal of liberal citizenship, see, for example, Catriona McKinnon, *Liberalism and the Defence of Political Constructivism* (Basingstoke: Palgrave, 2002).
61 Greenawalt, *Religion and the Constitution*, vol. 2, pp. 182–91; Nussbaum, *Liberty of Conscience*, pp. 229, 253, 265–6, 270.
62 Justice O'Connor, cited in Nussbaum, *Liberty of Conscience*, p. 247.
63 It is important to note that the argument assumes that there is a crucial asymmetry between (B*) and (C*). Only (C*) is considered to be problematic for equal civic status, as it risks alienating non-adherents of the publicly recognised faith(s). (B*), by contrast, is implicitly assumed to be relevantly 'neutral' as between religion and non-religion, and therefore not a threat to the civic status of religious believers. In response, one could retort that such symbolic neutrality is unavailable and that, therefore, the alienation of religious believers from a state of (B*) is also a threat to their equal civic status. I do not discuss this objection within the scope of this article, but only wish to note that the asymmetry assumption is required for the egalitarian argument in favour of (B*) to be conclusive and determinate in the way that Nussbaum and others intend it. Nussbaum is not unaware of this problem. She attempts to distinguish between French-style secularist 'separation', which rids the public square of any symbolic reference to religion, and her preferred solution of state neutrality as 'equality'. But as no religious symbol, in her view, is capable of being relevantly neutral between all citizens – she points out that non-denominational references to 'God' are alienating not only for agnostics and atheists but also for polytheists and non-deistic believers, and so that 'an establishment of all religion over non-religion does not solve the equality problem' (ibid., p. 225) – it is difficult to see what the shift from 'separation' to 'equality' achieves in practice.

PART VII

Equality

31

Complex Equality

Michael Walzer

Pluralism

Distributive justice is a large idea. It draws the entire world of goods within the reach of philosophical reflection. Nothing can be omitted; no feature of our common life can escape scrutiny. Human society is a distributive community. That's not all it is, but it is importantly that: we come together to share, divide, and exchange. We also come together to make the things that are shared, divided, and exchanged; but that very making – work itself – is distributed among us in a division of labor. My place in the economy, my standing in the political order, my reputation among my fellows, my material holdings: all these come to me from other men and women. It can be said that I have what I have rightly or wrongly, justly or unjustly; but given the range of distributions and the number of participants, such judgments are never easy.

The idea of distributive justice has as much to do with being and doing as with having, as much to do with production as with consumption, as much to do with identity and status as with land, capital, or personal possessions. Different political arrangements enforce, and different ideologies justify, different distributions of membership, power, honor, ritual eminence, divine grace, kinship and love, knowledge, wealth, physical security, work and leisure, rewards and punishments, and a host of goods more narrowly and materially conceived – food, shelter, clothing, transportation, medical care, commodities of every sort, and all the odd things (paintings, rare books, postage stamps) that human beings collect. And this multiplicity of goods is matched by a multiplicity of distributive procedures, agents, and criteria. There are such things as simple distributive systems – slave galleys, monasteries, insane asylums, kindergartens (though each of these, looked at closely, might show unexpected complexities); but no full-fledged human society has ever avoided the multiplicity. We must study it all, the goods and the distributions, in many different times and places.

There is, however, no single point of access to this world of distributive arrangements and ideologies. There has never been a universal medium of exchange. Since the decline of the barter economy, money has been the most common medium. But the old maxim according to which there are some things that money can't buy is not only normatively but also factually true. What should and should not be up for sale is something men and women always have to decide and have decided in many different ways. Throughout history, the market has been one of the most important mechanisms for the

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distribution of social goods; but it has never been, it nowhere is today, a complete distributive system.

Similarly, there has never been either a single decision point from which all distributions are controlled or a single set of agents making decisions. No state power has ever been so pervasive as to regulate all the patterns of sharing, dividing, and exchanging out of which a society takes shape. Things slip away from the state's grasp; new patterns are worked out – familial networks, black markets, bureaucratic alliances, clandestine political and religious organizations. State officials can tax, conscript, allocate, regulate, appoint, reward, punish, but they cannot capture the full range of goods or substitute themselves for every other agent of distribution. Nor can anyone else do that: there are market coups and cornerings, but there has never been a fully successful distributive conspiracy.

And finally, there has never been a single criterion, or a single set of interconnected criteria, for all distributions. Desert, qualification, birth and blood, friendship, need, free exchange, political loyalty, democratic decision: each has had its place, along with many others, uneasily coexisting, invoked by competing groups, confused with one another.

In the matter of distributive justice, history displays a great variety of arrangements and ideologies. But the first impulse of the philosopher is to resist the displays of history, the world of appearances, and to search for some underlying unity: a short list of basic goods, quickly abstracted to a single good; a single distributive criterion or an interconnected set; and the philosopher himself standing, symbolically at least, at a single decision point. I shall argue that to search for unity is to misunderstand the subject matter of distributive justice. Nevertheless, in some sense the philosophical impulse is unavoidable. Even if we choose pluralism, as I shall do, that choice still requires a coherent defense. There must be principles that justify the choice and set limits to it, for pluralism does not require us to endorse every proposed distributive criteria or to accept every would-be agent. Conceivably, there is a single principle and a single legitimate kind of pluralism. But this would still be a pluralism that encompassed a wide range of distributions. By contrast, the deepest assumption of most of the philosophers who have written about justice, from Plato onward, is that there is one, and only one, distributive system that philosophy can rightly encompass.

Today this system is commonly described as the one that ideally rational men and women would choose if they were forced to choose impartially, knowing nothing of their own situation, barred from making particularist claims, confronting an abstract set of goods.[1] If these constraints on knowing and claiming are suitably shaped, and if the goods are suitably defined, it is probably true that a singular conclusion can be produced. Rational men and women, constrained this way or that, will choose one, and only one, distributive system. But the force of that singular conclusion is not easy to measure. It is surely doubtful that those same men and women, if they were transformed into ordinary people, with a firm sense of their own identity, with their own goods in their hands, caught up in everyday troubles, would reiterate their hypothetical choice or even recognize it as their own. The problem is not, most importantly, with the particularism of interest, which philosophers have always assumed they could safely – that is, uncontroversially – set aside. Ordinary people can do that too, for the sake, say, of the public interest. The greater problem is with the particularism of history, culture, and membership. Even if they are committed to impartiality, the question most likely to arise in the minds of the members of a political community is not, What would rational individuals choose under universalizing conditions of such-and-such a sort? But rather, What would individuals like us choose, who are situated as we are, who share a culture and are determined to go on sharing it? And this is a question that is readily transformed into, What choices have we already made in the course of our common life? What understandings do we (really) share?

Justice is a human construction, and it is doubtful that it can be made in only one way. At any rate, I shall begin by doubting, and more than doubting, this standard philosophical assumption. The questions posed by the theory of distributive justice admit of a range of answers, and there is room within the range for cultural diversity and political choice. It's not only a matter of implementing some singular principle or set of principles in different historical settings. No one would deny that there is a range of morally permissible implementations. I want to argue for more than this: that the principles of justice are themselves pluralistic in form; that different social goods ought to be distributed for different reasons, in accordance with different procedures, by different agents; and that all these differences derive from different understandings of the social goods themselves – the inevitable product of historical and cultural particularism.

A Theory of Goods

Theories of distributive justice focus on a social process commonly described as if it had this form:

People distribute goods to (other) people.

Here, "distribute" means give, allocate, exchange, and so on, and the focus is on the individuals who stand at either end of these actions: not on producers and consumers, but on distributive agents and recipients of goods. We are as always interested in ourselves, but, in this case, in a special and limited version of ourselves, as people who give and take. What is our nature? What are our rights? What do we need, want, deserve? What are we entitled to? What would we accept under ideal conditions? Answers to these questions are turned into distributive principles, which are supposed to control the movement of goods. The goods, defined by abstraction, are taken to be movable in any direction.

But this is too simple an understanding of what actually happens, and it forces us too quickly to make large assertions about human nature and moral agency – assertions unlikely, ever, to command general agreement. I want to propose a more precise and complex description of the central process:

People conceive and create goods, which they then distribute among themselves.

Here, the conception and creation precede and control the distribution. Goods don't just appear in the hands of distributive agents who do with them as they like or give them out in accordance with some general principle.[2] Rather, goods with their meanings – because of their meanings – are the crucial medium of social relations; they come into people's minds before they come into their hands; distributions are patterned in accordance with shared conceptions of what the goods are and what they are for. Distributive agents are constrained by the goods they hold; one might almost say that goods distribute themselves among people.

Things are in the saddle
And ride mankind.[3]

But these are always particular things and particular groups of men and women. And, of course, we make the things – even the saddle. I don't want to deny the importance of human agency, only to shift our attention from distribution itself to conception and creation: the naming of the goods, and the giving of meaning, and the collective making. What we need to explain and limit the pluralism of distributive possibilities is a theory of goods. For our immediate purposes, that theory can be summed up in six propositions.

1. All the goods with which distributive justice is concerned are social goods. They are not and they cannot be idiosyncratically valued. I am not sure that there are any other kinds of goods; I mean to leave the question open. Some domestic objects are cherished for private and sentimental reasons, but only in cultures where sentiment regularly attaches to such objects. A beautiful sunset, the smell of new-mown hay, the excitement of an urban vista: these perhaps are privately valued goods, though they are also, and more obviously, the objects of cultural assessment. Even new inventions are not valued in accordance with the ideas of their inventors; they are subject to a wider process of conception and creation. God's goods, to be sure, are exempt from this rule – as in the first chapter of Genesis: "and God saw every thing that He had made, and, behold, it was very good" (1:31). That evaluation doesn't require the agreement of mankind (who might be doubtful), or of a majority of men and women, or of any group of men and women meeting under ideal conditions (though Adam and Eve in Eden would probably endorse it). But I can't think of any other exemptions. Goods in the world have shared meanings because conception and creation are social processes. For the same reason, goods have different meanings in different societies. The same "thing" is valued for different reasons, or it is valued here and disvalued there. John Stuart Mill once complained that "people like in crowds," but I know of no other way to like or to dislike social goods.[4] A solitary person could hardly understand the meaning of the goods or figure out the reasons for taking them as likable or dislikable. Once people like in crowds, it becomes possible for individuals to break away, pointing to latent or subversive meanings, aiming at alternative values – including the values, for example, of notoriety and eccentricity. An easy eccentricity has sometimes been one of the privileges of the aristocracy: it is a social good like any other.

2. Men and women take on concrete identities because of the way they conceive and create, and then possess and employ social goods. "The line between what is me and mine," wrote William James, "is very hard to draw."[5] Distributions can not be understood as the acts of men and women who do not yet have particular goods in their minds or in their hands. In fact, people already stand in a relation to a set of goods; they have a history of transactions, not only with one another but also with the moral and material world in which

they live. Without such a history, which begins at birth, they wouldn't be men and women in any recognizable sense, and they wouldn't have the first notion of how to go about the business of giving, allocating, and exchanging goods.

3. There is no single set of primary or basic goods conceivable across all moral and material worlds – or, any such set would have to be conceived in terms so abstract that they would be of little use in thinking about particular distributions. Even the range of necessities, if we take into account moral as well as physical necessities, is very wide, and the rank orderings are very different. A single necessary good, and one that is always necessary – food, for example – carries different meanings in different places. Bread is the staff of life, the body of Christ, the symbol of the Sabbath, the means of hospitality, and so on. Conceivably, there is a limited sense in which the first of these is primary, so that if there were twenty people in the world and just enough bread to feed the twenty, the primacy of bread-as-staff-of-life would yield a sufficient distributive principle. But that is the only circumstance in which it would do so; and even there, we can't be sure. If the religious uses of bread were to conflict with its nutritional uses – if the gods demanded that bread be baked and burned rather than eaten – it is by no means clear which use would be primary. How, then, is bread to be incorporated into the universal list? The question is even harder to answer, the conventional answers less plausible, as we pass from necessities to opportunities, powers, reputations, and so on. These can be incorporated only if they are abstracted from every particular meaning – hence, for all practical purposes, rendered meaningless.

4. But it is the meaning of goods that determines their movement. Distributive criteria and arrangements are intrinsic not to the good-in-itself but to the social good. If we understand what it is, what it means to those for whom it is a good, we understand how, by whom, and for what reasons it ought to be distributed. All distributions are just or unjust relative to the social meanings of the goods at stake. This is in obvious ways a principle of legitimation, but it is also a critical principle.[6] When medieval Christians, for example, condemned the sin of simony, they were claiming that the meaning of a particular social good, ecclesiastical office, excluded its sale and purchase. Given the Christian understanding of office, it followed – I am inclined to say, it necessarily followed – that office holders should be chosen for their knowledge and piety and not for their wealth. There are presumably things that money can buy, but not this thing. Similarly, the words *prostitution* and *bribery*, like *simony*, describe the sale and purchase of goods that, given certain understandings of their meaning, ought never to be sold or purchased.

5. Social meanings are historical in character; and so distributions, and just and unjust distributions, change over time. To be sure, certain key goods have what we might think of as characteristic normative structures, reiterated across the lines (but not all the lines) of time and space. It is because of this reiteration that the British philosopher Bernard Williams is able to argue that goods should always be distributed for "relevant reasons" – where relevance seems to connect to essential rather than to social meanings.[7] The idea that offices, for example, should go to qualified candidates – though not the only idea that has been held about offices – is plainly visible in very different societies where simony and nepotism, under different names, have similarly been thought sinful or unjust. (But there has been a wide divergence of views about what sorts of position and place are properly called "offices.") Again, punishment has been widely understood as a negative good that ought to go to people who are judged to deserve it on the basis of a verdict, not of a political decision. (But what constitutes a verdict? Who is to deliver it? How, in short, is justice to be done to accused men and women? About these questions there has been significant disagreement.) These examples invite empirical investigation. There is no merely intuitive or speculative procedure for seizing upon relevant reasons.

6. When meanings are distinct, distributions must be autonomous. Every social good or set of goods constitutes, as it were, a distributive sphere within which only certain criteria and arrangements are appropriate. Money is inappropriate in the sphere of ecclesiastical office; it is an intrusion from another sphere. And piety should make for no advantage in the marketplace, as the marketplace has commonly been understood. Whatever can rightly be sold ought to be sold to pious men and women and also to profane, heretical, and sinful men and women (else no one would do much business). The market is open to all comers; the church is not. In no society, of course, are social meanings entirely distinct. What happens in one distributive sphere affects what happens in the others; we can look, at most, for relative autonomy. But relative autonomy, like social meaning, is a critical principle – indeed, as I shall be arguing

throughout this book, a radical principle. It is radical even though it doesn't point to a single standard against which all distributions are to be measured. There is no single standard. But there are standards (roughly knowable even when they are also controversial) for every social good and every distributive sphere in every particular society; and these standards are often violated, the goods usurped, the spheres invaded, by powerful men and women.

Dominance and Monopoly

In fact, the violations are systematic. Autonomy is a matter of social meaning and shared values, but it is more likely to make for occasional reformation and rebellion than for everyday enforcement. For all the complexity of their distributive arrangements, most societies are organized on what we might think of as a social version of the gold standard: one good or one set of goods is dominant and determinative of value in all the spheres of distribution. And that good or set of goods is commonly monopolized, its value upheld by the strength and cohesion of its owners. I call a good dominant if the individuals who have it, because they have it, can command a wide range of other goods. It is monopolized whenever a single man or woman, a monarch in the world of value – or a group of men and women, oligarchs – successfully hold it against all rivals. Dominance describes a way of using social goods that isn't limited by their intrinsic meanings or that shapes those meanings in its own image. Monopoly describes a way of owning or controlling social goods in order to exploit their dominance. When goods are scarce and widely needed, like water in the desert, monopoly itself will make them dominant. Mostly, however, dominance is a more elaborate social creation, the work of many hands, mixing reality and symbol. Physical strength, familial reputation, religious or political office, landed wealth, capital, technical knowledge: each of these, in different historical periods, has been dominant; and each of them has been monopolized by some group of men and women. And then all good things come to those who have the one best thing. Possess that one, and the others come in train. Or, to change the metaphor, a dominant good is converted into another good, into many others, in accordance with what often appears to be a natural process but is in fact magical, a kind of social alchemy.

No social good ever entirely dominates the range of goods; no monopoly is ever perfect. I mean to describe tendencies only, but crucial tendencies. For we can characterize whole societies in terms of the patterns of conversion that are established within them. Some characterizations are simple: in a capitalist society, capital is dominant and readily converted into prestige and power; in a technocracy, technical knowledge plays the same part. But it isn't difficult to imagine, or to find, more complex social arrangements. Indeed, capitalism and technocracy are more complex than their names imply, even if the names do convey real information about the most important forms of sharing, dividing, and exchanging. Monopolistic control of a dominant good makes a ruling class, whose members stand atop the distributive system – much as philosophers, claiming to have the wisdom they love, might like to do. But since dominance is always incomplete and monopoly imperfect, the rule of every ruling class is unstable. It is continually challenged by other groups in the name of alternative patterns of conversion.

Distribution is what social conflict is all about. Marx's heavy emphasis on productive processes should not conceal from us the simple truth that the struggle for control of the means of production is a distributive struggle. Land and capital are at stake, and these are goods that can be shared, divided, exchanged, and endlessly converted. But land and capital are not the only dominant goods; it is possible (it has historically been possible) to come to them by way of other goods – military or political power, religious office and charisma, and so on. History reveals no single dominant good and no naturally dominant good, but only different kinds of magic and competing bands of magicians.

The claim to monopolize a dominant good – when worked up for public purposes – constitutes an ideology. Its standard form is to connect legitimate possession with some set of personal qualities through the medium of a philosophical principle. So aristocracy, or the rule of the best, is the principle of those who lay claim to breeding and intelligence: they are commonly the monopolists of landed wealth and familial reputation. Divine supremacy is the principle of those who claim to know the word of God: they are the monopolists of grace and office. Meritocracy, or the career open to talents, is the principle of those who claim to be talented: they are most often the monopolists of education. Free exchange is the principle of those who are

ready, or who tell us they are ready, to put their money at risk: they are the monopolists of movable wealth. These groups – and others, too, similarly marked off by their principles and possessions – compete with one another, struggling for supremacy. One group wins, and then a different one; or coalitions are worked out, and supremacy is uneasily shared. There is no final victory, nor should there be. But that is not to say that the claims of the different groups are necessarily wrong, or that the principles they invoke are of no value as distributive criteria; the principles are often exactly right within the limits of a particular sphere. Ideologies are readily corrupted, but their corruption is not the most interesting thing about them.

It is in the study of these struggles that I have sought the guiding thread of my own argument. The struggles have, I think, a paradigmatic form. Some group of men and women – class, caste, strata, estate, alliance, or social formation – comes to enjoy a monopoly or a near monopoly of some dominant good; or, a coalition of groups comes to enjoy, and so on. This dominant good is more or less systematically converted into all sorts of other things – opportunities, powers, and reputations. So wealth is seized by the strong, honor by the well-born, office by the well educated. Perhaps the ideology that justifies the seizure is widely believed to be true. But resentment and resistance are (almost) as pervasive as belief. There are always some people, and after a time there are a great many, who think the seizure is not justice but usurpation. The ruling group does not possess, or does not uniquely possess, the qualities it claims; the conversion process violates the common understanding of the goods at stake. Social conflict is intermittent, or it is endemic; at some point, counter-claims are put forward. Though these are of many different sorts, three general sorts are especially important:

1. The claim that the dominant good, whatever it is, should be redistributed so that it can be equally or at least more widely shared: this amounts to saying that monopoly is unjust.
2. The claim that the way should be opened for the autonomous distribution of all social goods: this amounts to saying that dominance is unjust.
3. The claim that some new good, monopolized by some new group, should replace the currently dominant good: this amounts to saying that the existing pattern of dominance and monopoly is unjust.

The third claim is, in Marx's view, the model of every revolutionary ideology – except, perhaps, the proletarian or last ideology. Thus, the French Revolution in Marxist theory: the dominance of noble birth and blood and of feudal landholding is ended, and bourgeois wealth is established in its stead. The original situation is reproduced with different subjects and objects (this is never unimportant), and then the class war is immediately renewed. It is not my purpose here to endorse or to criticize Marx's view. I suspect, in fact, that there is something of all three claims in every revolutionary ideology, but that, too, is not a position that I shall try to defend here. Whatever its sociological significance, the third claim is not philosophically interesting – unless one believes that there is a naturally dominant good, such that its possessors could legitimately claim to rule the rest of us. In a sense, Marx believed exactly that. The means of production is the dominant good throughout history, and Marxism is a historicist doctrine insofar as it suggests that whoever controls the prevailing means legitimately rules.[8] After the communist revolution, we shall all control the means of production: at that point, the third claim collapses into the first. Meanwhile, Marx's model is a program for ongoing distributive struggle. It will matter, of course, who wins at this or that moment, but we won't know why or how it matters if we attend only to the successive assertions of dominance and monopoly.

Simple Equality

It is with the first two claims that I shall be concerned, and ultimately with the second alone, for that one seems to me to capture best the plurality of social meanings and the real complexity of distributive systems. But the first is the more common among philosophers; it matches their own search for unity and singularity; and I shall need to explain its difficulties at some length.

Men and women who make the first claim challenge the monopoly but not the dominance of a particular social good. This is also a challenge to monopoly in general; for if wealth, for example, is dominant and widely shared, no other good can possibly be monopolized. Imagine a society in which everything is up for sale and every citizen has as much money as every other. I shall call this the "regime of simple equality." Equality is multiplied through the conversion process, until it extends across the full range of social goods. The regime of simple equality won't last for long, because the

further progress of conversion, free exchange in the market, is certain to bring inequalities in its train. If one wanted to sustain simple equality over time, one would require a "monetary law" like the agrarian laws of ancient times or the Hebrew sabbatical, providing for a periodic return to the original condition. Only a centralized and activist state would be strong enough to force such a return; and it isn't clear the state officials would actually be able or willing to do that, if money were the dominant good. In any case, the original condition is unstable in another way. It's not only that monopoly will reappear, but also that dominance will disappear.

In practice, breaking the monopoly of money neutralizes its dominance. Other goods come into play, and inequality takes on new forms. Consider again the regime of simple equality. Everything is up for sale, and everyone has the same amount of money. So everyone has, say, an equal ability to buy an education for his children. Some do that, and others don't. It turns out to be a good investment: other social goods are, increasingly, offered for sale only to people with educational certificates. Soon everyone invests in education; or, more likely, the purchase is universalized through the tax system. But then the school is turned into a competitive world within which money is no longer dominant. Natural talent or family upbringing or skill in writing examinations is dominant instead, and educational success and certification are monopolized by some new group. Let's call them (what they call themselves) the "group of the talented." Eventually the members of this group claim that the good they control should be dominant outside the school: offices, titles, prerogatives, wealth too, should all be possessed by themselves. This is the career open to talents, equal opportunity, and so on. This is what fairness requires; talent will out; and in any case, talented men and women will enlarge the resources available to everyone else. So Michael Young's meritocracy is born, with all its attendant inequalities.[9]

What should we do now? It is possible to set limits to the new conversion patterns, to recognize but constrain the monopoly power of the talented. I take this to be the purpose of John Rawls's difference principle, according to which inequalities are justified only if they are designed to bring, and actually do bring, the greatest possible benefit to the least advantaged social class.[10] More specifically, the difference principle is a constraint imposed on talented men and women, once the monopoly of wealth has been broken. It works in this way: Imagine a surgeon who claims more than his equal share of wealth on the basis of the skills he has learned and the certificates he has won in the harsh competitive struggles of college and medical school. We will grant the claim if, and only if, granting it is beneficial in the stipulated ways. At the same time, we will act to limit and regulate the sale of surgery – that is, the direct conversion of surgical skill into wealth.

This regulation will necessarily be the work of the state, just as monetary laws and agrarian laws are the work of the state. Simple equality would require continual state intervention to break up or constrain incipient monopolies and to repress new forms of dominance. But then state power itself will become the central object of competitive struggles. Groups of men and women will seek to monopolize and then to use the state in order to consolidate their control of other social goods. Or, the state will be monopolized by its own agents in accordance with the iron law of oligarchy. Politics is always the most direct path to dominance, and political power (rather than the means of production) is probably the most important, and certainly the most dangerous, good in human history.[11] Hence the need to constrain the agents of constraint, to establish constitutional checks and balances. These are limits imposed on political monopoly, and they are all the more important once the various social and economic monopolies have been broken.

One way of limiting political power is to distribute it widely. This may not work, given the well-canvassed dangers of majority tyranny; but these dangers are probably less acute than they are often made out to be. The greater danger of democratic government is that it will be weak to cope with re-emerging monopolies in society at large, with the social strength of plutocrats, bureaucrats, technocrats, meritocrats, and so on. In theory, political power is the dominant good in a democracy, and it is convertible in any way the citizens choose. But in practice, again, breaking the monopoly of power neutralizes its dominance. Political power cannot be widely shared without being subjected to the pull of all the other goods that the citizens already have or hope to have. Hence democracy is, as Marx recognized, essentially a reflective system, mirroring the prevailing and emerging distribution of social goods.[12] Democratic decision making will be shaped by the cultural conceptions that determine or underwrite the new monopolies. To prevail against these monopolies, power will have to be centralized, perhaps itself monopolized. Once again, the state must be very powerful if it is to fulfill the purposes assigned to it by the difference principle or by any similarly interventionist rule.

Still, the regime of simple equality might work. One can imagine a more or less stable tension between emerging monopolies and political constraints, between the claim to privilege put forward by the talented, say, and the enforcement of the difference principle, and then between the agents of enforcement and the democratic constitution. But I suspect that difficulties will recur, and that at many points in time the only remedy for private privilege will be statism, and the only escape from statism will be private privilege. We will mobilize power to check monopoly, then look for some way of checking the power we have mobilized. But there is no way that doesn't open opportunities for strategically placed men and women to seize and exploit important social goods.

These problems derive from treating monopoly, and not dominance, as the central issue in distributive justice. It is not difficult, of course, to understand why philosophers (and political activists, too) have focused on monopoly. The distributive struggles of the modern age begin with a war against the aristocracy's singular hold on land, office, and honor. This seems an especially pernicious monopoly because it rests upon birth and blood, with which the individual has nothing to do, rather than upon wealth, or power, or education, all of which – at least in principle – can be earned. And when every man and woman becomes, as it were, a smallholder in the sphere of birth and blood, an important victory is indeed won. Birthright ceases to be a dominant good; henceforth, it purchases very little; wealth, power, and education come to the force. With regard to these latter goods, however, simple equality cannot be sustained at all, or it can only be sustained subject to the vicissitudes I have just described. Within their own spheres, as they are currently understood, these three tend to generate natural monopolies that can be repressed only if state power is itself dominant and if it is monopolized by officials committed to the repression. But there is, I think, another path to another kind of equality.

Tyranny and Complex Equality

I want to argue that we should focus on the reduction of dominance – not, or not primarily, on the break-up or the constraint of monopoly. We should consider what it might mean to narrow the range within which particular goods are convertible and to vindicate the autonomy of distributive spheres. But this line of argument, though it is not uncommon historically, has never fully emerged in philosophical writing. Philosophers have tended to criticize (or to justify) existing or emerging monopolies of wealth, power, and education. Or, they have criticized (or justified) particular conversions – of wealth into education or of office into wealth. And all this, most often, in the name of some radically simplified distributive system. The critique of dominance will suggest instead a way of reshaping and then living with the actual complexity of distributions.

Imagine now a society in which different social goods are monopolistically held – as they are in fact and always will be, barring continual state intervention – but in which no particular good is generally convertible. As I go along, I shall try to define the precise limits on convertibility, but for now the general description will suffice. This is a complex egalitarian society. Though there will be many small inequalities, inequality will not be multiplied through the conversion process. Nor will it be summed across different goods, because the autonomy of distributions will tend to produce a variety of local monopolies, held by different groups of men and women. I don't want to claim that complex equality would necessarily be more stable than simple equality, but I am inclined to think that it would open the way for more diffused and particularized forms of social conflict. And the resistance to convertibility would be maintained, in large degree, by ordinary men and women within their own spheres of competence and control, without large-scale state action.

This is, I think, an attractive picture, but I have not yet explained just why it is attractive. The argument for complex equality begins from our understanding – I mean, our actual, concrete, positive, and particular understanding – of the various social goods. And then it moves on to an account of the way we relate to one another through those goods. Simple equality is a simple distributive condition, so that if I have fourteen hats and you have fourteen hats, we are equal. And it is all to the good if hats are dominant, for then our equality is extended through all the spheres of social life. On the view that I shall take here, however, we simply have the same number of hats, and it is unlikely that hats will be dominant for long. Equality is a complex relation of persons, mediated by the goods we make, share, and divide among ourselves; it is not an identity of possessions. It requires then, a diversity of distributive criteria that mirrors the diversity of social goods.

The argument for complex equality has been beautifully put by Pascal in one of his *Pensées*.

> The nature of tyranny is to desire power over the whole world and outside its own sphere. There are different companies – the strong, the handsome, the intelligent, the devout – and each man reigns in his own, not elsewhere. But sometimes they meet, and the strong and the handsome fight for mastery – foolishly, for their mastery is of different kinds. They misunderstand one another, and make the mistake of each aiming at universal dominion. Nothing can win this, not even strength, for it is powerless in the kingdom of the wise….
>
> *Tyranny*. The following statements, therefore, are false and tyrannical: "Because I am handsome, so I should command respect." "I am strong, therefore men should love me… ." "I am … et cetera."
>
> Tyranny is the wish to obtain by one means what can only be had by another. We owe different duties to different qualities: love is the proper response to charm, fear to strength, and belief to learning.[13]

Marx made a similar argument in his early manuscripts; perhaps he had this *pensée* in mind:

> Let us assume man to be man, and his relation to the world to be a human one. Then love can only be exchanged for love, trust for trust, etc. If you wish to enjoy art you must be an artistically cultivated person; if you wish to influence other people, you must be a person who really has a stimulating and encouraging effect upon others…. If you love without evoking love in return, i.e., if you are not able, by the manifestation of yourself as a loving person, to make yourself a beloved person – then your love is impotent and a misfortune.[14]

These are not easy arguments, and most of my book is simply an exposition of their meaning. But here I shall attempt something more simple and schematic: a translation of the arguments into the terms I have already been using.

The first claim of Pascal and Marx is that personal qualities and social goods have their own spheres of operation, where they work their effects freely, spontaneously, and legitimately. There are ready or natural conversions that follow from, and are intuitively plausible because of, the social meaning of particular goods. The appeal is to our ordinary understanding and, at the same time, against our common acquiesence in illegitimate conversion patterns. Or, it is an appeal from our acquiesence to our resentment. There is something wrong, Pascal suggests, with the conversion of strength into belief. In political terms, Pascal means that no ruler can rightly command my opinions merely because of the power he wields. Nor can he, Marx adds, rightly claim to influence my actions: if a ruler wants to do that, he must be persuasive, helpful, encouraging, and so on. These arguments depend for their force on some shared understanding of knowledge, influence, and power. Social goods have social meanings, and we find our way to distributive justice through an interpretation of those meanings. We search for principles internal to each distributive sphere.

The second claim is that the disregard of these principles is tyranny. To convert one good into another, when there is no intrinsic connection between the two, is to invade the sphere where another company of men and women properly rules. Monopoly is not inappropriate within the spheres. There is nothing wrong, for example, with the grip that persuasive and helpful men and women (politicians) establish on political power. But the use of political power to gain access to other goods is a tyrannical use. Thus, an old description of tyranny is generalized: princes become tyrants, according to medieval writers, when they seize the property or invade the family of their subjects.[15] In political life – but more widely, too – the dominance of goods makes for the domination of people.

The regime of complex equality is the opposite of tyranny. It establishes a set of relationships such that domination is impossible. In formal terms, complex equality means that no citizen's standing in one sphere or with regard to one social good can be undercut by his standing in some other sphere, with regard to some other good. Thus, citizen X may be chosen over citizen Y for political office, and then the two of them will be unequal in the sphere of politics. But they will not be unequal generally so long as X's office gives him no advantages over Y in any other sphere – superior medical care, access to better schools for his children, entrepreneurial opportunities, and so on. So long as office is not a dominant good, is not generally convertible, office holders will stand, or at least can stand, in a relation of equality to the men and women they govern.

But what if dominance were eliminated, the autonomy of the spheres established – and the same people were successful in one sphere after another, triumphant in every company, piling up goods without the need for

illegitimate conversions? This would certainly make for an inegalitarian society, but it would also suggest in the strongest way that a society of equals was not a lively possibility. I doubt that any egalitarian argument could survive in the face of such evidence. Here is a person whom we have freely chosen (without reference to his family ties or personal wealth) as our political representative. He is also a bold and inventive entrepreneur. When he was younger, he studied science, scored amazingly high grades in every exam, and made important discoveries. In war, he is surpassingly brave and wins the highest honors. Himself compassionate and compelling, he is loved by all who know him. Are there such people? Maybe so, but I have my doubts. We tell stories like the one I have just told, but the stories are fictions, the conversion of power or money or academic talent into legendary fame. In any case, there aren't enough such people to constitute a ruling class and dominate the rest of us. Nor can they be successful in every distributive sphere, for there are some spheres to which the idea of success doesn't pertain. Nor are their children likely, under conditions of complex equality, to inherit their success. By and large, the most accomplished politicians, entrepreneurs, scientists, soldiers, and lovers will be different people; and so long as the goods they possess don't bring other goods in train, we have no reason to fear their accomplishments.

The critique of dominance and domination points toward an open-ended distributive principle. *No social good x should be distributed to men and women who possess some other good y merely because they possess y and without regard to the meaning of x*. This is a principle that has probably been reiterated, at one time or another, for every *y* that has ever been dominant. But it has not often been stated in general terms. Pascal and Marx have suggested the application of the principle against all possible *y*'s, and I shall attempt to work out that application. I shall be looking, then, not at the members of Pascal's companies – the strong or the weak, the handsome or the plain – but at the goods they share and divide. The purpose of the principle is to focus our attention; it doesn't determine the shares or the division. The principle directs us to study the meaning of social goods, to examine the different distributive spheres from the inside.

Three Distributive Principles

The theory that results is unlikely to be elegant. No account of the meaning of a social good, or of the boundaries of the sphere within which it legitimately operates, will be uncontroversial. Nor is there any neat procedure for generating or testing different accounts. At best, the arguments will be rough, reflecting the diverse and conflict-ridden character of the social life that we seek simultaneously to understand and to regulate – but not to regulate until we understand. I shall set aside, then, all claims made on behalf of any single distributive criterion, for no such criterion can possibly match the diversity of social goods. Three criteria, however, appear to meet the requirements of the open-ended principle and have often been defended as the beginning and end of distributive justice, so I must say something about each of them. Free exchange, desert, and need: all three have real force, but none of them has force across the range of distributions. They are part of the story, not the whole of it.

Free Exchange

Free exchange is obviously open-ended; it guarantees no particular distributive outcome. At no point in any exchange process plausibly called "free" will it be possible to predict the particular division of social goods that will obtain at some later point.[16] (It may be possible, however, to predict the general structure of the division.) In theory at least, free exchange creates a market within which all goods are convertible into all other goods through the neutral medium of money. There are no dominant goods and no monopolies. Hence the successive divisions that obtain will directly reflect the social meanings of the goods that are divided. For each bargain, trade, sale, and purchase will have been agreed to voluntarily by men and women who know what that meaning is, who are indeed its makers. Every exchange is a revelation of social meaning. By definition, then, no *x* will ever fall into the hands of someone who possesses *y*, merely because he possesses *y* and without regard to what *x* actually means to some other member of society. The market is radically pluralistic in its operations and its outcomes, infinitely sensitive to the meanings that individuals attach to goods. What possible restraints can be imposed on free exchange, then, in the name of pluralism?

But everyday life in the market, the actual experience of free exchange, is very different from what the theory suggests. Money, supposedly the neutral medium, is in practice a dominant good, and it is monopolized by people who possess a special talent for bargaining and trading – the green thumb of bourgeois society. Then other people demand a redistribution of money and the establishment of the regime of simple equality, and the search begins for some way to sustain that regime. But even if

we focus on the first untroubled moment of simple equality – free exchange on the basis of equal shares – we will still need to set limits on what can be exchanged for what. For free exchange leaves distributions entirely in the hands of individuals, and social meanings are not subject, or are not always subject, to the interpretative decisions of individual men and women.

Consider an easy example, the case of political power. We can conceive of political power as a set of goods of varying value, votes, influence, offices, and so on. Any of these can be traded on the market and accumulated by individuals willing to sacrifice other goods. Even if the sacrifices are real, however, the result is a form of tyranny – petty tyranny, given the conditions of simple equality. Because I am willing to do without my hat, I shall vote twice; and you who value the vote less than you value my hat, will not vote at all. I suspect that the result is tyrannical even with regard to the two of us, who have reached a voluntary agreement. It is certainly tyrannical with regard to all the other citizens who must now submit to my disproportionate power. It is not the case that votes can't be bargained for; on one interpretation, that's what democratic politics is all about. And democratic politicians have certainly been known to buy votes, or to try to buy them, by promising public expenditures that benefit particular groups of voters. But this is done in public, with public funds, and subject to public approval. Private trading is ruled out by virtue of what politics, or democratic politics, is – that is, by virtue of what we did when we constituted the political community and of what we still think about what we did.

Free exchange is not a general criterion, but we will be able to specify the boundaries within which it operates only through a careful analysis of particular social goods. And having worked through such an analysis, we will come up at best with a philosophically authoritative set of boundaries and not necessarily with the set that ought to be politically authoritative. For money seeps across all boundaries – this is the primary form of illegal immigration; and just where one ought to try to stop it is a question of expediency as well as of principle. Failure to stop it at some reasonable point has consequences throughout the range of distributions, but consideration of these belongs in a later chapter.

Desert

Like free exchange, desert seems both open-ended and pluralistic. One might imagine a single neutral agency dispensing rewards and punishments, infinitely sensitive to all the forms of individual desert. Then the distributive process would indeed be centralized, but the results would still be unpredictable and various. There would be no dominant good. No x would ever be distributed without regard to its social meaning; for, without attention to what x is, it is conceptually impossible to say that x is deserved. All the different companies of men and women would receive their appropriate reward. How this would work in practice, however, is not easy to figure out. It might make sense to say of this charming man, for example, that he deserves to be loved. It makes no sense to say that he deserves to be loved by this (or any) particular woman. If he loves her while she remains impervious to his (real) charms, that is his misfortune. I doubt that we would want the situation corrected by some outside agency. The love of particular men and women, on our understanding of it, can only be distributed by themselves, and they are rarely guided in these matters by considerations of desert.

The case is exactly the same with influence. Here, let's say, is a woman widely thought to be stimulating and encouraging to others. Perhaps she deserves to be an influential member of our community. But she doesn't deserve that I be influenced by her or that I follow her lead. Nor would we want my followership, as it were, assigned to her by any agency capable of making such assignments. She may go to great lengths to stimulate and encourage me, and do all the things that are commonly called stimulating or encouraging. But if I (perversely) refuse to be stimulated or encouraged, I am not denying her anything that she deserves. The same argument holds by extension for politicians and ordinary citizens. Citizens can't trade their votes for hats; they can't individually decide to cross the boundary that separates the sphere of politics from the market-place. But within the sphere of politics, they do make individual decisions; and they are rarely guided, again, by considerations of desert. It's not clear that offices can be deserved – another issue that I must postpone; but even if they can be, it would violate our understanding of democratic politics were they simply distributed to deserving men and women by some central agency.

Similarly, however we draw the boundaries of the sphere within which free exchange operates, desert will play no role within those boundaries. I am skillful at bargaining and trading, let's say, and so accumulate a large number of beautiful pictures. If we assume, as painters mostly do, that pictures are appropriately traded in the market, then there is nothing wrong with my having the pictures. My title is legitimate. But it would be odd to

say that I deserve to have them simply because I am good at bargaining and trading. Desert seems to require an especially close connection between particular goods and particular persons, whereas justice only sometimes requires a connection of that sort. Still, we might insist that only artistically cultivated people, who deserve to have pictures, should actually have them. It's not difficult to imagine a distributive mechanism. The state could buy all the pictures that were offered for sale (but artists would have to be licensed, so that there wouldn't be an endless number of pictures), evaluate them, and then distribute them to artistically cultivated men and women, the better pictures to the more cultivated. The state does something like this, sometimes, with regard to things that people need – medical care, for example – but not with regard to things that people deserve. There are practical difficulties here, but I suspect a deeper reason for this difference. Desert does not have the urgency of need, and it does not involve having (owning and consuming) in the same way. Hence, we are willing to tolerate the separation of owners of paintings and artistically cultivated people, or we are unwilling to require the kinds of interference in the market that would be necessary to end the separation. Of course, public provision is always possible alongside the market, and so we might argue that artistically cultivated people deserve not pictures but museums. Perhaps they do, but they don't deserve that the rest of us contribute money or appropriate public funds for the purchase of pictures and the construction of buildings. They will have to persuade us that art is worth the money; they will have to stimulate and encourage our own artistic cultivation. And if they fail to do that, their own love of art may well turn out to be "impotent and a misfortune."

Even if we were to assign the distribution of love, influence, offices, works of art, and so on, to some omnipotent arbiters of desert, how would we select them? How could anyone deserve such a position? Only God, who knows what secrets lurk in the hearts of men, would be able to make the necessary distributions. If human beings had to do the work, the distributive mechanism would be seized early on by some band of aristocrats (so they would call themselves) with a fixed conception of what is best and most deserving, and insensitive to the diverse excellences of their fellow citizens. And then desert would cease to be a pluralist criterion; we would find ourselves face to face with a new set (of an old sort) of tyrants. We do, of course, choose people as arbiters of desert – to serve on juries, for example, or to award prizes; it will be worth considering later what the prerogatives of a juror are. But it is important to stress here that he operates within a narrow range. Desert is a strong claim, but it calls for difficult judgments; and only under very special conditions does it yield specific distributions.

Need

Finally, the criterion of need. "To each according to his needs" is generally taken as the distributive half of Marx's famous maxim: we are to distribute the wealth of the community so as to meet the necessities of its members.[17] A plausible proposal, but a radically incomplete one. In fact, the first half of the maxim is also a distributive proposal, and it doesn't fit the rule of the second half. "From each according to his ability" suggests that jobs should be distributed (or that men and women should be conscripted to work) on the basis of individual qualifications. But individuals don't in any obvious sense need the jobs for which they are qualified. Perhaps such jobs are scarce, and there are a large number of qualified candidates: which candidates need them most? If their material needs are already taken care of, perhaps they don't need to work at all. Or if, in some non-material sense, they all need to work, then that need won't distinguish among them, at least not to the naked eye. It would in any case be odd to ask a search committee looking, say, for a hospital director to make its choice on the basis of the needs of the candidates rather than on those of the staff and the patients of the hospital. But the latter set of needs, even if it isn't the subject of political disagreement, won't yield a single distributive decision.

Nor will need work for many other goods. Marx's maxim doesn't help at all with regard to the distribution of political power, honor and fame, sailboats, rare books, beautiful objects of every sort. These are not things that anyone, strictly speaking, needs. Even if we take a loose view and define the verb *to need* the way children do, as the strongest form of the verb *to want*, we still won't have an adequate distributive criterion. The sorts of things that I have listed cannot be distributed equally to those with equal wants because some of them are generally, and some of them are necessarily, scarce, and some of them can't be possessed at all unless other people, for reasons of their own, agree on who is to possess them.

Need generates a particular distributive sphere, within which it is itself the appropriate distributive principle. In a poor society, a high proportion of social wealth will be drawn into this sphere. But given the great variety of goods that arises out of any common life, even when it is

lived at a very low material level, other distributive criteria will always be operating alongside of need, and it will always be necessary to worry about the boundaries that mark them off from one another. Within its sphere, certainly, need meets the general distributive rule about *x* and *y*. Needed goods distributed to needy people in proportion to their neediness are obviously not dominated by any other goods. It's not having *y*, but only lacking *x* that is relevant. But we can now see, I think, that every criterion that has any force at all meets the general rule within its own sphere, and not elsewhere. This is the effect of the rule: different goods to different companies of men and women for different reasons and in accordance with different procedures. And to get all this right, or to get it roughly right, is to map out the entire social world.

Hierarchies and Caste Societies

Or, rather, it is to map out a particular social world. For the analysis that I propose is imminent and phenomenological in character. It will yield not an ideal map or a master plan but, rather, a map and a plan appropriate to the people for whom it is drawn, whose common life it reflects. The goal, of course, is a reflection of a special kind, which picks up those deeper understandings of social goods which are not necessarily mirrored in the everyday practice of dominance and monopoly. But what if there are no such understandings? I have been assuming all along that social meanings call for the autonomy, or the relative autonomy, of distributive spheres; and so they do much of the time. But it's not impossible to imagine a society where dominance and monopoly are not violations but enactments of meaning, where social goods are conceived in hierarchical terms. In feudal Europe, for example, clothing was not a commodity (as it is today) but a badge of rank. Rank dominated dress. The meaning of clothing was shaped in the image of the feudal order. Dressing in finery to which one wasn't entitled was a kind of lie; it made a false statement about who one was. When a king or a prime minister dressed as a commoner in order to learn something about the opinions of his subjects, this was a kind of politic deceit. On the other hand, the difficulties of enforcing the clothing code (the sumptuary laws) suggests that there was all along an alternative sense of what clothing meant. At some point, at least, one can begin to recognize the boundaries of a distinct sphere within which people dress in accordance with what they can afford or what they are willing to spend or how they want to look. The sumptuary laws may still be enforced, but now one can make – and ordinary men and women do, in fact, make – egalitarian arguments against them.

Can we imagine a society in which all goods are hierarchically conceived? Perhaps the caste system of ancient India had this form (though that is a farreaching claim, and it would be prudent to doubt its truth: for one thing, political power seems always to have escaped the laws of caste). We think of castes as rigidly segregated groups, of the caste system as a "plural society," a world of boundaries.[18] But the system is constituted by an extraordinary integration of meanings. Prestige, wealth, knowledge, office, occupation, food, clothing, even the social good of conversation: all are subject to the intellectual as well as to the physical discipline of hierarchy. And the hierarchy is itself determined by the single value of ritual purity. A certain kind of collective mobility is possible, for castes or subcastes can cultivate the outward marks of purity and (within severe limits) raise their position in the social scale. And the system as a whole rests upon a religious doctrine that promises equality of opportunity, not in this life but across the lives of the soul. The individual's status here and now "is the result of his conduct in his last incarnation … and if unsatisfactory can be remedied by acquiring merit in his present life which will raise his status in the next."[19] We should not assume that men and women are ever entirely content with radical inequality. Nevertheless, distributions here and now are part of a single system, largely unchallenged, in which purity is dominant over other goods – and birth and blood are dominant over purity. Social meanings overlap and cohere.

The more perfect the coherence, the less possible it is even to think about complex equality. All goods are like crowns and thrones in a hereditary monarchy. There is no room, and there are no criteria, for autonomous distributions. In fact, however, even hereditary monarchies are rarely so simply constructed. The social understanding of royal power commonly involves some notion of divine grace, or magical gift, or human insight; and these criteria for office holding are potentially independent of birth and blood. So it is for most social goods: they are only imperfectly integrated into larger systems; they are understood, at least sometimes, in their own terms. The theory of goods explicates understandings of this sort (where they exist), and the theory of complex equality exploits them. We say, for example, that it is tyrannical for a man without grace or gift or insight to sit upon the throne. And this is only the first and most obvious kind of tyranny. We can search for many other kinds.

Tyranny is always specific in character: a particular boundary crossing, a particular violation of social meaning. Complex equality requires the defense of boundaries; it works by differentiating goods just as hierarchy works by differentiating people. But we can only talk of a *regime* of complex equality when there are many boundaries to defend; and what the right number is cannot be specified. There is no right number. Simple equality is easier: one dominant good widely distributed makes an egalitarian society. But complexity is hard: how many goods must be autonomously conceived before the relations they mediate can become the relations of equal men and women? There is no certain answer and hence no ideal regime. But as soon as we start to distinguish meanings and mark out distributive spheres, we are launched on an egalitarian enterprise.

The Setting of the Argument

The political community is the appropriate setting for this enterprise. It is not, to be sure, a self-contained distributive world: only the world is a self-contained distributive world, and contemporary science fiction invites us to speculate about a time when even that won't be true. Social goods are shared, divided, and exchanged across political frontiers. Monopoly and dominance operate almost as easily beyond the frontiers as within them. Things are moved, and people move themselves, back and forth across the lines. Nevertheless, the political community is probably the closest we can come to a world of common meanings. Language, history, and culture come together (come more closely together here than anywhere else) to produce a collective consciousness. National character, conceived as a fixed and permanent mental set, is obviously a myth; but the sharing of sensibilities and intuitions among the members of a historical community is a fact of life. Sometimes political and historical communities don't coincide, and there may well be a growing number of states in the world today where sensibilities and intuitions aren't readily shared; the sharing takes place in smaller units. And then, perhaps, we should look for some way to adjust distributive decisions to the requirements of those units. But this adjustment must itself be worked out politically, and its precise character will depend upon understandings shared among the citizens about the value of cultural diversity, local autonomy, and so on. It is to these understandings that we must appeal when we make our arguments – all of us, not philosophers alone; for in matters of morality, argument simply is the appeal to common meanings.

Politics, moreover, establishes its own bonds of commonality. In a world of independent states, political power is a local monopoly. These men and women, we can say, under whatever constraints, shape their own destiny. Or they struggle as best they can to shape their own destiny. And if their destiny is only partially in their own hands, the struggle is entirely so. They are the ones whose decision it is to tighten or loosen distributive criteria, to centralize or decentralize procedures, to intervene or refuse to intervene in this or that distributive sphere. Probably, some set of leaders make the actual decisions, but the citizens should be able to recognize the leaders as their own. If the leaders are cruel or stupid or endlessly venal, as they often are, the citizens or some of the citizens will try to replace them, fighting over the distribution of political power. The fight will be shaped by the institutional structures of the community – that is, by the outcomes of previous fights. Politics present is the product of politics past. It establishes an unavoidable setting for the consideration of distributive justice.

There is one last reason for adopting the view of the political community as setting, a reason that I shall elaborate on at some length in the next chapter. The community is itself a good – conceivably the most important good – that gets distributed. But it is a good that can only be distributed by taking people in, where all the senses of that latter phrase are relevant: they must be physically admitted and politically received. Hence membership cannot be handed out by some external agency; its value depends upon an internal decision. Were there no communities capable of making such decisions, there would in this case be no good worth distributing.

The only plausible alternative to the political community is humanity itself, the society of nations, the entire globe. But were we to take the globe as our setting, we would have to imagine what does not yet exist: a community that included all men and women everywhere. We would have to invent a set of common meanings for these people, avoiding if we could the stipulation of our own values. And we would have to ask the members of this hypothetical community (or their hypothetical representatives) to agree among themselves on what distributive arrangements and patterns of conversion are to count as just. Ideal contractualism or undistorted communication, which represents one approach – not my own – to justice in particular communities, may well be the only approach for the globe as a whole.[20] But

whatever the hypothetical agreement, it could not be enforced without breaking the political monopolies of existing states and centralizing power at the global level. Hence the agreement (or the enforcement) would make not for complex but for simple equality – if power was dominant and widely shared – or simply for tyranny – if power was seized, as it probably would be, by a set of international bureaucrats. In the first case, the people of the world would have to live with the difficulties I have described: the continual reappearance of local privilege, the continual reassertion of global statism. In the second case, they would have to live with difficulties that are considerably worse. I will have a little more to say about these difficulties later. For now I take them to be reasons enough to limit myself to cities, countries, and states that have, over long periods of time, shaped their own internal life.

With regard to membership, however, important questions arise between and among such communities, and I shall try to focus on them and to draw into the light all those occasions when ordinary citizens focus on them. In a limited way, the theory of complex equality can be extended from particular communities to the society of nations, and the extension has this advantage: it will not run roughshod over local understandings and decisions. Just for that reason, it also will not yield a uniform system of distributions across the globe, and it will only begin to address the problems raised by mass poverty in many parts of the globe. I don't think the beginning unimportant; in any case, I can't move beyond it. To do that would require a different theory, which would take as its subject not the common life of citizens but the more distanced relations of states: a different theory, a different book, another time.

Notes

1 See John Rawls, *A Theory of Justice* (Cambridge, MA, 1971); Jürgen Habermas, *Legitimation Crisis*, trans. Thomas McCarthy (Boston, 1975), esp. p. 113; Bruce Ackerman, *Social Justice in the Liberal State* (New Haven, 1980).

2 Robert Nozick makes a similar argument in *Anarchy, State, and Utopia* (New York, 1974), pp. 149–50, but with radically individualistic conclusions that seem to me to miss the social character of production.

3 Ralph Waldo Emerson, "Ode," in *The Complete Essays and Other Writings*, ed. Brooks Atkinson (New York, 1940), p. 770.

4 John Stuart Mill, *On Liberty*, in *The Philosophy of John Stuart Mill*, ed. Marshall Cohen (New York, 1961), p. 255. For an anthropological account of liking and not liking social goods, see Mary Douglas and Baron Isherwood, *The World of Goods* (New York, 1979).

5 William James, quoted in C.R. Snyder and Howard Fromkin, *Uniqueness: The Human Pursuit of Difference* (New York, 1980), p. 108.

6 Aren't social meanings, as Marx said, nothing other than "the ideas of the ruling class," "the dominant material relationships grasped as ideas"? (Karl Marx, *The German Ideology*, ed. R. Pascal (New York, 1947), p. 89). I don't think that they are ever only that or simply that, though the members of the ruling class and the intellectuals they patronize may well be in a position to exploit and distort social meanings in their own interests. When they do that, however, they are likely to encounter resistance, rooted (intellectually) in those same meanings. A people's culture is always a joint, even if it isn't an entirely cooperative, production; and it is always a complex production. The common understanding of particular goods incorporates principles, procedures, conceptions of agency, that the rulers would not choose if they were choosing *right now* – and so provides the terms of social criticism. The appeal to what I shall call "internal" principles against the usurpations of powerful men and women is the ordinary form of critical discourse.

7 Bernard Williams, *Problems of the Self: Philosophical Papers, 1956–1972* (Cambridge, England, 1973), pp. 230–49 ("The Idea of Equality"). This essay is one of the starting points of my own thinking about distributive justice. See also the critique of Williams's argument (and of an earlier essay of my own) in Amy Gutmann, *Liberal Equality* (Cambridge, England, 1980), ch. 4.

8 See Alan W. Wood, "The Marxian Critique of Justice," *Philosophy and Public Affairs* 1 (1972): 244–82.

9 Michael Young, *The Rise of the Meritocracy, 1870–2033* (Harmondsworth, England, 1961) – a brilliant piece of social science fiction.

10 Rawls, *Theory of Justice*, pp. 75ff.

11 I should note here what will become more clear as I go along, that political power is a special sort of good. It has a twofold character. First, it is like the other things that men and women make, value, exchange, and share: sometimes dominant, sometimes not; sometimes widely held, sometimes the possession of a very few. And, second, it is unlike all the other things because, however it is had and whoever has it, political power is the regulative agency for social goods generally. It is used to defend the boundaries of all the distributive spheres, including its own, and to enforce the common understandings of what goods are and what they are for. (But it can also be used, obviously, to invade the different spheres and to override those understandings.) In this second sense, we might say, indeed, that

political power is always dominant – at the boundaries, but not within them. The central problem of political life is to maintain that crucial distinction between "at" and "in." But this is a problem that cannot be solved given the imperatives of simple equality.

12 See Marx's comment, in his "Critique of the Gotha Program," that the democratic republic is the "form of state" within which the class struggle will be fought to a conclusion: the struggle is immediately and without distortion reflected in political life (Marx and Engels, *Selected Works* [Moscow, 1951], vol. II, p. 31).

13 Blaise Pascal, *The Pensées*, trans. J.M. Cohen (Harmondsworth, England, 1961), p. 96 (no. 244).

14 Karl Marx, *Economic and Philosophical Manuscripts*, in *Early Writings*, ed. T.B. Bottomore (London, 1963), pp. 193–4. It is interesting to note an earlier echo of Pascal's argument in Adam Smith's *Theory of Moral Sentiments* (Edinburgh, 1813), vol. I, pp. 378–9; but Smith seems to have believed that distributions in his own society actually conformed to this view of appropriateness – a mistake neither Pascal nor Marx ever made.

15 See the summary account in Jean Bodin, *Six Books of a Commonweale*, ed. Kenneth Douglas McRae (Cambridge, MA, 1962), pp. 210–18.

16 Cf. Nozick on "patterning," *Anarchy, State, and Utopia* [2], pp. 155ff.

17 Marx, "Gotha Program" (above), p. 23.

18 J.H. Hutton, *Caste in India: Its Nature, Function, and Origins* (4th ed., Bombay, 1963), pp. 127–8. I have also drawn on Célestin Bouglé, *Essays on the Caste System*, trans. D.F. Pocock (Cambridge, England, 1971), esp. Part III, chs. 3 and 4; and Louis Dumont, *Homo Hierarchus: The Caste System and Its Implications* (revised English ed., Chicago, 1980).

19 Hutton, *Caste in India*, (above) p. 125.

20 See Charles Beitz, *Political Theory and International Relations* (Princeton, 1979), part III, for an effort to apply Rawlsian ideal contractualism to international society.

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Equality of What?

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Discussions in moral philosophy have offered us a wide menu in answer to the question: equality of what? In this lecture I shall concentrate on three particular types of equality, viz., (i) utilitarian equality, (ii) total utility equality, and (iii) Rawlsian equality. I shall argue that all three have serious limitations, and that while they fail in rather different and contrasting ways, an adequate theory cannot be constructed even on the *combined* grounds of the three. Towards the end I shall try to present an alternative formulation of equality which seems to me to deserve a good deal more attention than it has received, and I shall not desist from doing some propaganda on its behalf.

First a methodological question. When it is claimed that a certain moral principle has shortcomings, what can be the basis of such an allegation? There seem to be at least two different ways of grounding such a criticism, aside from just checking its *direct* appeal to moral intuition. One is to check the *implications* of the principle by taking up particular cases in which the results of employing that principle can be seen in a rather stark way, and then to examine these implications against our intuition. I shall call such a critique a *case-implication critique*. The other is to move not from the general to the particular, but from the general to the *more* general. One can examine the consistency of the principle with another principle that is acknowledged to be more fundamental. Such prior principles are usually formulated at a rather abstract level, and frequently take the form of congruence with some very general procedures. For example, what could be reasonably assumed to have been chosen under the *as if* ignorance of the Rawlsian "original position," a hypothetical primordial state in which people decide on what rules to adopt without knowing who they are going to be – as if they could end up being any one of the persons in the community.[1] Or what rules would satisfy Richard Hare's requirement of "universalizability" and be consistent with "giving equal weights to the equal interests of the occupants of all the roles."[2] I shall call a critique based on such an approach a *prior-principle critique*. Both approaches can be used in assessing the moral claims of each type of equality, and will indeed be used here.

I Utilitarian Equality

Utilitarian equality is the equality that can be derived from the utilitarian concept of goodness applied to problems of distribution. Perhaps the simplest case is the

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"pure distribution problem": the problem of dividing a given homogeneous cake among a group of persons.[3] Each person gets more utility the larger his share of the cake, and gets utility *only* from his share of the cake; his utility increases at a diminishing rate as the amount of his share goes up. The utilitarian objective is to maximize the sum-total of utility irrespective of distribution, but that requires the *equality* of the *marginal* utility of everyone – marginal utility being the incremental utility each person would get from an additional unit of cake.[4] According to one interpretation, this equality of marginal utility embodies equal treatment of everyone's interests.[5]

The position is a bit more complicated when the total size of the cake is not independent of its distribution. But even then maximization of the total utility sum requires that transfers be carried to the point at which the marginal utility gain of the gainers equals the marginal utility loss of the losers, after taking into account the effect of the transfer on the size and distribution of the cake.[6] It is in this wider context that the special type of equality insisted upon by utilitarianism becomes assertively distinguished. Richard Hare has claimed that "giving equal weight to the equal interests of all the parties" would "lead to utilitarianism" – thus satisfying the prior-principle requirement of universalizability.[7] Similarly, John Harsanyi shoots down the non-utilitarians (including this lecturer, I hasten to add), by claiming for utilitarianism an exclusive ability to avoid "unfair discrimination" between "one person's and another person's equally urgent human needs."[8]

The moral importance of needs, on this interpretation, is based exclusively on the notion of utility. This is disputable, and having had several occasions to dispute it in the past,[9] I shall not shy away from disputing it in this particular context. But while I will get on to this issue later, I want first to examine the nature of utilitarian equality without – for the time being – questioning the grounding of moral importance entirely on utility. Even when utility is the sole basis of importance there is still the question as to whether the size of *marginal* utility, irrespective of *total* utility enjoyed by the person, is an adequate index of moral importance. It is, of course, possible to define a metric on utility characteristics such that each person's utility scale is coordinated with everyone else's in a way that equal social importance is simply "scaled" as equal marginal utility. If interpersonal comparisons of utility are taken to have no descriptive content, then this can indeed be thought to be a natural approach. No matter how the relative social importances are arrived at, the marginal utilities attributed to each person would then simply reflect these values. This can be done explicitly by appropriate interpersonal scaling,[10] or implicitly through making the utility numbering reflect choices in situations of *as if* uncertainty associated with the "original position" under the additional assumption that ignorance be interpreted as equal probability of being anyone.[11] This is not the occasion to go into the technical details of this type of exercise, but the essence of it consists in using a scaling procedure such that marginal utility measures are automatically identified as indicators of social importance.

This route to utilitarianism may meet with little resistance, but it is non-controversial mainly because it says so little. A problem arises the moment utilities and interpersonal comparisons thereof are taken to have some independent descriptive content, as utilitarians have traditionally insisted that they do. There could then be conflicts between these descriptive utilities and the appropriately scaled, essentially normative, utilities in terms of which one is "forced" to be a utilitarian. In what follows I shall have nothing more to say on utilitarianism through appropriate interpersonal scaling, and return to examining the traditional utilitarian position, which takes utilities to have interpersonally comparable descriptive content. How moral importance should relate to these descriptive features must, then, be explicitly faced.

The position can be examined from the prior-principle perspective as well as from the case-implication angle. John Rawls's criticism as a preliminary to presenting his own alternative conception of justice took mostly the prior-principle form. This was chiefly in terms of acceptability in the "original position," arguing that in the postulated situation of *as if* ignorance people would not choose to maximize the utility sum. But Rawls also discussed the violence that utilitarianism does to our notions of liberty and equality. Some replies to Rawls's arguments have reasserted the necessity to be a utilitarian by taking the "scaling" route, which was discussed earlier, and which – I think – is inappropriate in meeting Rawls's critique. But I must confess that I find the lure of the "original position" distinctly resistible since it seems very unclear what precisely would be chosen in such a situation. It is also far from obvious that prudential choice under *as if* uncertainty provides an adequate basis for moral judgment in *un*original, i.e., real-life, positions.[12] But I believe Rawls's more direct critiques in terms of liberty and equality do remain powerful.

Insofar as one is concerned with the *distribution* of utilities, it follows immediately that utilitarian ism would in general give one little comfort. Even the minutest gain in total utility *sum* would be taken to outweigh distributional inequalities of the most blatant kind. This problem would be avoidable under certain assumptions, notably the case in which everyone has the *same* utility function. In the pure distribution problem, with this assumption the utilitarian best would require absolute equality of everyone's total utilities.[13] This is because when the marginal utilities are equated, so would be the total utilities if everyone has the same utility function. This is, however, egalitarianism by serendipity: just the accidental result of the marginal tail wagging the total dog. More importantly, the assumption would be very frequently violated, since there are obvious and well-discussed variations between human beings. John may be easy to please, but Jeremy not. If it is taken to be an acceptable prior-principle that the equality of the distribution of total utilities has some value, then the utilitarian conception of equality – marginal as it is – must stand condemned.

The recognition of the fundamental diversity of human beings does, in fact, have very deep consequences, affecting not merely the utilitarian conception of social good, but others as well, including (as I shall argue presently) even the Rawlsian conception of equality. If human beings are identical, then the application of the prior-principle of universalizability in the form of "giving equal weight to the equal interest of all parties" simplifies enormously. Equal marginal utilities of all – reflecting one interpretation of the equal treatment of needs – coincides with equal total utilities – reflecting one interpretation of serving their overall interests equally well. With diversity, the two can pull in opposite directions, and it is far from clear that "giving equal weight to the equal interest of all parties" would require us to concentrate only on one of the two parameters – taking no note of the other.

The case-implication perspective can also be used to develop a related critique, and I have tried to present such a critique elsewhere.[14] For example, if person A as a cripple gets half the utility that the pleasure-wizard person B does from any given level of income, then in the pure distribution problem between A and B the utilitarian would end up giving the pleasure-wizard B more income than the cripple A. The cripple would then be doubly worse off: both since he gets less utility from the same level of income, *and* since he will also get less income. Utilitarianism must lead to this thanks to its single-minded concern with maximizing the utility sum. The pleasure-wizard's superior efficiency in producing utility would pull income away from the less efficient cripple.

Since this example has been discussed a certain amount,[15] I should perhaps explain what is being asserted and what is not. First, it is *not* being claimed that anyone who has lower total utility (e.g., the cripple) at any given level of income must of necessity have lower marginal utility also. This must be true for some levels of income, but need not be true everywhere. Indeed, the opposite could be the case when incomes are equally distributed. If that were so, then of course even utilitarianism would give the cripple more income than the non-cripple, since at that point the cripple would be the more efficient producer of utility. My point is that there is no guarantee that this will be the case, and more particularly, if it were the case that the cripple were not only worse off in terms of total utility but could convert income into utility less efficiently everywhere (or even just at the point of equal income division), then utilitarianism would compound his disadvantage by settling him with less income on top of lower efficiency in making utility out of income. The point, of course, is not about cripples in general, nor about all people with total utility disadvantage, but concerns people – including cripples – with disadvantage in terms of both total *and* marginal utility at the relevant points.

Second, the descriptive content of utility is rather important in this context. Obviously, if utilities were scaled to reflect moral importance, then wishing to give priority to income for the cripple would simply amount to attributing a higher "marginal utility" to the cripple's income; but this – as we have already discussed – is a very special sense of utility – quite devoid of descriptive content. In terms of descriptive features, what is being assumed in our example is that the cripple can be helped by giving him income, but the increase in his utility as a consequence of a marginal increase in income is less – in terms of the accepted descriptive criteria – than giving that unit of income to the pleasure-wizard, when both have initially the same income.

Finally, the problem for utilitarianism in this case-implication argument is not dependent on an implicit assumption that the claim to more income arising from disadvantage must dominate over the claim arising from high marginal utility.[16] A system that gives some weight to both claims would still fail to meet the utilitarian formula of social good, which demands an exclusive concern with the latter claim. It is this narrowness that

makes the utilitarian conception of equality such a limited one. Even when utility is accepted as the only basis of moral importance, utilitarianism fails to capture the relevance of overall advantage for the requirements of equality. The prior-principle critiques can be supplemented by case-implication critiques using this utilitarian lack of concern with distributional questions except at the entirely marginal level.

II Total Utility Equality

Welfarism is the view that the goodness of a state of affairs can be judged entirely by the goodness of the utilities in that state.[17] This is a less demanding view than utilitarianism in that it does not demand – in addition – that the goodness of the utilities must be judged by their sum-total. Utilitarianism is, in this sense, a special case of welfarism, and provides one illustration of it. Another distinguished case is the criterion of judging the goodness of a state by the utility level of the worst-off person in that state – a criterion often attributed to John Rawls. (*Except* by John Rawls! He uses social primary goods rather than utility as the index of advantage, as we shall presently discuss.) One can also take some other function of the utilities – other than the sum-total or the minimal element.

Utilitarian equality is one type of welfarist equality. There are others, notably the equality of total utility. It is tempting to think of this as some kind of an analogue of utilitarianism shifting the focus from marginal utility to total utility. This correspondence is, however, rather less close than it might first appear. First of all, while we economists often tend to treat the marginal and the total as belonging to the same plane of discourse, there is an important difference between them. Marginal is an essentially *counter-factual* notion: marginal utility is the additional utility that *would be* generated if the person had one more unit of income. It contrasts what is observed with what allegedly would be observed if something else were different: in this case if the income had been one unit greater. Total is not, however, an inherently counter-factual concept; whether it is or is not would depend on the variable that is being totalled. In case of utilities, if they are taken to be observed facts, total utility will not be counter-factual. Thus total utility equality is a matter for direct observation, whereas utilitarian equality is not so, since the latter requires hypotheses as to what things would have been under different postulated circumstances. The contrast can be easily traced to the fact that utilitarian equality is essentially a consequence of sum *maximization*, which is itself a counter-factual notion, whereas total utility equality is an equality of some directly observed magnitudes.

Second, utilitarianism provides a complete ordering of all utility distributions – the ranking reflecting the order of the sums of individual utilities – but as specified so far, total utility equality does not do more than just point to the case of absolute equality. In dealing with two cases of non-equal distributions, something more has to be said so that they could be ranked. The ranking can be completed in many different ways.

One way to such a complete ranking is provided by the lexicographic version of the maximin rule, which is associated with the Rawlsian Difference Principle, but interpreted in terms of utilities as opposed to primary goods. Here the goodness of the state of affairs is judged by the level of utility of the worst-off person in that state; but if the worst-off persons in two states respectively have the same level of utility, then the states are ranked according to the utility levels of the second worst-off. If they too tie, then by the utility levels of the third worst-off, and so on. And if two utility distributions are matched at each rank all the way from the worst off to the best off, then the two distributions are equally good. Following a convention established in social choice theory, I shall call this *leximin*.

In what way does total utility equality lead to the leximin? It does this when combined with some other axioms, and in fact the analysis closely parallels the recent axiomatic derivations of the Difference Principle by several authors.[18] Consider four utility levels a, b, c, d, in decreasing order of magnitude. One can argue that in an obvious sense the pair of extreme points (a, d) displays greater inequality than the pair of intermediate points (b, c). Note that this is a purely *ordinal* comparison based on ranking only, and the exact magnitudes of a, b, c, and d make no difference to the comparison in question. If one were *solely* concerned with equality, then it could be argued that (b, c) is superior – or at least non-inferior – to (a, d). This requirement may be seen as a strong version of preferring equality of utility distributions, and may be called "utility equality preference." It is possible to combine this with an axiom due to Patrick Suppes which captures the notion of *dominance* of one utility distribution over another, in the sense of each element of one distribution being at least as large as the corresponding element in the other distribution.[19] In the two-person case this requires that state x must be regarded as at least as good as y, *either* if each person in

state *x* has at least as much utility as himself in state *y*, *or* if each person in state *x* has at least as much utility as the *other* person in state *y*. *If*, in addition, at least one of them has strictly more, then of course *x* could be declared to be strictly better (and not merely at least as good). If this Suppes principle and the "utility equality preference" are combined, then we are pushed in the direction of leximin. Indeed, leximin can be fully derived from these two principles by requiring that the approach must provide a complete ordering of all possible states no matter what the interpersonally comparable individual utilities happen to be (called "unrestricted domain"), and that the ranking of any two states must depend on utility information concerning *those* states only (called "independence").

Insofar as the requirements other than utility equality preference (i.e., the Suppes principle, unrestricted domain, and independence) are regarded as acceptable – and they have indeed been widely used in the social choice literature – leximin can be seen as the natural concomitant of giving priority to the conception of equality focussing on total utility.

It should be obvious, however, that leximin can be fairly easily criticized from the prior-principle perspective as well as the case-implication perspective. Just as utilitarianism pays no attention to the force of one's claim arising from one's disadvantage, leximin ignores claims arising from the *intensity* of one's needs. The *ordinal* characteristic that was pointed out while presenting the axiom of utility equality preference makes the approach insensitive to the magnitudes of potential utility gains and losses. While in the critique of utilitarianism that was presented earlier I argued against treating these potential gains and losses as the only basis of moral judgment, it was *not* of course alleged that these have no moral relevance at all. Take the comparison of (*a, d*) vis-à-vis (*b, c*), discussed earlier, and let (*b, c*) stand for (*3, 2*). Utility equality preference would assert the superiority of (*3, 2*) over (*10, 1*) as well as (*4, 1*). Indeed, it would not distinguish between the two cases at all. It is this lack of concern with "how much" questions that makes leximin rather easy to criticize *either* by showing its failure to comply with such prior-principles as "giving equal weight to the equal interest of all parties," *or* by spelling out its rather austere implications in specific cases.

Aside from its indifference to "how much" questions, leximin also has little interest in "how many" questions – paying no attention at all to the number of people whose interests are overridden in the pursuit of the interests of the worst off. The worst-off position rules the roost, and it does not matter whether this goes against the interests of one other person, or against those of a million or a billion other persons. It is sometimes claimed that leximin would not be such an extreme criterion if it could be modified so that this innumeracy were avoided, and if the interests of *one* worse-off position were given priority over the interests of exactly *one* better-off position, but not necessarily against the interests of *more than one* better-off position. In fact, one can define a less demanding version of leximin, which can be called leximin-2, which takes the form of applying the leximin principle *if* all persons other than two are indifferent between the alternatives, but not necessarily otherwise. Leximin-2, as a compromise, will be still unconcerned with "how much" questions on the magnitudes of utilities of the two non-indifferent persons, but need not be blinkered about "how many" questions dealing with numbers of people: the priority applies to one person over exactly one other.[20]

Interestingly enough, a consistency problem intervenes here. It can be proved that given the regularity conditions, viz., unrestricted domain and independence, leximin-2 logically entails leximin in general.[21] That is, given these regularity conditions, there is no way of retaining moral sensitivity to the number of people on each side by choosing the limited requirement of leximin-2 without going all the way to leximin itself. It appears that indifference to *how much* questions concerning utilities implies indifference to *how many* questions concerning the number of people on different sides. One innumeracy begets another.

Given the nature of these critiques of utilitarian equality and total utility equality respectively, it is natural to ask whether some *combination* of the two should not meet both sets of objections. If utilitarianism is attacked for its unconcern with inequalities of the utility distribution, and leximin is criticized for its lack of interest in the magnitudes of utility gains and losses, and even in the numbers involved, then isn't the right solution to choose some mixture of the two? It is at this point that the long-postponed question of the relation between utility and moral worth becomes crucial. While utilitarianism and leximin differ sharply from each other in the use that they respectively make of the utility information, both share an exclusive concern with utility data. If non-utility considerations have any role in either approach, this arises from the part they play in the determination of utilities, or possibly as surrogates for utility information in the absence of adequate utility

data. A combination of utilitarianism and leximin would still be confined to the box of welfarism, and it remains to be examined whether welfarism as a general approach is *itself* adequate.

One aspect of the obtuseness of welfarism was discussed clearly by John Rawls.

> In calculating the greatest balance of satisfaction it does not matter, except indirectly, what the desires are for. We are to arrange institutions so as to obtain the greatest sum of satisfactions; we ask no questions about their source or quality but only how their satisfaction would affect the total of well-being…. Thus if men take a certain pleasure in discriminating against one another, in subjecting others to a lesser liberty as a means of enhancing their self-respect, then the satisfaction of these desires must be weighed in our deliberations according to their intensity, or whatever, along with other desires…. In justice as fairness, on the other hand, persons accept in advance a principle of equal liberty and they do this without a knowledge of their more particular ends…. An individual who finds that he enjoys seeing others in positions of lesser liberty understands that he has no claim whatever to this enjoyment. The pleasure he takes in other's deprivation is wrong in itself: it is a satisfaction which requires the violation of a principle to which he would agree in the original position.[22]

It is easily seen that this is an argument not merely against utilitarianism, but against the adequacy of utility information for moral judgments of states of affairs, and is, thus, an attack on welfarism in general. Second, it is clear that as a criticism of welfarism – and *a fortiori* as a critique of utilitarianism – the argument uses a principle that is unnecessarily strong. If it were the case that pleasures taken "in other's deprivation" were not taken to be wrong in itself, but simply *disregarded*, even then the rejection of welfarism would stand. Furthermore, even if such pleasures were regarded as valuable, but *less* valuable than pleasures arising from other sources (e.g., enjoying food, work, or leisure), welfarism would still stand rejected. The issue – as John Stuart Mill had noted – is the lack of "parity" between one source of utility and another.[23] Welfarism requires the endorsement not merely of the widely shared intuition that any pleasure has some value – and one would have to be a bit of a kill-joy to dissent from this – but also the much more dubious proposition that pleasures must be relatively weighed *only* according to their respective intensities, irrespective of the source of the pleasure and the nature of the activity that goes with it. Finally, Rawls's argument takes the form of an appeal to the prior-principle of equating moral rightness with prudential acceptability in the original position. Even those who do not accept that prior principle could reject the welfarist no-nonsense counting of utility irrespective of all other information by reference to other prior principles, e.g., the irreducible value of liberty.

The relevance of non-utility information to moral judgments is the central issue involved in disputing welfarism. Libertarian considerations point towards a particular class of non-utility information, and I have argued elsewhere that this may require even the rejection of the so-called Pareto principle based on utility dominance.[24] But there are also other types of non-utility information which have been thought to be intrinsically important. Tim Scanlon has recently discussed the contrast between "urgency" and utility (or intensity of preference). He has also argued that "the criteria of well-being that we actually employ in making moral judgments are objective," and a person's level of well-being is taken to be "independent of that person's tastes and interests."[25] These moral judgments could thus conflict with utilitarian – and more generally (Scanlon could have argued) with welfarist – moralities, no matter whether utility is interpreted as pleasure, or – as is increasingly common recently – as desire-fulfilment.

However, acknowledging the relevance of objective factors does not require that well-being be taken to be independent of tastes, and Scanlon's categories are *too* pure. For example, a lack of "parity" between utility from self-regarding actions and that from other-regarding actions will go beyond utility as an index of well-being and will be fatal to welfarism, but the contrast is not, of course, independent of tastes and subjective features. "Objective" considerations can count along with a person's tastes. What is required is the denial that a person's well-being be judged *exclusively* in terms of his or her utilities. If such judgments take into account a person's pleasures and desire-fulfilments, but also certain objective factors, e.g., whether he or she is hungry, cold, or oppressed, the resulting calculus would still be non-welfarist. Welfarism is an extremist position, and its denial can take many different forms – pure and mixed – so long as totally ignoring non-utility information is avoided.

Second, it is also clear that the notion of urgency need not work only *through* the determinants of personal well-being – however broadly conceived. For example, the claim that one should not be *exploited* at work is not

based on making exploitation an additional parameter in the specification of well-being on top of such factors as income and effort, but on the moral view that a person deserves to get what he – according to one way of characterizing production – has produced. Similarly, the urgency deriving from principles such as "equal pay for equal work" hits directly at discrimination without having to redefine the notion of personal well-being to take note of such discriminations. One could, for example, say: "She must be paid just as much as the men working in that job, not primarily because she would otherwise have a lower level of well-being than the others, but simply because she is doing the *same* work as the men there, and why should she be paid less?" These moral claims, based on non-welfarist conceptions of equality, have played important parts in social movements, and it seems difficult to sustain the hypothesis that they are purely "instrumental" claims – ultimately justified by their indirect impact on the fulfilment of welfarist, or other well-being-based, objectives.

Thus the dissociation of urgency from utility can arise from two different sources. One disentangles the notion of personal well-being from utility, and the other makes urgency not a function only of well-being. But, at the same time, the former does not require that well-being be independent of utility, and the latter does not necessitate a notion of urgency that is independent of personal well-being. Welfarism is a purist position and must avoid any contamination from either of these sources.

III Rawlsian Equality

Rawls's "two principles of justice" characterize the need for equality in terms of – what he has called – "primary social goods."[26] These are "things that every rational man is presumed to want," including "rights, liberties and opportunities, income and wealth, and the social bases of self-respect." Basic liberties are separated out as having priority over other primary goods, and thus priority is given to the principle of liberty which demands that "each person is to have an equal right to the most extensive basic liberty compatible with a similar liberty for others." The second principle supplements this, demanding efficiency and equality, judging advantage in terms of an index of primary goods. Inequalities are condemned unless they work out to everyone's advantage. This incorporates the "Difference Principle" in which priority is given to furthering the interests of the worst-off. And that leads to maximin, or to leximin, defined not on individual utilities but on the index of primary goods. But given the priority of the liberty principle, no trade-offs are permitted between basic liberties and economic and social gain.

Herbert Hart has persuasively disputed Rawls's arguments for the priority of liberty,[27] but with that question I shall not be concerned here. What is crucial for the problem under discussion is the concentration on bundles of primary social goods. Some of the difficulties with welfarism that I tried to discuss will not apply to the pursuit of Rawlsian equality. Objective criteria of well-being can be directly accommodated within the index of primary goods. So can be Mill's denial of the parity between pleasures from different sources, since the sources can be discriminated on the basis of the nature of the goods. Furthermore, while the Difference Principle is egalitarian in a way similar to leximin, it avoids the much-criticized feature of leximin of giving more income to people who are hard to please and who have to be deluged in champagne and buried in caviar to bring them to a normal level of utility, which you and I get from a sandwich and beer. Since advantage is judged not in terms of utilities at all, but through the index of primary goods, expensive tastes cease to provide a ground for getting more income. Rawls justifies this in terms of a person's responsibility for his own ends.

But what about the cripple with utility disadvantage, whom we discussed earlier? Leximin will give him more income in a pure distribution problem. Utilitarianism, I had complained, will give him *less*. The Difference Principle will give him neither more nor less on grounds of his being a cripple. His utility disadvantage will be irrelevant to the Difference Principle. This may seem hard, and I think it is. Rawls justifies this by pointing out that "hard cases" can "distract our moral perception by leading us to think of people distant from us whose fate arouses pity and anxiety."[28] This can be so, but hard cases do exist, and to take disabilities, or special health needs, or physical or mental defects, as morally irrelevant, or to leave them out for fear of making a mistake, may guarantee that the *opposite* mistake will be made.

And the problem does not end with hard cases. The primary goods approach seems to take little note of the diversity of human beings. In the context of assessing utilitarian equality, it was argued that if people were fundamentally similar in terms of utility functions, then the utilitarian concern with maximizing the sum-total of utilities would push us simultaneously also in the direction of equality of utility levels. Thus utilitarianism could be rendered vastly more attractive if people really were

similar. A corresponding remark can be made about the Rawlsian Difference Principle. If people were basically very similar, then an index of primary goods might be quite a good way of judging advantage. But, in fact, people seem to have very different needs varying with health, longevity, climatic conditions, location, work conditions, temperament, and even body size (affecting food and clothing requirements). So what is involved is not merely ignoring a few hard cases, but overlooking very widespread and real differences. Judging advantage purely in terms of primary goods leads to a partially blind morality.

Indeed, it can be argued that there is, in fact, an element of "fetishism" in the Rawlsian framework. Rawls takes primary goods as the embodiment of advantage, rather than taking advantage to be a *relationship* between persons and goods. Utilitarianism, or leximin, or – more generally – welfarism does not have this fetishism, since utilities are reflections of one type of relation between persons and goods. For example, income and wealth are not valued under utilitarianism as physical units, but in terms of their capacity to create human happiness or to satisfy human desires. Even if utility is not thought to be the right focus for the person-good relationship, to have an entirely good-oriented framework provides a peculiar way of judging advantage.

It can also be argued that while utility in the form of happiness or desire-fulfilment may be an *inadequate* guide to urgency, the Rawlsian framework asserts it to be *irrelevant* to urgency, which is, of course, a much stronger claim. The distinction was discussed earlier in the context of assessing welfarism, and it was pointed out that a rejection of welfarism need not take us to the point in which utility is given no role whatsoever. That a person's interest should have nothing directly to do with his happiness or desire-fulfilment seems difficult to justify. Even in terms of the prior-principle of prudential acceptability in the "original position," it is not at all clear why people in that primordial state should be taken to be so indifferent to the joys and sufferings in occupying particular positions, or if they are not, why their concern about these joys and sufferings should be taken to be morally irrelevant.

IV Basic Capability Equality

This leads to the further question: Can we not construct an adequate theory of equality on the *combined* grounds of Rawlsian equality and equality under the two welfarist conceptions, with some trade-offs among them? I would now like to argue briefly why I believe this too may prove to be informationally short. This can, of course, easily be asserted *if* claims arising from considerations other than well-being were acknowledged to be legitimate. Non-exploitation, or non-discrimination, requires the use of information not fully captured either by utility or by primary goods. Other conceptions of entitlements can also be brought in going beyond concern with personal well-being only. But in what follows I shall not introduce these concepts. My contention is that *even* the concept of *needs* does not get adequate coverage through the information on primary goods and utility.

I shall use a case-implication argument. Take the cripple again with marginal utility disadvantage. We saw that utilitarianism would do nothing for him; in fact it will give him *less* income than to the physically fit. Nor would the Difference Principle help him; it will leave his physical disadvantage severely alone. He did, however, get preferential treatment under leximin, and more generally, under criteria fostering total equality. His low level of total utility was the basis of his claim. But now suppose that he is no worse off than others in utility terms despite his physical handicap because of certain other utility features. This could be because he has a jolly disposition. Or because he has a low aspiration level and his heart leaps up whenever he sees a rainbow in the sky. Or because he is religious and feels that he will be rewarded in after-life, or cheerfully accepts what he takes to be just penalty for misdeeds in a past incarnation. The important point is that despite his marginal utility disadvantage, he has no longer a total utility deprivation. Now not even leximin – or any other notion of equality focussing on total utility – will do much for him. If we still think that he has needs as a cripple that should be catered to, then the basis of that claim clearly rests neither in high marginal utility, nor in low total utility, nor – of course – in deprivation in terms of primary goods.

It is arguable that what is missing in all this framework is some notion of "basic capabilities": a person being able to do certain basic things. The ability to move about is the relevant one here, but one can consider others, e.g., the ability to meet one's nutritional requirements, the wherewithal to be clothed and sheltered, the power to participate in the social life of the community. The notion of urgency related to this is not fully captured by either utility or primary goods, or any combination of the two. Primary goods suffers from fetishist handicap in being concerned with goods, and even though the list of

goods is specified in a broad and inclusive way, encompassing rights, liberties, opportunities, income, wealth, and the social basis of self-respect, it still is concerned with good things rather than with what these good things *do* to human beings. Utility, on the other hand, *is* concerned with what these things do to human beings, but uses a metric that focusses not on the person's capabilities but on his mental reaction. There is something still missing in the combined list of primary goods and utilities. If it is argued that resources should be devoted to remove or substantially reduce the handicap of the cripple despite there being no marginal utility argument (because it is expensive), despite there being no total utility argument (because he is so contented), and despite there being no primary goods deprivation (because he has the goods that others have), the case must rest on something else. I believe what is at issue is the interpretation of needs in the form of basic capabilities. This interpretation of needs and interests is often implicit in the demand for equality. This type of equality I shall call "basic capability equality."

The focus on basic capabilities can be seen as a natural extension of Rawls's concern with primary goods, shifting attention from goods to what goods do to human beings. Rawls himself motivates judging advantage in terms of primary goods by referring to capabilities, even though his criteria end up focussing on goods as such: on income rather than on what income does, on the "social bases of self-respect" rather than on self-respect itself, and so on. If human beings were very like each other, this would not have mattered a great deal, but there is evidence that the conversion of goods to capabilities varies from person to person substantially, and the equality of the former may still be far from the equality of the latter.

There are, of course, many difficulties with the notion of "basic capability equality." In particular, the problem of indexing the basic capability bundles is a serious one. It is, in many ways, a problem comparable with the indexing of primary good bundles in the context of Rawlsian equality. This is not the occasion to go into the technical issues involved in such an indexing, but it is clear that whatever partial ordering can be done on the basis of broad uniformity of personal preferences must be supplemented by certain established conventions of relative importance.

The ideas of relative importance are, of course, conditional on the nature of the society. The notion of the equality of basic capabilities is a very general one, but any application of it must be rather culture-dependent, especially in the weighting of different capabilities. While Rawlsian equality has the characteristic of being both culture-dependent and fetishist, basic capability equality avoids fetishism, but remains culture-dependent. Indeed, basic capability equality can be seen as essentially an extension of the Rawlsian approach in a non-fetishist direction.

V Concluding Remarks

I end with three final remarks. First, it is not my contention that basic capability equality can be the sole guide to the moral good. For one thing morality is not concerned only with equality. For another, while it is my contention that basic capability equality has certain clear advantages over other types of equality, I did not argue that the others were morally irrelevant. Basic capability equality is a partial guide to the part of moral goodness that is associated with the idea of equality. I have tried to argue that as a partial guide it has virtues that the other characterizations of equality do not possess.

Second, the index of basic capabilities, like utility, can be used in many different ways. Basic capability equality corresponds to total utility equality, and it can be extended in different directions, e.g., to leximin of basic capabilities.

On the other hand, the index can be used also in a way similar to utilitarianism, judging the strength of a claim in terms of incremental contribution to *enhancing* the index value. The main departure is in focussing on a *magnitude* different from utility as well as the primary goods index. The new dimension can be utilized in different ways, of which basic capability equality is only one.

Last, the bulk of this lecture has been concerned with rejecting the claims of utilitarian equality, total utility equality, and Rawlsian equality to provide a sufficient basis for the equality-aspect of morality – indeed, even for that part of it which is concerned with needs rather than deserts. I have argued that none of these three is sufficient, nor is any combination of the three.

This is my main thesis. I have also made the constructive claim that this gap can be narrowed by the idea of basic capability equality, and more generally by the use of basic capability as a morally relevant dimension taking us beyond utility and primary goods. I should end by pointing out that the validity of the main thesis is not conditional on the acceptance of this constructive claim.

Notes

1 J. Rawls, *A Theory of Justice* (Cambridge, MA: Harvard University Press, 1971), pp. 17–22. See also W. Vickrey, "Measuring Marginal Utility by Reactions to Risk," *Econometrica* 13 (1945), and J.C. Harsanyi, "Cardinal Welfare, Individualistic Ethics, and Interpersonal Comparisons of Utility," *Journal of Political Economy* 63 (1955).

2 R.M. Hare, *The Language of Morals* (Oxford: Clarendon Press, 1952); "Ethical Theory and Utilitarianism," in H.D. Lewis, ed., *Contemporary British Philosophy* (London: Allen and Unwin, 1976), pp. 116–17.

3 I have tried to use this format for an axiomatic contrast of the Rawlsian and utilitarian criteria in "Rawls versus Bentham: An Axiomatic Examination of the Pure Distribution Problem," in *Theory and Decision* 4 (1974); reprinted in N. Daniels, ed., *Reading Rawls* (Oxford: Blackwell, 1975). See also L. Kern, "Comparative Distributive Ethics: An Extension of Sen's Examination of the Pure Distribution Problem," in H.W. Gottinger and W. Leinfellner, eds., *Decision Theory and Social Ethics* (Dordrecht: Reidel, 1978), and J.P. Griffin, "Equality: On Sen's Equality Axiom," Keble College, Oxford, 1978, mimeographed.

4 The equality condition would have to be replaced by a corresponding combination of inequality requirements when the appropriate "continuity" properties do not hold. Deeper difficulties are raised by "non-convexities" (e.g., increasing marginal utility).

5 J. Harsanyi, "Can the Maximin Principle Serve as a Basis for Morality? A Critique of John Rawls' Theory," *American Political Science Review* 64 (1975).

6 As mentioned in note 4, the equality conditions would require modification in the absence of continuity of the appropriate type. Transfers must be carried to the point at which the marginal utility gain of the gainers from any further transfer is *no more than* the marginal utility loss of the losers.

7 Hare (1976), pp. 116–17.

8 John Harsanyi, "Non-linear Social Welfare Functions: A Rejoinder to Professor Sen," in R.E. Butts and J. Hintikka, eds., *Foundational Problems in the Special Sciences* (Dordrecht: Reidel, 1977), pp. 294–5.

9 *Collective Choice and Social Welfare* (San Francisco: Holden-Day, 1970), chapter 6 and section 11.4; "On Weights and Measures: Informational Constraints in Social Welfare Analysis," *Econometrica* 45 (1977). See also T.M. Scanlon's arguments against identifying utility with "urgency" in his "Preference and Urgency," *Journal of Philosophy* 72 (1975).

10 For two highly ingenious examples of such an exercise, see Peter Hammond, "Dual Interpersonal Comparisons of Utility and the Welfare Economics of Income Distribution," *Journal of Public Economics* 6 (1977): 51–7; and Menahem Yaari, "Rawls, Edgeworth, Shapley and Nash: Theories of Distributive Justice Re-examined," Research Memorandum No. 33, Center for Research in Mathematical Economics and Game Theory, Hebrew University, Jerusalem, 1978.

11 See Harsanyi (1955, 1975, 1977).

12 On this, see Thomas Nagel, "Rawls on Justice," *Philosophical Review* 83 (1973), and "Equality" in his *Mortal Questions* (Cambridge: Cambridge University Press, 1979).

13 The problem is much more complex when the total cake is not fixed, and where the maximization of utility sum need not lead to the equality of total utilities unless some additional assumptions are made, e.g., the absence of incentive arguments for inequality.

14 *On Economic Inequality* (Oxford: Clarendon Press, 1973), pp. 16–20.

15 See John Harsanyi, "Non-linear Social Welfare Functions," *Theory and Decision* 6 (1976): 311–12; Harsanyi (1977); Kern (1978); Griffin (1978); Richard B. Brandt, *A Theory of the Good and the Right* (Oxford: Clarendon Press, 1979), chapter 16.

16 Such an assumption is made in my Weak Equity Axiom, proposed in Sen (1973), but it is unnecessarily demanding for rejecting utilitarianism. See Griffin (1978) for a telling critique of the Weak Equity Axiom, in this exacting form.

17 See Sen (1977), and also my "Welfarism and Utilitarianism," *Journal of Philosophy* 76 (1979).

18 See P.J. Hammond, "Equity, Arrow's Conditions and Rawls' Difference Principle," *Econometrica* 44 (1976); S. Strasnick, "Social Choice Theory and the Derivation of Rawls' Difference Principle," *Journal of Philosophy* 73 (1976); C. d'Aspremont and L. Gevers, "Equity and Informational Basis of Collective Choice," *Review of Economic Studies* 44 (1977); K.J. Arrow, "Extended Sympathy and the Possibility of Social Choice," *American Economic Review* 67 (1977); A.K. Sen, "On Weights and Measures: Informational Constraints in Social Welfare Analysis," *Econometrica* 45 (1977); R. Deschamps and L. Gevers, "Leximin and Utilitarian Rules: A Joint Characterization," *Journal of Economic Theory* 17 (1978); K.W.S. Roberts, "Possibility Theorems with Interpersonally Comparable Welfare Levels," *Review of Economic Studies* 47 (1980); P.J. Hammond, "Two Person Equity," *Econometrica* 47 (1979).

19 P. Suppes, "Some Formal Models of Grading Principles," *Synthese* 6 (1966).

20 Leximin – and maximin – are concerned with conflicts between positional priorities, i.e., between ranks (such as the "worst-off position," "second worst-off position," etc.), and not with interpersonal priorities. When positions coincide with persons (e.g., the *same* person being the

worst off in each state), then positional conflicts translate directly into personal conflicts.

21 Theorem 8, Sen (1977). See also Hammond (1979) for extensions of this result.

22 Rawls (1971), pp. 30–1.

23 John Stuart Mill, *On Liberty* (1859), p. 140.

24 Sen (1970), especially chapter 6. Also Sen (1979).

25 T.M. Scanlon (1975), pp. 658–9.

26 Rawls (1971), pp. 60–5.

27 H.L.A. Hart, "Rawls on Liberty and Its Priority," *University of Chicago Law Review* 40 (1973); reprinted in N. Daniels, ed., *Reading Rawls* (Oxford: Blackwell, 1975).

28 John Rawls, "A Kantian Concept of Equality," *Cambridge Review* (February 1975), p. 96.

33

Equality and Priority

Derek Parfit

In his article 'Equality', Nagel imagines that he has two children, one healthy and happy, the other suffering from some painful handicap. Nagel's family could either move to a city where the second child could receive special treatment, or move to a suburb where the first child would flourish. Nagel writes:

> This is a difficult choice on any view. To make it a test for the value of equality, I want to suppose that the case has the following feature: the gain to the first child of moving to the suburb is substantially greater than the gain to the second child of moving to the city.

He then comments:

> If one chose to move to the city, it would be an egalitarian decision. It is more urgent to benefit the second child, even though the benefit we can give him is less than the benefit we can give to the first child.[1]

My aim, in this paper, is to discuss this kind of reasoning.

I

Nagel's decision turns on the relative importance of two facts: he could give one child a greater benefit, but the other child is worse off. There are countless cases of this kind. In these cases, when we are choosing between two acts or policies, one relevant fact is how great the resulting benefits would be. For Utilitarians, that is all that matters. On their view, we should always aim for the greatest sum of benefits. But, for egalitarians, it also matters how well off the beneficiaries would be. We should sometimes choose a smaller sum of benefits, for the sake of a better distribution.

Should we aim for a better distribution? If so, when and how? These are difficult questions, but their subject matter is, in a way, simple. It is enough to consider different possible states of affairs, or outcomes, each involving the same set of people. We imagine knowing how well off, in these outcomes, these people would be. We then ask whether either outcome would be better, or would be the outcome that we ought to bring about.

Some writers reject these questions. Nozick objects, for example, that these questions wrongly assume that there is

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something to be distributed. Most goods, he argues, are not up for distribution, or redistribution.[2] They are goods to which particular people already have entitlements, or special claims. Others make similar claims about desert.

These objections we can set aside. We can assume that, in the cases we are considering, no one deserves to be better off than anyone else; nor does anyone have special claims to whatever we are distributing. Since there are *some* cases of this kind, we have a subject. If we can reach conclusions, we can then consider how widely these apply. Like Rawls and others, I believe that, at the fundamental level, most cases are of this kind.

To ask my questions, we need only two assumptions. First, some people can be worse off than others, in ways that are morally relevant. Second, these differences can be matters of degree. To describe my imagined cases, I shall use figures. Nagel's choice, for example, can be shown as follows:

	The first child	*The second child*
Move to the city:	20	10
Move to the suburb:	25	9

Such figures misleadingly suggest precision. Even in principle, I believe, there could not be precise differences between how well off different people are. I intend these figures to show only that the choice between these outcomes makes much more difference to Nagel's first child, but that, in both outcomes, the second child would be much worse off.

One point about my figures is important. Each unit is a roughly equal benefit, however well off the person is who receives it. If someone rises from 99 to 100, this person benefits as much as someone else who rises from 9 to 10. Without this assumption we cannot ask some of our questions. Thus we cannot ask whether some benefit would matter more if it came to someone who was worse off.

Since each extra unit is an equal benefit, however well off the recipient is, these units should not be thought of as equal quantities of resources. The same increase in resources usually brings greater benefits to those who are worse off. But these benefits need not be thought of in Utilitarian terms, as involving greater happiness, or desire-fulfilment. They might be improvements in health, or length of life, or education, or range of opportunities, or involve any other goods that we take to be morally important.[3]

II

Most of us believe in some kind of equality. We believe in political equality, or equality before the law, or we believe that everyone has equal rights, or that everyone's interests should be given equal weight. Though these kinds of equality are of great importance, they are not my subject here. I am concerned with people's being *equally well off*. To be egalitarians, in my sense, this is the kind of equality in which we must believe.

Some egalitarians believe that, if people were equally well off, that would be a better state of affairs. If we hold this view, we can be called *Teleological* – or, for short, *Telic* – Egalitarians. We accept

> *The Principle of Equality*: It is in itself bad if some people are worse off than others.[4]

Suppose that the people in some community could all be either equally well off, or equally badly off. The Principle of Equality does not tell us that the second would be worse. To explain that obvious truth, we might appeal to

> *The Principle of Utility*: It is in itself better if people are better off.

When people would be on average better off, or would receive a greater sum of benefits, we can say, for brevity, that there would be more *utility*.

If we cared only about equality, we would be *Pure* Egalitarians. If we cared only about utility, we would be Utilitarians. Most of us accept a *pluralist* view: one that appeals to more than one principle or value. According to *Pluralist Egalitarians*, it would be better both if there was more equality, and if there was more utility. In deciding which of two outcomes would be better, we give weight to both these values.

These values may conflict. One of two outcomes may be in one way worse, because there would be more inequality, but in another way better, because there would be more utility. We must then decide which of these two facts would be more important. Consider, for example, the following possibilities:

(1)	Everyone at 150	
(2)	Half at 199	Half at 200
(3)	Half at 101	Half at 200

For Pure Egalitarians, (1) is the best outcome, since it contains the least inequality. For Utilitarians, (1) is the worst outcome, since it contains the least utility. For most Pluralist Egalitarians, (1) would be neither the best nor the worst of these outcomes. (1) would be, on balance, worse than (2), since it would be *much* worse in terms of utility, and only *slightly* better in terms of equality. Similarly, (1) would be better than (3), since it would be much better in terms of equality, and only slightly worse in terms of utility.

In many cases the Pluralist View is harder to apply. Compare

(1) Everyone at 150

with

(4) Half at N Half at 200.

If we are Pluralist Egalitarians, for which values of N would we believe (1) to be worse than (4)? For some range of values – such as 120 to 150 – we may find this question hard to answer. And it may not have an answer. The relative importance of equality and utility may be, even in principle, imprecise.

We should next distinguish two kinds of value. If we claim that equality is good, we may mean only that it has good effects. If people are unequal, for example, that can produce conflict, or damage the self-respect of those who are worst off, or put some people in the power of others. If we care about equality because we are concerned with such effects, we believe that equality has *instrumental* value, or is good as a means. But I am concerned with a different idea. For true Egalitarians, equality has *intrinsic* value, or is in itself good.

This distinction is important. If we believe that, besides having bad effects, inequality is in itself bad, we shall think it to be worse. And we shall think it bad even when it has no bad effects.

To illustrate this second point, consider what I shall call *the Divided World*. The two halves of the world's population are, we can suppose, unaware of each other's existence. Perhaps the Atlantic has not yet been crossed. Consider next two possible states of affairs:

(1) Half at 100 Half at 200
(2) Everyone at 145

Of these two states, (1) is in one way better than (2), since people are on average better off. But we may believe that, all things considered, (1) is worse than (2). How could we explain this view?

If we are Telic Egalitarians, our explanation would be this. While it is good that, in (1), people are on average better off, it is bad that some people are worse off than others. The badness of this inequality morally outweighs the extra benefits.

In making such a claim, we could not appeal to inequality's bad effects. Since the two halves of the world's population are quite unconnected, this inequality has no effects. If we are to claim that (1) is worse because of its inequality, we must claim that this inequality is in itself bad.[5]

III

We can now turn to a different kind of egalitarian view. According to *Deontic Egalitarians*, though we should sometimes aim for equality, that is *not* because we would thereby make the outcome better. On this view, it is not in itself bad if some people are worse off than others. When we ought to aim for equality, that is always for some other moral reason.

Such a view typically appeals to claims about *comparative* justice. Whether people are unjustly treated, in this comparative sense, depends on whether they are treated *differently* from other people. Thus it may be unfair if, in a distribution of resources, some people are denied their share. Fairness may require that, if certain goods are given to some, they should be given to all.

Another kind of justice is *non-comparative*. Whether people are unjustly treated, in this other sense, depends only on facts about them. It is irrelevant whether others are treated differently. Thus, if we treated no one as they deserved, this treatment would be unjust in the non-comparative sense. But, if we treated everyone equally unjustly, there would be no comparative injustice.[6]

It can be hard to distinguish these two kinds of justice, and there are difficult questions about the relation between them.[7] One point should be mentioned here. Non-comparative justice may require us to produce equality. Perhaps, if everyone were equally deserving, we should make everyone equally well off. But such equality would be merely the effect of giving people what they deserved. Only comparative justice makes equality our aim.

When I said that, in my examples, no one deserves to be better off than others, I did not mean that everyone is equally deserving. I meant that, in these cases, questions

of desert do not arise. It is only comparative justice with which we are here concerned.

There is another relevant distinction. In some cases, justice is *purely procedural*. It requires only that we act in a certain way. For example, when some good cannot be divided, we may be required to conduct a lottery, which gives everyone an equal chance to receive this good. In other cases, justice is in part *substantive*. Here too, justice may require a certain kind of procedure; but there is a separate criterion of what the outcome ought to be. One example would be the claim that people should be given equal shares.[8]

We can now redescribe our two kinds of Egalitarianism. On the Telic View, inequality is bad; on the Deontic View, it is unjust.

It may be objected that, when inequality is unjust, it is, for that reason, bad. But this does not undermine this way of drawing our distinction. On the Deontic View, injustice is a special kind of badness, one that necessarily involves wrong-doing. What is unjust, and therefore bad, is not strictly the state of affairs, but the way in which it was produced.

There is one kind of case which most clearly separates these two views: those in which some inequality cannot be avoided. For Deontic Egalitarians, if nothing can be done, there can be no injustice. In Rawls's words, if some situation 'is unalterable … the question of justice does not arise'.[9]

Consider, for example, the inequality in our natural endowments. Some of us are born more talented or healthier than others, or are more fortunate in other ways. If we are Deontic Egalitarians, we shall not believe that such inequality is in itself bad. We might agree that, if we *could* distribute talents, it would be unjust or unfair to distribute them unequally. But, except when there are bad effects, we shall see nothing to regret in the inequalities produced by the random shuffling of our genes. Many Telic Egalitarians take a different view. They believe that, even when such inequality is unavoidable, it is in itself bad.[10]

These views differ in several other ways. The Telic View, for example, is likely to have wider scope. If we believe that inequality is in itself bad, we may think it bad whoever the people are between whom it holds. It may seem to make no difference whether these people are in the same or different communities. We may also think it irrelevant what the respects are in which some people are worse off than others: whether they have less income, or worse health, or are less fortunate in other ways. *Any* inequality, if undeserved and unchosen, we may think bad. Nor, third, will it seem to make a difference how such inequality arose. That is implied by the very notion of intrinsic badness. When we ask whether some state is in itself bad, it is irrelevant how it came about.

If we are Deontic Egalitarians, our view may have none of these features. Though there are many versions of the Deontic View, one large group are broadly contractarian. Such views often appeal to the idea of reciprocity, or mutual benefit. On some views of this kind, when goods are co-operatively produced, and no one has special claims, all the contributors should get equal shares. There are here two restrictions. First, what is shared are only the fruits of co-operation. Nothing is said about other goods, such as those that come from nature. Second, the distribution covers only those who produce these goods. Those who cannot contribute, such as the handicapped, or children, or future generations, have no claims.[11]

Other views of this kind are less restrictive. They may cover all the members of the same community, and all kinds of good. But they still exclude outsiders. It is irrelevant that, in other communities, there are people who are much worse off. On such views, if there is inequality between people in different communities, this need not be anyone's concern. Since the greatest inequalities are on this global scale, this restriction has immense importance.

Consider next the question of causation. The Telic View naturally applies to all cases. On this view, we always have a reason to prevent or reduce inequality, if we can. If we are Deontic Egalitarians, we might think the same; but that is less likely. Since our view is not about the goodness of outcomes, it may cover only inequalities that result from acts, or only those that are intentionally produced. And it may tell us to be concerned only with the inequalities that we ourselves produce. On such a view, when we are responsible for some distribution, we ought to distribute equally. But, when no one is responsible, inequality is not unjust. In such cases, there is nothing morally amiss. We have no reason to remove such inequality, by redistribution. Here again, since this view has narrower scope, this can make a great practical difference.

IV

Let us now consider two objections to the Telic View.

On the widest version of this view, *any* inequality is bad. It is bad, for example, that some people are sighted

and others are blind. We would therefore have a moral reason to take single eyes from the sighted and give them to the blind. That conclusion may seem horrific.

Such a reaction is, I believe, mistaken. To set aside some irrelevant complications, we can imagine a simplified example. Suppose that, after some genetic change, children are henceforth born as twins, one of whom is always blind. And suppose that, as a universal policy, operations are performed after every birth, in which one eye from the sighted twin is transplanted into its blind sibling. That would be non-voluntary redistribution, since newborn babies cannot give consent. But I am inclined to believe that such a policy would be justified.

Some people would reject this policy, believing that it violates the rights of the sighted twins. But that belief provides no ground for rejecting the Telic View. As pluralists, Telic Egalitarians could agree that the State should not redistribute organs. Since they do not believe equality to be the only value, they could agree that, in this example, some other principle has greater weight, or is overriding. Their belief is only that, if we all had one eye, this would be *in one way* better than if half of us had two eyes and the other half had none. Far from being horrific, that belief is clearly true. If we all had one eye, that would be much better for all of the people who would otherwise be blind.[12]

A second objection is more serious. If inequality is bad, its disappearance must be in one way a change for the better, however this change occurs. Suppose that, in some natural disaster, those who are better off lose all their extra resources, and become as badly off as everyone else. Since this change would remove the inequality, it must be in one way welcome, on the Telic View. Though this disaster would be worse for some people, and better for no one, it must be, in one way, a change for the better. Similarly, it would be in one way an improvement if we destroyed the eyes of the sighted, not to benefit the blind, but only to make the sighted blind. These implications can be more plausibly regarded as monstrous, or absurd. The appeal to such examples we can call *the Levelling Down Objection*.[13]

It is worth repeating that, to criticize Egalitarians by appealing to this objection, it is not enough to claim that it would be *wrong* to produce equality by levelling down. Since they are pluralists, who do not care only about equality, Egalitarians could accept that claim. Our objection must be that, if we achieve equality by levelling down, there is *nothing* good about what we have done. Similarly, if some natural disaster makes everyone equally badly off, that is not in any way good news. These claims do contradict the Telic Egalitarian View.

I shall return to the Levelling Down Objection. The point to notice now is that, on a Deontic view, we avoid this objection. If we are Deontic Egalitarians, we do not believe that inequality is bad, so we are not forced to admit that, on our view, it would be in one way better if inequality were removed by levelling down. We may believe that we have a reason to remove inequality only *when*, and only *because*, our way of doing so benefits the people who are worse off. Or we may believe that, when some people are worse off than others, through no fault or choice of theirs, they have a special claim to be raised up to the level of the others, but they have no claim that others be brought down to their level.

Given these differences between the Telic and Deontic Views, it is important to decide which view, if either, we should accept. If we are impressed by the Levelling Down Objection, we may be tempted by the Deontic View. But, if we give up the Telic View, we may find it harder to justify some of our beliefs. If inequality is not in itself bad, we may find it harder to defend our view that we should often redistribute resources. And some of our beliefs might have to go. Reconsider the Divided World, in which the two possible states are these:

(1)	Half at 100	Half at 200
(2)	Everyone at 145	

In outcome (1) there is inequality. But, since the two groups are unaware of each other's existence, this inequality was not deliberately produced, or maintained. Since this inequality does not involve wrong-doing, there is no injustice. On the Deontic View, there is nothing more to say. If we believe that (1) is worse, and because of the inequality, we must accept the Telic form of the Egalitarian View. We must claim that the inequality in (1) is in itself bad.

We might, however, give a different explanation. Rather than believing in equality, we might be especially concerned about those people who are worse off. That could be our reason for preferring (2).

Let us now consider this alternative.

V

In discussing his imagined case, Nagel writes:

> If one chose to move to the city, it would be an egalitarian decision. It is more urgent to benefit the second child … This urgency is not necessarily decisive.

> It may be outweighed by other considerations, for equality is not the only value. But it is a factor, and it depends on the worse off position of the second child. An improvement in his situation is more important than an equal or somewhat greater improvement in the situation of the first child.[14]

This passage contains the idea that equality has value. But it gives more prominence to another idea. It is more important, Nagel claims, to benefit the child who is worse off. That idea can lead us to a quite different view.

Consider first those people who are badly off: those who are suffering, or those whose basic needs have not been met. It is widely believed that we should give priority to helping such people. This would be claimed even by Utilitarians, since, if people are badly off, they are likely to be easier to help.

Nagel, and others, make a stronger claim. On their view, it is more urgent to help these people even if they are *harder* to help. While Utilitarians claim that we should give these people priority when, and because, we can help them *more*, this view claims that we should give them priority, even when we can help them *less*.

Some people apply this view only to the two groups of the well off and the badly off.[15] But I shall consider a broader view, which applies to everyone. On what I shall call

> *The Priority View*. Benefiting people matters more the worse off these people are.

For Utilitarians, the moral importance of each benefit depends only on how great this benefit would be. For *Prioritarians*, it also depends on how well off the person is to whom this benefit comes. We should not give equal weight to equal benefits, whoever receives them. Benefits to the worse off should be given more weight.[16] This priority is not, however, absolute. On this view, benefits to the worse off could be morally outweighed by sufficiently great benefits to the better off. If we ask what would be sufficient, there may not always be a precise answer. But there would be many cases in which the answer would be clear.[17]

On the Priority View, I have said, it is more important to benefit those who are worse off. But this claim does not, by itself, amount to a different view, since it would be made by all Egalitarians. If we believe that we should aim for equality, we shall think it more important to benefit those who are worse off, since such benefits reduce inequality. If *this* is why we give such benefits priority, we do not hold the Priority View. On this view, as I define it here, we do *not* believe in equality. We do not think it in itself bad, or unjust, that some people are worse off than others. That is what makes this a distinctive view.

The Priority View can be easily misunderstood. On this view, if I am worse off than you, benefits to me matter more. Is this *because* I am worse off than you? In one sense, yes. But this has nothing to do with my relation to you.

It may help to use this analogy. People at higher altitudes find it harder to breathe. Is this because they are higher up than other people? In one sense, yes. But they would find it just as hard to breathe even if there were no other people who were lower down. In the same way, on the Priority View, benefits to the worse off matter more, but that is only because these people are at a lower *absolute* level. It is irrelevant that these people are worse off *than others*. Benefits to them would matter just as much even if there *were* no others who were better off.

The chief difference is, then, this. Egalitarians are concerned with *relativities*: with how each person's level compares with the level of other people. On the Priority View, we are concerned only with people's absolute levels. This is a fundamental structural difference. Because of this difference, there are several ways in which these views have different implications.

One example concerns scope. Telic Egalitarians may, I have said, give their view wide scope. They may believe that inequality is bad even when it holds between people who have no connections with each other. This may seem dubious. Why would it matter if, in some far off land, and quite unknown to me, there are other people who are better off than me?

On the Priority View, there is no ground for such doubts. This view naturally has universal scope. If it is more important to benefit one of two people, because this person is worse off, it is irrelevant whether these people are in the same community, or are aware of each other's existence. The greater urgency of benefiting this person does not depend on her relation to the other person, but only on her lower absolute level.

These views differ in other ways, which I have no space to discuss here. But I have described the kind of case in which these views most deeply disagree. These are the cases which raise the Levelling Down Objection. Egalitarians face this objection because they believe that inequality is in itself bad. If we accept the Priority View, we avoid this objection. On this view, except when it is bad for people, inequality does not matter.

VI

Though equality and priority are different ideas, this distinction has been often overlooked.

One reason is that, especially in earlier centuries, Egalitarians have often fought battles in which this distinction did not arise. They were demanding legal or political equality, or attacking arbitrary privileges, or differences in status. These are not the kinds of good to which our distinction applies. And it is here that the demand for equality is most plausible.

Second, when Egalitarians considered other kinds of good, they often assumed that, if equality were achieved, this would either increase the sum of these goods, or would at least not reduce this sum. In either of these cases, equality and priority cannot conflict.

Third, even when a move to equality would reduce the total sum of benefits, Egalitarians often assumed that such a move would at least bring *some* benefits to the people who were worse off. In such cases, equality and priority could not deeply conflict. Egalitarians ignored the cases in which equality could not be achieved except by levelling down.

Since this distinction has been overlooked, some writers have made claims that are not really about equality, and would be better stated as claims about priority. For example, Nagel writes:

> To defend equality as a good in itself, one would have to argue that improvements in the lot of people lower on the scale of well-being took priority over greater improvements to those higher on the scale.[18]

In the example with which we began, Nagel similarly claims that it would be 'more urgent' to benefit the handicapped child. He then writes:

> This urgency is not necessarily decisive. It may be outweighed by other considerations, for equality is not the only value.[19]

These remarks suggest that, to the question 'Why is it more urgent to benefit this child?', Nagel would answer, 'Because this would reduce the inequality between these two children'. But I doubt that this is really Nagel's view. Would it be just as urgent to benefit the handicapped child, even if he had no sibling who was better off? I suspect that, on Nagel's view, it would. Nagel would then, though using the language of equality, really be appealing to the Priority View.[20]

Consider next the idea of distribution according to need. Several writers argue that, when we are moved by this idea, our aim is to achieve equality. Thus Raphael writes:

> If the man with greater needs is given more than the man with lesser needs, the intended result is that each of them should have (or at least approach) the same level of satisfaction; the inequality of nature is corrected.[21]

When discussing the giving of extra resources to meet the needs of the ill, or handicapped, Norman similarly writes:

> the underlying idea is one of equality. The aim is that everybody should, as far as possible, have an equally worthwhile life.[22]

As before, if that were the aim, it could be as well achieved by levelling down. This cannot be what Norman means. He could avoid this implication by omitting the word 'equally', so that his claim became: 'the aim is that everybody should, as far as possible, have a worthwhile life.' With this revision, Norman could not claim that equality is the underlying idea. But that, I believe, would strengthen his position. Distribution according to need is better regarded as a form of the Priority View.[23]

What these writers claim about need, some have claimed about all kinds of distributive principle. For example, Ake writes:

> Justice in a society as a whole ought to be understood as a complete equality of the overall level of benefits and burdens of each member of that society.

The various principles of distributive justice, Ake claims, can all be interpreted as having as their aim 'to restore a situation of complete equality to the greatest degree possible'.[24] Some writers even make such claims about retributive justice. They argue that, by committing crimes, criminals make themselves better off than those who keep the law. The aim of punishment is to restore them to their previous level.

These writers, I believe, claim too much for equality. But there are some plausible views which are rightly expressed in egalitarian terms. For example, Cohen suggests that 'the right reading of egalitarianism' is that 'its purpose is to eliminate involuntary disadvantage'.[25] He means by this *comparative* disadvantage: being worse off

than others. This is an essentially relational idea. Only equality could eliminate such disadvantage. Cohen's view could not be re-expressed in the language of priority. Similar assumptions underlie Rawls's view, whose complexity leads me to ignore it here.

Some Egalitarians are not moved by the Levelling Down Objection. For example, Ake writes

> What about the case of someone who suddenly comes into good fortune, perhaps entirely by his or her own efforts? Should additional burdens … be imposed on that person in order to restore equality and safeguard justice? … Why wouldn't it be just to impose any kind of additional burden whatsoever on him in order to restore the equality? The answer is that, strictly speaking, it would be … [26]

Ake admits that, on his view, it *would* be just to level down, by imposing burdens on this person. What he concedes is only that the claim of justice would here be overridden. Levelling down would be in one way good, or be something that we would have a moral reason to do. Similarly, Temkin writes:

> I, for one, believe that inequality is bad. But do I really think that there is some respect in which a world where only some are blind is worse than one where all are? Yes. Does this mean I think it would be better if we blinded everybody? No. Equality is not all that matters.27

Several other writers make such claims.[28]

VII

Since some writers are unmoved by the Levelling Down Objection, let us now reconsider that objection. Consider these alternatives:

(1)	Everyone at some level	
(2)	Some at this level	Others better off

In outcome (1) everyone is equally well off. In outcome (2), some people are better off, but in a way that is worse for no one. For Telic Egalitarians, the inequality in (2) is in itself bad. Could this make (2), all things considered, a worse outcome than (1)?

Some Egalitarians answer Yes. These people do not believe that the avoidance of inequality always matters most. But they regard inequality as a great evil. On their view, a move to inequality *can* make an outcome worse, even when this outcome would be better for everyone. Those who hold this view we can call *Strong Egalitarians*.

Others hold a different view. Since they believe that inequality is bad, they agree that outcome (2) is *in one way* worse than outcome (1). But they do not believe that (2) is worse all things considered. In a move from (1) to (2), some people would become better off. According to these Egalitarians, the loss of equality would be morally outweighed by the benefits to these people. (2) would be, on balance, better than (1). Those who hold this view we can call *Moderates*.

This version of Egalitarianism is often overlooked, or dismissed. People assume that, if we are Egalitarians, we must be against a move to inequality, even when this move would be bad for no one. If we regard such inequality as outweighed by the extra benefits, our view must, they assume, be trivial.[29]

That assumption is mistaken. If some change would increase inequality, but in a way that is worse for no one, the inequality must come from benefits to certain people. And there cannot be a *great* loss of equality unless these benefits are also great. Since these gains and losses would roughly march in step, there is room for Moderates to hold a significant position. They believe that, in all such cases, the gain in utility would outweigh the loss in equality. That is consistent with the claim that, in many other cases, that would not be so. Moderates can claim that *some* gains in utility, even if *great*, would *not* outweigh some losses in equality. Consider, for example, these alternatives:

(1)	All at 100	
(4)	Half at 100	Half at 200
(5)	Half at 70	Half at 200.

Moderates believe that, compared with (1), (4) is better. But they might claim that (5) is worse. Since (5) would involve a much greater sum of benefits, that is not a trivial claim.

Return now to the Levelling Down Objection. Strong Egalitarians believe that, in some cases, a move towards inequality, even though it would be worse for no one, would make the outcome worse.[30] This view may seem incredible. One of two outcomes *cannot* be worse, we may claim, if it would be worse for no one. To challenge Strong Egalitarians, it would be enough to defend this claim. To challenge Moderates, we must defend the

stronger claim that, when inequality is worse for no one, it is not in any way bad.

Many of us would make this stronger claim. It is widely assumed that nothing can be bad if it is bad for no one. This we can call the *Person-affecting View*.

This view might be defended by an appeal to some account of the nature of morality, or moral reasoning. According to some writers, for example, to explain the impersonal sense in which one of two outcomes can be *worse* – or worse, period – we must appeal to claims about what would be worse *for* particular people. The Person-affecting View can also be supported by various kinds of contractualism. [31]

Egalitarians might reply by defending a different meta-ethical view. Or they might argue that, when the Person-affecting View is applied to certain other questions, it has unacceptable implications, since it conflicts too sharply with some of our beliefs.[32] Since I have no space to discuss these questions here, I shall merely express an opinion. The Person-affecting View has, I believe, less plausibility than, and cannot be used to strengthen, the Levelling Down Objection.

VIII

I shall now summarize what I have claimed. According to Telic Egalitarians, it is in itself bad, or unfair, if some people are worse off than others through no fault or choice of theirs. Though this view is widely held, and can seem very plausible, it faces the Levelling Down Objection. This objection seems to me to have great force, but is not, I think, decisive.

Suppose that we began by being Telic Egalitarians, but we are convinced by this objection. We cannot believe that, if the removal of inequality would be bad for some people, and better for no one, this change would be in any way good. If we are to salvage something of our view, we then have two alternatives.

We might become Deontic Egalitarians. We might come to believe that, though we should sometimes aim for equality, that is not because we would thereby make the outcome better. We must then explain and defend our beliefs in some other way. And the resulting view may have narrower scope. For example, it may apply only to goods of certain kinds, such as those that are co-operatively produced, and it may apply only to inequality between members of the same community.

We may also have to abandon some of our beliefs. Reconsider the Divided World:

(1)	Half at 100	Half at 200
(2)	Everyone at 145	

On the Deontic View, we cannot claim that it would be better if the situation changed from (1) to (2). This view is only about what people ought to do, and makes no comparisons between states of affairs.

Our alternative is to move to the Priority View. We could then keep our belief about the Divided World. It is true that, in a change from (1) to (2), the better off would lose more than the worse off would gain. That is why, in utilitarian terms, (2) is worse than (1). But, on the Priority View, though the better off would lose more, the gains to the worse off count for more. Benefits to the worse off do more to make the outcome better. That could be why (1) is worse than (2).

The views that I have been discussing often coincide. But, as I have tried to show, they are quite different. They can support different beliefs, and policies, and they can be challenged and defended in different ways. Taxonomy, though unexciting, needs to be done. Until we have a clearer view of the alternatives, we cannot hope to decide which view is true, or is the best view.

Notes

1 Thomas Nagel, *Mortal Question* (Cambridge: Cambridge University Press, 1979), pp. 123–4. See also Nagel's *Equality and Partiality* (New York: Oxford University Press, 1991).

2 Robert Nozick, *Anarchy, State, and Utopia* (New York: Basic Books, 1974), pp. 149–50.

3 For two such broader accounts of well-being, see Amartya Sen, 'Capability and Well-Being', in *The Quality of Life*, edited by Martha Nussbaum and Amartya Sen (Oxford: Oxford University Press, 1993), Amartya Sen, *Inequality Reexamined* (Oxford: Oxford University Press, 1992), ch. 3; and Thomas Scanlon, 'Value, Desire, and the Quality of Life', in Nussbaum and Sen, op. cit.

4 We might add, 'through no fault or choice of theirs'. In a fuller statement of this principle, we would need to assess the relative badness of different patterns of inequality. But we can here ignore these complications. They are well

discussed in Larry Temkin's *Inequality* (New York: Oxford University Press, 1993).

5 In his paper in this volume, which I cannot properly discuss here, Richard Norman writes: '[Parfit] asks us whether (1) is worse that (2). I have to confess that I do not know how to answer that question, and I do not think that this is simply a personal confession on my part … I want to say of Parfit's Divided world example that when you abstract the question from the social context in which we make judgements about equality and inequality, it is no longer clear how to answer it'. It is, I agree, not obvious whether the inequality in (1) is bad. But that it is not because we cannot make value judgments about such examples. It is clear that (1) would be better than (3) Half at 100, Half at 50, but worse than (4) Everyone at 200.

6 Cf. Joel Feinberg, 'Noncomparative Justice', *Philosophical Review* 83 (1974).

7 Cf. Philip Montague, 'Comparative and Non-comparative Justice', *Philosophical Quarterly* 30 (1980).

8 There is an intermediate case. Justice may require a certain outcome, but only because this avoids a procedural flaw. One such flaw is partiality. Suppose that we have to distribute certain publicly-owned goods. If we could easily divide these goods, others might be rightly suspicious if we gave to different people unequal shares. That might involve favouritism, or wrongful discrimination. We may thus believe that, to avoid these flaws, we should distribute these goods equally.How does this view differ from a view that requires equality for substantive reasons? One difference is this. Suppose that we have manifestly tried to distribute equally, but our procedure has innocently failed. If we aimed for equality only to avoid the taint of partiality or discrimination, there would be no case for correcting the result. (For discussions of these points, see Robert Goodin, 'Egalitarianism, Fetishistic and Otherwise', *Ethics* 98 (1987); and Lawrence Sager and Lewis Kornhauser, 'Just Lotteries', *Social Science Information* (Sage, London, Newbury Park and New Delhi, vol. 27, 1988).)

9 John Rawls, *A Theory of Justice* (Cambridge, MA: Harvard University Press, 1971), p. 291.

10 There is now a complication. Those who hold this second view do not merely think that such inequality is bad. They often speak of natural injustice. On their view, it is unjust or unfair that some people are born less able, or less healthy, than others. Similarly, it is unfair if nature bestows on some richer resources. Talk of unfairness here is sometimes claimed to make no sense. I believe that it does make sense. But, even on this view, our distinction stands. According to Telic Egalitarians, it is the state of affairs which is bad, or unjust; but Deontic Egalitarians are concerned only with what we ought to do.

11 See, for example, David Gauthier, *Morals by Agreement* (Oxford: Oxford University Press, 1980), pp. 18 and 268.

12 Cf. Nozick, op. cit., p. 206 (though Nozick's target here is not the Principle of Equality but Rawls's Difference Principle).

13 Such an objection is suggested, for example, in Joseph Raz, *The Morality of Freedom* (Oxford: Oxford University Press, 1986), ch. 9, and Larry Temkin, op. cit. pp. 247–8.

14 Nagel, op. cit., p. 124.

15 Cf. H. Frankfurt, *The Importance of What We Care About* (Cambridge: Cambridge University Press, 1988), ch. 11, and Joseph Raz, op. cit., ch. 9.

16 Several other writers have suggested such a view. See, for example, Thomas Scalon, 'Nozick on Rights, Liberty, and Property', *Philosophy & Public Affairs* 6 (1976), pp. 6 to 10, Joseph Raz, op. cit. Harry Frankfurt, 'Equality as a Moral Ideal', in *The Importance of What We Care About* (Cambridge: Cambridge University Press, 1988), David Wiggins, 'Claims of Need', in his *Needs, Values, Truth* (Oxford: Blackwell, 1987), Dennis McKerlie, 'Egalitarianism', *Dialogue* 23 (1984), and 'Equality and Priority', *Utilitas* 6 (1994).

17 Like the belief in equality, the Priority View can take either Telic or Deontic forms. It can be a view about which outcomes would be better, or a view that is only about what we ought to do. But, for our purposes here, this difference does not matter.

18 *Reading Nozick*, edited by Jeffrey Paul (Oxford: Blackwell, 1981) p. 203.

19 Op. cit., p. 124.

20 Similar remarks apply to section 117 of my *Reasons and Persons* (Oxford: Oxford University Press, 1984). For a later discussion of the choice between these views, see Nagel's *Equality and Partiality*, op. cit., chs. 7 and 8.

21 D. D.Raphael, *Justice and Liberty* (London: Athlone Press, 1980), p. 10. Cf. p. 49.

22 Richard Norman, *Free and Equal* (Oxford: Oxford University Press, 1987), p. 80

23 See, however, the excellent discussion in David Miller, 'Social Justice and the Principle of Need', in *The Frontiers of Political Theory*, ed. Michael Freeman and David Robertson (Brighton: Harvester Press, 1980).

24 Christopher Ake, 'Justice as Equality', *Philosophy & Public Affairs* 5 (1975), pp. 71 and 77.

25 G. A. Cohen, 'On the Currency of Egalitarian Justice', *Ethics* 99 (1989).

26 Op cit., p. 73.

27 Inequality, p. 282.

28 See, for example, Amartya Sen, *Inequality Reexamined* (Oxford: Oxford University Press, 1992), pp. 92–3.

29 See, for example, Antony Flew, *The Politics of Procrustes* (Buffalo, New York: Prometheus, 1981), p. 26, McKerlie, 'Egalitarianism', op. cit., p. 232. See also Nozick, op. cit., p. 211.

30 I am assuming here that inequality is not in itself bad for people. It is not bad for me if, unknown to me and without

affecting me, there exist some other people who are better off than me. That assumption is implied, not only by hedonistic theories about well-being, but also by plausible versions both of desire-fulfilment theories, and of theories that appeal to what Scanlon calls *substantive goods*. For a contrary view, however, which would need a further discussion, see John Broome, *Weighing Goods* (Oxford: Blackwell, 1991), ch. 9.

31 Such as the view advanced in Thomas Scanlon's 'Contractualism and Utilitarianism', in ed. Amartya Sen and Bernard Williams, *Utilitarianism and Beyond* (Cambridge: Cambridge University Press, 1982).

32 See Temkin, op. cit., ch. 9. Another objection to the Person-affecting View comes from what I have called *the Non-Identity Problem* (in my *Reasons and Persons*), ch. 16.

34

Chance, Choice, and Justice

Brian Barry

I Two Principles of Justice

The proposition that I want to examine in this chapter can be stated quite simply as follows. A just society is one whose institutions honour two principles of distribution. One is a principle of compensation. It says that the institutions of a society should operate in such a way as to counteract the effects of good and bad fortune. In particular, it says that the victims of ill luck should as far as possible be made as well off as those who are similarly placed in all respects other than having suffered this piece of bad luck. The other principle is one of personal responsibility. It says that social arrangements should be such that people finish up with the outcomes of their voluntary acts.

Let me say this at once. There is no suggestion that these two principles constitute a complete specification of principles relevant to the distribution of benefits and burdens within a society. In fact, it is fairly evident that these principles could not get going at all without other principles to lay the groundwork. The first principle depends for its application on our having as a benchmark for the compensation of victims of bad luck some idea of the welfare level appropriate to those similarly placed except for having suffered the bad luck. And the second principle presupposes an assignment of rights to act (e.g. a principle of equal civil and political rights) so as to provide a legitimate sphere of choice. I should also say that the application of these two principles of justice would always have to be modified by the operation of a principle of expediency, which is I believe accepted in every society. According to this, which I shall call the principle of common advantage, an inequality is justified if it works to the benefit of everybody. It is perhaps worth noting here that utilitarianism consists of offering a particular interpretation of what it means to say that something is to everybody's advantage and then dumping all other principles. In putting forward these two principles of justice I am therefore rejecting utilitarianism.

The problem that I want to concentrate on is this. Let us suppose that we find ourselves initially attracted by both the principle of compensation and the principle of responsibility. How do we fit them together? On the face of it, they fit together very nicely. Indeed, they can be seen as two aspects of a single principle: that it is 'inequitable if an individual is in a worse situation than another because of factors beyond his control'.[1] If something is a matter of luck, that means it is beyond your control; if it is a matter of choice, that means it is within your control.

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Unfortunately, however, this verbal resolution of the problem falls apart as soon as we press on it. I can illustrate the difficulties most dramatically by showing that it is possible to extend the scope of choice so that it leaves very little room for chance and conversely that it is possible to extend the scope of chance so that it threatens to engulf choice completely.

II Choicism

Let us begin with the first case. I am not concerned here with the possibility that someone might simply accept the relevance of choice and deny that of chance, as a matter of principle. This is a possible position, and indeed it is in general terms that taken by Robert Nozick in *Anarchy, State, and Utopia*.[2] Nozick postulates a framework of rights and then says that just outcomes are those arising from the choices made by people in the exercise of those rights. You might have the bad luck to starve to death under these arrangements because you have not been so fortunate as to inherit or be given enough to live on, and for reasons beyond your control (e.g. disability or inability to find work) cannot earn enough to live on. But Nozick simply has no provision for modifying the outcomes arising from choice so as to deal with bad luck. I am not going to argue with that sort of view, whose unattractiveness seems to me patent. What I am interested in here is the way in which somewhat less extreme versions of Nozick's conclusions can be reached even if both choice and chance are recognized as being in principle relevant.

The best way of approaching this is to consider a simple lottery where people buy one or more tickets for some modest sum like fifty pence, the counterfoils are put into a hat and the winner, who gets everybody's stakes, is the person whose number is pulled out. Nothing could be a better example of an outcome determined by chance. The principle of compensation would appear to imply that the winner's prize should be redistributed among the participants in the lottery so as to restore the status quo ante. Yet there seems something odd in the suggestion that justice requires this. Why? Fairly obviously the answer lies in the presumptively voluntary nature of participation in the lottery. If people deliberately put themselves in a situation where they have a large chance of losing a small amount and a small chance of gaining a greater amount, isn't it fair that the outcome should stand?

Since a good deal hangs on our returning a positive answer, it will be advisable for us to test the ground carefully before going further. Thus, we should bear in mind that the principle of personal responsibility relates to voluntary actions and that choices may fail to be voluntary in a variety of ways. Conditions undermining voluntariness include coercion, internal compulsion, addiction, provocation and necessity (the lack of acceptable alternatives). It has to be said that the interpretation of these is itself open to controversy, and hardboiled choicists are liable to construe most of these phenomena as very strong preferences while denying the relevance of necessity altogether. However, even the softboiled might well be satisfied that in some instances the participants in a lottery such as I described were not suffering from such things as social pressure, compulsion, or desperation. So it could still be held that the winner could justly hang on to the prize.

Notice that this answer does not require us to make the claim that any just society must permit gambling. We might accept that a society could justly prohibit gambling either on paternalistic grounds (that some people will become compulsive gamblers and blanket prohibition is the only effective form of protection) or on the Puritanical ground that anything which divorces rewards from efforts is morally enervating. Notice, however, that these grounds do not themselves invoke justice. So long as we accept that a society may justly permit gambling, we can still arrive at the conclusion that, where it is permitted, the winner of a lottery has a just claim on the prize.

This might seem at first glance to be a quite small concession to the idea that choice can trump chance, but it can be used as the thin end of a very thick wedge. I shall invent the word 'choicist' to refer to someone who wants to show that it is consistent with justice to give the principle of personal responsibility a lot of scope at the expense of the principle of compensation, while acknowledging the validity of both principles. I shall now set out what seems to me the best case for choicism. I shall not go as far as some actual choicists but I shall push the case to the limits of intellectual respectability, and perhaps a bit beyond.

A very important weapon in the armoury of the choicist is the institution of insurance. By invoking the possibility of insuring oneself against various misfortunes it is possible to construct an argument that marginalizes the principle of compensation over a wide range of cases. We can connect this to the previous discussion by

observing that insurance is simply a form of gambling, where a small loss in the form of a premium is voluntarily accepted in return for the prospect of a large gain in the form of a payout by the insurer. The peculiarity of insurance is simply that what triggers the payment is a piece of specified bad luck. (To the extent that the contingency triggering the payout is not solely due to luck, insurers start talking about 'moral hazard' and getting uncomfortable. Let us leave that complication on one side for now and think of insurance as being against bad luck.) Suppose, then, that your house burns down due to causes completely beyond your control. That is bad luck, straightforwardly enough, as even the most rabid choicist will admit. But, it may be said, whether you suffer financial loss from the destruction of your house depends on your prior decision to insure it fully, inadequately, or not at all. Thus, we can conclude that someone who loses everything in a fire can justly be left destitute because the option of insuring against the loss was available and not taken.

Let us go back to the Nozickian vision of a society in which market-derived outcomes are modified only by private arrangements. How far can it be reinstated by someone who admits the validity of the principle of compensation but wants to minimize its impact? We shall certainly be able to find, consistently with justice, people starving to death. All we need to show is that they had the option of avoiding that fate through insurance and didn't take it. For example, anyone now unable to work owing to sickness or accident but previously in good health could have taken out insurance against loss of earnings. Involuntary unemployment presents more of a problem, unless our choicist has the gall to claim that there is no such thing; but there could be a state-run system of insurance to which individuals could subscribe or not. An honest and intelligent choicist would also have to admit that a purely private system of medical insurance would fail to cover people against the bad luck of being bad medical risks. But again, subscription to the insurance scheme could be made voluntary, so that we could justly have people dying because they couldn't afford treatment. Destitution in old age could obviously be treated as voluntary, in almost all cases.

What about earned income? I think that any serious choicist would have to admit that some people are congenitally unemployable or employable only in jobs whose market value is very low. The principle of compensation would therefore mandate that the results of such bad luck should be modified by transfers, and here we have a clear departure from the Nozickian world. But this still leaves us with most of the enormous disparities in earnings that market systems produce. How far can a choicist defend these against the claim that unequal earnings are largely a matter of good and bad luck – in genes, social background, schooling, or simply being in the right place at the right time?

To some degree the lottery example can be invoked to save the day. Thus, suppose that with given abilities you might acquire the qualifications to go into a high-variance occupation or a low-variance one – become a barrister or a solicitor – then it might be argued that if you do very badly in the high-variance occupation (get very few briefs as a barrister) you have no legitimate cause for complaint. This is a good point for the choicist as far as it goes, but it does not go very far, since the terms of comparison are confined to barristers and solicitors.

An across-the-board justification would require the claim that everybody initially faced the same choice set, and all subsequent differentiation of earnings prospects arises from different choices made along the way. This is on the face of it highly implausible, if we take it that for something to count as a choice it must be a real possibility that it be chosen. (A paraplegic does not have a choice of running or not.) But then everything turns on what has to be true for something to constitute a real possibility.

The classic choicist move here is to distinguish sharply between possibility and probability. For example, it might be conceded that a bright child with well-educated supportive parents will find it easier to do well in school and is, as a statistical matter, more likely to. (It is hard to see how anybody could deny that.) But it may be said that so long as a few children of average brightness and with disadvantageous home circumstances succeed that shows it is possible for all to do so. (This is the sense of 'equal opportunity' in which every private in Napoleon's armies carried a marshall's baton in his knapsack.)

Of course, for even these minimal claims about equal opportunities to be valid, we would already have to be some distance from a Nozickian world, since there would have to be an educational system accessible to all children, whatever their family circumstances, including financial support to enable all children to stay at school through the full term of full-time education, and this school system would have to be set up in such a way as to ensure that all children did actually have the means available to do well if they took advantage of them. This

would fairly plainly not be true of contemporary Britain, for example.

Even after all these conditions were met, however, I believe that a sincere choicist would have to admit that not everything is possible to everybody, and concede the case for a somewhat progressive income tax system to deal in a rough and ready way with good and bad luck in relation to the job market. But it would be possible, I take it, to resist the suggestion that an ideally just system of earnings would be one providing everyone with equal final pay after compensating for the disutility of work.

In concluding my exposition of the choicist case, I want to come back to a point I made in connection with lotteries. I said that a just society does not have to allow lotteries to occur. The conclusion favourable to choicism is a purely hypothetical one: that if there are to be lotteries, it is just for the winner to hang on the prize. The decision whether or not to permit lotteries has to be taken on grounds other than those of justice: protection of the vulnerable or the maintenance of desirable dispositions on one side, and on the other presumably the value of individual liberty to do what one wishes in the absence of compelling reasons to the contrary.

The point can be generalized. Thus, if there are two occupations with the same mean income and different dispersions (as solicitors and barristers might be) then someone who does badly in the high-dispersion occupation cannot complain of injustice, even if failure is attributable wholly to bad luck (including perhaps the bad luck of not having influential connections). But it is not unjust for a society to get rid of high-variance occupations and make barristers part of a salaried legal service. The case for and against will have to be argued on other grounds.

In the same way, the most a choicist can claim on the basis of the principle of personal responsibility is this: *if* a society's institutions make insurance against a whole variety of misfortunes voluntary, and actually provide the insurance (supplementing or superseding privately offered insurance where necessary), then it is not unjust to leave uncompensated the losses suffered by those who have failed to avail themselves of the opportunity of taking out insurance. Considerations of justice will not, however, tell us whether to have a system like that or to have compulsory social insurance and a national health service. That decision will, again, have to be made on other grounds, presumably security and efficiency (since private insurance has high overhead costs) on one side and personal liberty – the opportunity of shaping one's life by one's choices – on the other.

Similarly, a choicist can say that it is consistent with justice for educational outcomes to be heavily dependent on choice, so that pupils who choose not to study are left by the wayside. But it would also be consistent with justice to charge schools with the duty of trying to motivate all their students and require all children to complete their secondary education.

III Qualified Choicism

I have tried to give an idea of the way in which choicism works to produce policy implications. Before going further, let me pause for a few general remarks about the presuppositions of the choicist position. Choicism, then, builds upon some simple ideas about choice that appeal to the common sense of a basically liberal society such as ours. Thus, it is assumed that you have a free choice among kinds of fruit if all you have to do is to stretch out your hand and take one from a bowl containing a selection. Similarly, it is assumed that you have the option of acquiring a qualification if you could get it by enrolling in a course you can afford and doing some work that is within your capability. It would be regarded as paradoxical to claim that such choices do not generate responsibility for the outcomes because they flow from preferences that are not themselves chosen.

It is also assumed that if two people have the same choice set they are treated equally, so that two people are equally well treated as consumers if they have the same income, and members of two religious bodies have equal treatment if a uniform, non-discriminatory set of rules applies to both of the bodies. And again it would be thought of as paradoxical to deny this in the first case by pointing out that one person may be able to get more satisfaction from spending the income than the other and in the second case by pointing out that a rule of universal toleration suits a religion that favours toleration more than one that seeks to make everybody conform to it. Yet a case can certainly be made out for these paradoxical claims, which extend the scope of the principle of compensation at the expense of the principle of responsibility.

My main business in the rest of this chapter will be coming to grips with the kind of large-scale anti-choicism that I have just introduced. Before that, however, I should like to show that choicism, as I have expounded it so far, is vulnerable to attack without disputing the common sense premisses about choice and personal responsibility on which it depends. Qualified choicism, as I

shall call it for convenience, is the view that the significance (or potential significance) of choice in justifying unequal outcomes has been overstated.

In any attempt to cut choicism down to size, the weakest point in it must surely be the claim that a large proportion of all earnings differentials can be defended as arising from voluntary choice. To maintain this, the choicist claim about equality of opportunity has to be the strong one that at any rate most differences in final educational attainment come about as a result of children making different choices out of steadily divergent choice sets that were at some early stage identical. But if only a few children of average native ability from disadvantaged backgrounds do well educationally, this must cast doubt on the claim that doing well formed a real option for all the rest. It seems more plausible to suppose that we would find some special factors accounting for the exceptions, and that they could not therefore be used to show that the other children could have done the same if they had chosen to.

I deliberately built up the choicist position starting from its strongest case and working down from there. I do not therefore believe that there is any sound objection from the qualified choicist viewpoint to the lottery example. The extension to insurance, however, seems more open to challenge. Much, I suggest, turns on the answer to questions like these: under what conditions would it be rational for someone dependent on employment for an income to decline insurance, if available on reasonable terms, against loss of earnings? If the answer is (as I think it indeed is) that there are almost no circumstances in which this would be rational, the conclusion will have to be that those who do not take the insurance are lacking in foresight, suffer from weakness of will, or are simply too ill-organized to act appropriately. Any of these would be enough to at any rate call into question personal responsibility to the extent of suggesting that destitution is too high a penalty for failure to insure. Where almost all rational choices would go the same way, leaving people the choice is rather like leaving a stretch of dangerous cliff unfenced so as to leave people the option of plunging into the sea.

IV Anti-choicism

I now want to turn, as promised, to a more radical critique of the choicist position, which I shall call anti-choicism. It may be recalled that when defining choicism I excluded from consideration those people who simply do not recognize the validity of the principle of compensation. My choicists are people who recognize it but seek to minimize its role in determining just outcomes. I shall define anti-choicism so that it is the converse of choicism. I shall therefore leave on one side those who hold a normative theory that has no room for the principle of personal responsibility from the outset. Examples of such theories would be: that average utility should be maximized, that minimum utility should be maximized, or that some function with equal distribution and average level of utility as arguments should be maximized. Of course, in working out the implications of such theories it will no doubt be found necessary to attach consequences to actions so as to encourage socially beneficial actions and discourage anti-social ones. But this is purely instrumental, justified by its tendency to increase the maximand.

The position I am interested in is one which accepts in principle that choice and chance are both relevant to justice but goes on to claim that when we look carefully we shall find that chance will largely or wholly swallow up choice. To make it plain that I am focusing on only one way of not being a choicist, I might perhaps have done better to call anti-choicism 'chancism', but sufficient unto the day is the neologism thereof.

The issue between choicism and anti-choicism turns on the relevance of tastes, aspirations and beliefs to personal responsibility for the outcomes of choices made in accordance with them. Choicism, as I am defining it, adopts a robust line on this: naturally people's choices flow from their tastes, aspirations and beliefs; but this is precisely what endows the choices made on the basis of them with authenticity. (If someone suddenly did something totally 'out of character', that would be more liable to lead us to accept a plea of 'diminished responsibility' for the outcome.)

The anti-choicist position, in contrast, holds that people cannot be held personally responsible for their tastes, aspirations, or beliefs, and this entails that they also cannot be held responsible for the outcomes of actions that flow from them. To save repetition (though at the cost of some violation to the language) let us talk about 'preferences' to refer to tastes, aspirations and beliefs. Then the anti-choicist view can be explained in this way. Although the principle of personal responsibility is valid as a principle, it does not have any application in the world we actually live in, which is one of universal causality. Personal responsibility depends upon choice, but we do not in general choose our preferences. It is true that it is sometimes possible for us to change our

preferences by working on them. But presumably the decision to try to change some existing preference derives from a second-order preference which is not itself chosen. And even if we admitted yet higher-order preferences, we would never get to a radical choice, a choice unconditioned by a preference that was not itself subject to choice.

A more moderate version of anti-choicism embraces the basic anti-choicist premiss by saying that the only preferences to generate personal responsibility are those that were deliberately created by the agent, whether or not they could now be changed, and those that could now be changed by the agent, whether or not they were deliberately created in the first place. The distinctive feature of moderate anti-choicism is that it abandons the dogma that no preferences can ever pass the test and instead settles for a case-by-case approach. Some preferences, it is supposed, will give rise to personal responsibility but many others will not.[3]

Rather than engage in any more preliminaries, let me exhibit anti-choicism, in both of its forms, in operation. I shall take up two questions which, I will note in passing, are usually discussed by quite different sets of people, even though the underlying theoretical issue is the same. For my first example, I shall return to the idea of equal educational opportunity.

In my discussion of qualified choicism, I pointed out that the size of the choice set facing an individual is always problematic. That some alternative is formally open to a certain person – to take an advanced course in physics, say – does not mean that it is a real possibility for that person: it may require capacities he or she simply has not got. Nevertheless, I still assumed that there are real choices open – to take one subject or another, to study hard or not, to stay on at school or not, and so on – and that these at any rate give rise to responsibility for their outcomes. On the extreme anti-choicist view, this is invariably a delusion. For the choice must flow from a preference which is, immediately or at some remove, not the result of choice. In case it seems hard to take this seriously, let me observe that much of the literature on the subject presupposes that choices are a source of unequal opportunity on all fours with home environment and quality of school. It is assumed, as an unargued ideal of social justice, that if we factor out differences in native endowment we ought to be able to slice through the population of a society along any dimension – gender, religion, ethnic group, race, social class, region, and so on – and find on each side of the division a perfect microcosm of the society as a whole, as far as levels and perhaps even types of educational attainment are concerned. Since it seems evident that part of the explanation of systematic differences in group achievement is the existence of different patterns of preference among their members, it must be that these are to be regarded as sources of socially unjust inequalities in educational outcome.

The moderate version of anti-choicism would leave it open that some choices were genuine and could properly act as an acceptable basis for differences in outcome. But to just the extent that these choices were patterned, so that girls systematically tended to make different choices from boys, or WASPs from white 'ethnics', this very fact would suggest that the sources of the underlying preferences should be sought in cultural attitudes and thus seen as a matter of chance rather than choice.

It should perhaps be added that the choicist criterion accepts non-culpable ignorance as an excusing condition. (If I put white powder in your coffee, sincerely and reasonably believing it to be artificial sweetener, I am not responsible for your being poisoned when it turns out to have been strychnine.) No doubt some ill-advised educational choices can be brought within the range of that limitation on the scope of the principle of personal responsibility. But it is hard to see how it could be made to cover, say, the tendency for a smaller proportion of girls than boys to study science subjects, or the smaller appetite for a college education among white 'ethnics' as compared with WASPs. The gap between the implications of choicism and the implications of anti-choicism thus remains wide.

The best way into my second example is via a reconsideration of the choicist idea that can be expressed in the words: 'Equal choice sets constitute equal treatment.' It is fairly easy to see that as it stands this must be an incomplete specification. Confronting two people with the same set of options cannot be a sufficient condition of equal treatment. If I like apples and you like oranges, a bowl containing both gives us equal treatment; but one containing only oranges would just as well satisfy the condition of confronting us with an identical choice set. Similarly, a law permitting the practice of all varieties of Christianity but prohibiting all others is equal treatment among Christians but not between Christians and others; yet all of them face the same choice set.

It looks as if to the condition that the choice sets should be the same we need to add something about

their having the same value. But how do we tell when two choice sets have the same value? Choicists are in the embarrassing position of having no general answer to this question. In the case of consumer goods, for example, it can be said that people are treated equally when they have equal amounts of money, because this means that they have an entitlement to the same share of the society's resources: the equality of value is established by the equal cost to the rest of the society. With members of religious faiths, a criterion of this kind gives no help. Equal treatment will have to mean that they all get the same tax treatment, the same treatment with regard to schooling, the same treatment under the blasphemy laws and so on. The legal framework has equal value for all religious faiths only in this sense: that it does not give special favours to one that it does not give to others.

Anti-choicists, in contrast, offer a simple and comprehensive criterion of equal value: a certain choice set has the same value for two people if the option in it that each most prefers produces the same level of welfare, understood subjectively as 'utility'. (This option may, of course, be a different one for the two people.) Since the same criterion applies in all areas, we can aggregate across them and arrive at the general conclusion that social justice requires equal welfare for all the members of a society. For whatever it is about them that results in their actions yielding more or less utility is a matter of good or bad luck. The principle of compensation demands, therefore, that the effects of this good or bad luck should be cancelled out by an appropriate redistribution of resources.

It may be objected immediately that, if all actions produce the same amount of welfare for the agent as everybody else has, nobody will have any incentive to behave prudently, or to do things that benefit others rather than things that harm them. The average level of welfare of the population, which everyone share in, will be lowered only infinitesimally over a large population. Everyone therefore stands to gain from a move away from guaranteed equal welfare to a set-up that attaches reward and penalties to beneficial and antisocial actions respectively.

Is this simply, then, a return to the principle of personal responsibility? No. It is true that the institutions called for by common advantage will at a number of points be similar to those implied by the principle of personal responsibility. But the rationale will be quite different. Some criminologists, for example, have taken a strong anti-choicist line and argued that all or almost all criminal behaviour is the result of some combination of unfavourable heredity and crime-inducing environment. It is quite consistent with this to say that crime should be punished in order to reduce its incidence. But at the same time it has to be admitted that the deliberately lowered welfare levels of convicted criminals are a matter of bad luck on their part, and thus unjust. It is simply that the common advantage requires that they suffer in order to provide an example to others (and themselves in future). Thus, if things could somehow be arranged so that prisoners enjoyed the average level of welfare, while everyone (including them when they left) could be induced to believe they were suffering, that would be an ideally just state of affairs. Actual punishment is a concession by justice to expediency.

By invoking the principle of common advantage, then, we can fend off the more disastrous implications of the anti-choice position. But we may still feel that there is something mildly crazy about the idea that an ideally just situation would be one where people who needed champagne and caviar to get to the average level of consumer satisfaction would get more money or where the adherents of some killjoy religion would have to be allowed to bring everybody else down to their own level by stopping others from enjoying themselves.

Let's suppose that we accept the basic anti-choicist premiss that the outcomes of unchosen preferences are a matter of good or bad luck. We could move away from the implication that justice mandated equal welfare if we adopted what I called the moderate anti-choicist position. This, it will be recalled, made room for personal responsibility for preferences provided they had either come about as a result of choice or could now be changed as a result of choice. The claims of a person with below-average welfare for compensation could therefore be resisted if the preferences causing the trouble were subject to choice in either of these ways. It does not seem to me, however, that this move would do much to get rid of implications of the kind I outlined a moment ago. The whole idea of choosing to change one's beliefs is fishy, while tastes for luxuries are notoriously hard to extinguish once established. Religious beliefs are less often deliberately cultivated than acquired in the course of one's upbringing; and although expensive tastes *may* have been cultivated, we certainly cannot assume that all are.

A heroic solution, which has been adopted by John Rawls, is to say that people's tastes, aspirations and

beliefs are always open to modification, so people can properly be held responsible for them. This enables him to adhere to what I have called the basic anti-choicist premiss and yet finish up with the classical choicist conclusion that people are treated equally if they have equal rights and equal incomes – in Rawls's terminology, equal shares of primary goods.

On the face of it, Rawls's claim about the malleability of preferences is an empirical one, and a hopelessly implausible one to boot. He has made it clear, however, that this is a part of a 'model conception of the person' which is presupposed by the theory.[4] An unkind, but I fear accurate, way of putting this would be to say that Rawls wants to salvage liberal conclusions about primary goods as the currency of distributive justice, and can do so without repudiating the anti-choicist premiss only by inserting between them a postulate ensuring personal responsibility for preferences. The justification of this postulate – that all preferences are subject to choice – is not that it is true (or even credible) but that it is needed to get the answer to come out in the right place.

It is easy enough to dismiss Rawls's proposed solution, and I have no doubt that we should not waste time on it. Unfortunately, however, Rawls's ill-fated venture in dogmatic psychology has provided a golden opportunity for theorists antipathetic to liberal conclusions to suggest that they depend on something of the sort. It is clear, however, that this is not so, because these conclusions can be derived quite straightforwardly so long as the anti-choicist premiss is repudiated. The most that Rawls's contortions show is that it is hard to get from anti-choicist premisses to choicist conclusions, and this should not surprise anybody.

V Responsibility for Preferences: An Alternative Approach

We come back, then, to the anti-choicist premiss. If it were to be generally accepted, it looks as if we would have to make fairly drastic changes in our ideas about what justice ideally entails, though problems of implementation would perhaps mean that we should see little change in actual social arrangements. But should we accept it? It seems to me to have appealed to too many people of undeniable intelligence to be simply dismissed in favour of the bluff choicist position that the status of preferences is irrelevant to personal responsibility. What I should like to propose instead is that we should divide the spoils between choicism and anti-choicism, accepting the more intuitively appealing part of the anti-choicist premiss but dropping the part that leads to the more unappetizing conclusions.

Let us agree, then, that it is legitimate to look behind choices to preferences before establishing personal responsibility for outcomes. People are, indeed, responsible for the outcomes of actions only if they are also responsible for the preferences from which those actions flow. But the error in the anti-choicist position lies, I suggest, in the next step which makes responsibility for preferences depend upon their being subject to choice. The alternative I propose is that people are responsible for their preferences whenever they are content with them. How these preferences originated is irrelevant, and the ease with which they could be changed is relevant only in this way: that we would have to question the sincerity of your claim not to want to have the preferences you actually do have if it were easy for you to change them.

I shall call this view 'semi-choicism', since it abandons the choicist resistance to any inquiry into responsibility for preferences, but rejects the anti-choicist criterion for responsibility for preferences. I wish to maintain that semi-choicism has two virtues: it has a certain intrinsic plausibility, and it also gets the right answers (or what seem to me the right answers) on particular problems.

Consider again the case of religious belief. Suppose you were raised in some strict, puritanical sect according to whose tenets most pleasures are sinful, and you continue to believe in those tenets. Now you could, obviously, wish that the truth about the will of God was more accommodating, but so long as you really believe that that is how things are, you cannot regret believing it, even if you recognize that some other set of beliefs would be compatible with choices having more enjoyable outcomes. The difficulty in changing your beliefs is not so much empirical as logical. Let us imagine your saying, 'Of course, it would be hard for me to change my beliefs now, after such a long process of indoctrination, but I wish I had been brought up in some less restrictive faith so that I would now have more congenial beliefs.' In saying that you would, it seems to me, be saying that you no longer did believe in what you had been brought up to believe. Once you thought it through, you would be more honest with yourself to say, 'Of course, I no longer believe that all those pleasures are really sinful, but I still

experience powerful guilt feelings about them.' It would be quite reasonable, I suggest, for someone in this position to be offered psychotherapy on the National Health Service in order to be relieved of these irrational feelings of guilt. And this, it may be observed, is precisely what is mandated by semi-choicism. For in this case you have preferences left over from your religious upbringing that you do not identify with and would like to be rid of. So long as you continued to believe, however, you could hardly complain that it was bad luck to have the preferences you had, since you would not have wished things to be any different.

Beliefs raise special issues because it is hard to give any sense to the idea of wanting to believe something other than what you do believe (as against wanting it to be the case that something else is true). However, the semi-choicist approach works equally well on preferences which are not conditioned upon belief in the way that religiously derived preferences are. Consider, for example, sexual preference. Now at present homosexuals are not given equal treatment according to the choicist criterion of having rights with equal value to those of heterosexuals. For example, a homosexual couple is less favourably treated than a heterosexual one by the laws dealing with income tax and estate duty. Suppose, however, that homosexuals and heterosexuals were treated equally according to the choicist criterion of equality, but that for some reason homosexuals tended to be less satisfied with life than heterosexuals. This would not be properly regarded as bad luck in as far as people feel that their sexuality is a central aspect of their personality and do not wish to be changed into some other kind of person.

That such a change is, as an empirical matter, difficult or impossible to accomplish, is not important. If a pill were invented tomorrow that switched people's sexual orientation painlessly and without side-effects, it would (I assume) have few takers, even if it were generally believed that one kind of sexual orientation tended to create more satisfaction with life than the other. To see this, I ask you to engage in another thought experiment. Imagine you were told that somebody who had been and could again be happier than you had suffered a ghastly accident, but that by killing you and attaching his head to your body he could, by a miracle of surgery, be restored to his old self. If you were a dedicated utilitarian, you might reluctantly agree that this was, impersonally considered, the best course of action. But you would surely not regard it as being in your interest. You would not, therefore, go around saying what bad luck it is that such an operation is not actually available. But if you wouldn't do that, why should you feel inclined to say what bad luck it is that you have your character rather than a quite different one?

As before, we can add that the semi-choicist position would call for the National Health Service to provide counselling and then assistance to anyone who genuinely, after careful consideration of all the implications, wanted to try to change sexual orientation – in either direction. But that seems to me perfectly reasonable. Once again, therefore, I suggest that the semi-choicist approach seems to come out in the right place.

What, finally, about tastes? Let us concede (though I doubt if it is invariably true) that a connoisseur gets less pleasure from a bottle of plonk than does somebody who wouldn't notice if it was Château Lafitte, and so on. Does that mean that a connoisseur reduced to drinking plonk wishes he were unable to tell that it is plonk and imagine how much better Château Lafitte would be? I doubt it. The ability to make fine discriminations is, after all, not something to be lightly wished away. But we should notice that where we do find tastes which many people wish they could change, it is considered quite appropriate for the National Health Service to offer help, examples being smoking, drinking, drug abuse, and eating disorders. To the extent that people want to change their preferences and cannot, the semi-choicist agrees with the anti-choicist that this is bad luck, and quite rightly so, it seems to me.

VI Conclusion

The issues that have been raised here about the roles of chance and choice are central to so many aspects of public policy that it is hardly surprising to find them surfacing constantly in everyday political arguments. The task of political philosophers in all this is to clarify the terms of debate. My experience in presenting the ideas contained here has been that some of my examples elicit unanimous responses where others give rise to mixed reactions. The conclusion I am inclined to draw from this is that there is more going on in some of these cases than I have yet identified. More work needs to be done to refine the analysis and to apply it.[5] I feel convinced, however, that any adequate theory of distributive justice will have to give a central position to chance and choice.

Notes

1 Julian Le Grand, 'Equity as an Economic Objective', *Journal of Applied Philosophy*, 1 (1984): 39–51, quotation from p. 46, italics suppressed.
2 Robert Nozick, *Anarchy, State, and Utopia* (New York: Basic Books, 1974).
3 See G. A. Cohen, 'On the Currency of Egalitarian Justice', *Ethics* 99 (1989): 906–44.
4 See especially the Dewey Lectures on 'Kantian Constructivism', *Journal of Philosophy*, 77 (1980): 515–72.
5 I contribute to this process myself by presenting a greatly extended analysis of chance and choice in *Justice as Impartiality* (Oxford: Clarendon Press, 1995).

35

What Is the Point of Equality?

Elizabeth S. Anderson

If much recent academic work defending equality had been secretly penned by conservatives, could the results be any more embarrassing for egalitarians? Consider how much of this work leaves itself open to classic and devastating conservative criticisms. Ronald Dworkin defines equality as an "envy-free" distribution of resources.[1] This feeds the suspicion that the motive behind egalitarian policies is mere envy. Philippe Van Parijs argues that equality in conjunction with liberal neutrality among conceptions of the good requires the state to support lazy, able-bodied surfers who are unwilling to work.[2] This invites the charge that egalitarians support irresponsibility and encourage the slothful to be parasitic on the productive. Richard Arneson claims that equality requires that, under certain conditions, the state subsidize extremely costly religious ceremonies that its citizens feel bound to perform.[3] G. A. Cohen tells us that equality requires that we compensate people for being temperamentally gloomy, or for being so incurably bored by inexpensive hobbies that they can only get fulfilling recreation from expensive diversions.[4] These proposals bolster the objection that egalitarians are oblivious to the proper limits of state power and permit coercion of others for merely private ends. Van Parijs suggests that to fairly implement the equal right to get married, when male partners are scarce, every woman should be given an equal tradable share in the pool of eligible bachelors and have to bid for whole partnership rights, thus implementing a transfer of wealth from successful brides to compensate the losers in love.[5] This supports the objection that egalitarianism, in its determination to correct perceived unfairness everywhere, invades our privacy and burdens the personal ties of love and affection that lie at the core of family life.

Those on the left have no less reason than conservatives and libertarians to be disturbed by recent trends in academic egalitarian thought. First, consider those whom recent academic egalitarians have singled out for special attention: beach bums, the lazy and irresponsible, people who can't manage to entertain themselves with simple pleasures, religious fanatics. Thomas Nagel[6] and Gerald Cohen give us somewhat more sympathetic but also pitiable characters in taking stupid, talentless, and bitter people to be exemplary beneficiaries of egalitarian concern. What has happened to the concerns of the politically oppressed? What about inequalities of race, gender, class, and caste? Where are the victims of nationalist genocide, slavery, and ethnic subordination?

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Second, the agendas defined by much recent egalitarian theorizing are too narrowly focused on the distribution of divisible, privately appropriated goods, such as income and resources, or privately enjoyed goods, such as welfare. This neglects the much broader agendas of actual egalitarian political movements. For example, gay and lesbian people seek the freedom to appear in public as who they are, without shame or fear of violence, the right to get married and enjoy benefits of marriage, to adopt and retain custody of children. The disabled have drawn attention to the ways the configuration of public spaces has excluded and marginalized them, and campaigned against demeaning stereotypes that cast them as stupid, incompetent, and pathetic. Thus, with respect to both the targets of egalitarian concern and their agendas, recent egalitarian writing seems strangely detached from existing egalitarian political movements.

What has gone wrong here? I shall argue that these problems stem from a flawed understanding of the point of equality. Recent egalitarian writing has come to be dominated by the view that the fundamental aim of equality is to compensate people for undeserved bad luck – being born with poor native endowments, bad parents, and disagreeable personalities, suffering from accidents and illness, and so forth. I shall argue that in focusing on correcting a supposed cosmic injustice, recent egalitarian writing has lost sight of the distinctively political aims of egalitarianism. The proper negative aim of egalitarian justice is not to eliminate the impact of brute luck from human affairs, but to end oppression, which by definition is socially imposed. Its proper positive aim is not to ensure that everyone gets what they morally deserve, but to create a community in which people stand in relations of equality to others.

In this article, I will compare the implications of these two conceptions of the point of equality. The first conception, which takes the fundamental injustice to be the natural inequality in the distribution of luck, can be called "luck egalitarianism" or "equality of fortune." I shall argue that equality of fortune fails the most fundamental test any egalitarian theory must meet: that its principles express equal respect and concern for all citizens. It fails this test in three ways. First, it excludes some citizens from enjoying the social conditions of freedom on the spurious ground that it's their fault for losing them. It escapes this problem only at the cost of paternalism. Second, equality of fortune makes the basis for citizens' claims on one another the fact that some are inferior to others in the worth of their lives, talents, and personal qualities. Thus, its principles express contemptuous pity for those the state stamps as sadly inferior and uphold envy as a basis for distributing goods from the lucky to the unfortunate. Such principles stigmatize the unfortunate and disrespect the fortunate by failing to show how envy can obligate them. Third, equality of fortune, in attempting to ensure that people take responsibility for their choices, makes demeaning and intrusive judgments of people's capacities to exercise responsibility and effectively dictates to them the appropriate uses of their freedom.

The theory I shall defend can be called "democratic equality." In seeking the construction of a community of equals, democratic equality integrates principles of distribution with the expressive demands of equal respect. Democratic equality guarantees ail law-abiding citizens effective access to the social conditions of their freedom at all times. It justifies the distributions required to secure this guarantee by appealing to the obligations of citizens in a democratic state. In such a state, citizens make claims on one another in virtue of their equality, not their inferiority, to others. Because the fundamental aim of citizens in constructing a state is to secure everyone's freedom, democratic equality's principles of distribution neither presume to tell people how to use their opportunities nor attempt to judge how responsible people are for choices that lead to unfortunate outcomes. Instead, it avoids bankruptcy at the hands of the imprudent by limiting the range of goods provided collectively and expecting individuals to take personal responsibility for the other goods in their possession.

Justice as Equality of Fortune

The following passage by Richard Arneson aptly describes the conception of justice I aim to criticize: "The concern of distributive justice is to compensate individuals for misfortune. Some people are blessed with good luck, some are cursed with bad luck, and it is the responsibility of society – all of us regarded collectively – to alter the distribution of goods and evils that arises from the jumble of lotteries that constitutes human life as we know it … Distributive justice stipulates that the lucky should transfer some or all of their gains due to luck to the unlucky."[7] This conception of justice can be traced to the work of John Rawls,[8] and has been (I believe mistakenly) attributed to him. Equality of fortune is now one of the dominant theoretical positions among egalitarians, as evidenced by the roster of theorists who endorse it, including Richard Arneson, Gerald Cohen, Ronald

Dworkin, Thomas Nagel, Eric Rakowski, and John Roemer.[9] Philippe Van Parijs also incorporates this principle into his theory of equality of resources or assets. Luck egalitarianism relies on two moral premises: that people should be compensated for undeserved misfortunes and that the compensation should come only from that part of others' good fortune that is undeserved.

Part of the appeal of equality of fortune comes from its apparently humanitarian impulse. When decent people see others suffer for no good reason – say, children dying from starvation – they tend to regard it as a matter of obligation that the more fortunate come to their aid. Part of its appeal comes from the force of the obviously correct claim that no one deserves their genetic endowments or other accidents of birth, such as who their parents are or where they were born. This seems to weaken claims of those blessed by their genes or social circumstances to retain all of the advantages that typically flow from such good fortune. Besides these intrinsic sources of appeal, proponents of equality of fortune have tried to build support for egalitarianism by responding to many of the formidable objections that conservatives and libertarians have made against egalitarians of the past.

Consider the following litany of objections to equality. Some critics argue that the pursuit of equality is futile. For no two people are really equal: the diversity of individuals in their talents, aims, social identities, and circumstances ensures that in achieving equality in some domain, one will inevitably create inequalities in others.[10] Give people the same amount of money and the prudent will get more happiness from it than the imprudent. Recent egalitarians have effectively responded to these charges by paying close attention to the problem of defining the proper space in which equality is desirable. Equality is a viable goal once the space of egalitarian concern is defined and the resulting inequalities in other domains are shown to be acceptable. Other critics charge that the quest for equality is wasteful because it would rather throw away goods that can't be evenly divided than let some have more than others.[11] What's worse, it may call for leveling down people's talents when all cannot be lifted to the same high standards.[12] Recent egalitarians adopt a leximin criterion of equality, permitting inequalities as long as they benefit, or, more permissively, don't harm the worst off.[13] So they don't care much about income disparities among the very prosperous. Many proponents of equality of fortune also accept a strong principle of self-ownership, and so deplore interference with people's choices to develop their talents or forced appropriation of those talents.[14]

Luck egalitarians have been most responsive to criticisms of equality based on ideals of desert, responsibility, and markets. Critics of equality object that egalitarians take goods away from the deserving.[15] Proponents of equality of fortune reply that they take from the fortunate only that portion of their advantages that everyone acknowledges is undeserved. On the receiving side, the critics protest that egalitarianism undermines personal responsibility by guaranteeing outcomes independent of people's personal choices.[16] In response, luck egalitarians have moved from an equality of outcome to an equality of opportunity conception of justice: they ask only that people start off with equal opportunities to achieve welfare or access to advantage, or that they start off with an equal share of resources.[17] But they accept the justice of whatever inequalities result from adults' voluntary choices. All place great stress on the distinction between the outcomes for which an individual is responsible – that is, those that result from her voluntary choices – and the outcomes for which she is not responsible – good or bad outcomes that occur independent of her choice or of what she could have reasonably foreseen. Luck egalitarians dub this the distinction between "option luck" and "brute luck."[18]

The resulting theories of equality of fortune thus share a common core: a hybrid of capitalism and the welfare state. For the outcomes for which individuals are held responsible, luck egalitarians prescribe rugged individualism: let the distribution of goods be governed by capitalist markets and other voluntary agreements.[19] This reliance on markets responds to the objection that egalitarianism does not appreciate the virtues of markets as efficient allocative mechanisms and as spaces for the exercise of freedom.[20] For the outcomes determined by brute luck, equality of fortune prescribes that all good fortune be equally shared and that all risks be pooled. "Good fortune" means, primarily, unproduced assets such as unimproved land, natural resources, and the income attributable to native endowments of talent. Some theorists would also include the welfare opportunities attributable to possession of unchosen favorable mental and physical traits. "Risks" mean any prospects that reduce one's welfare or resources. Luck egalitarians thus view the welfare state as a giant insurance company that insures its citizens against all forms of bad brute luck. Taxes for redistributive purposes are the moral equivalent of insurance premiums against bad luck. Welfare payments compensate people against losses traceable to bad brute luck, just like insurance policies do.

Ronald Dworkin has articulated this insurance analogy most elaborately.[21] He argues that justice demands that the state compensate each individual for whatever brute risks they would have insured themselves against, on the assumption that all were equally likely to suffer from the risk. The state steps in to provide social insurance when private insurance for a risk is not available to all on equal and affordable terms. Where such private insurance is available, brute luck is automatically converted into option luck, for society can hold individuals responsible for purchasing insurance on their own behalf.[22] In its pure form, luck egalitarianism would insist that if individuals imprudently fail to do so, no demand of justice requires society to bail them out. Most luck egalitarians recoil from this thought, however, and thus justify mandatory insurance, or other restrictions on individuals' liberty to squander their share of good fortune, on paternalistic grounds.[23]

Luck egalitarians disagree with one another primarily over the space in which they advocate equality. Should egalitarians seek equality of resources or assets (Dworkin, Rakowski, Roemer), real freedom – that is, legal rights plus the means to achieve one's ends (Van Parijs), equal opportunity for welfare (Arneson), or equal access to advantage – a mixed bag of internal capabilities, opportunities for welfare, and resources (Cohen, Nagel)? This looks like a wide diversity of views, but the central disagreement among them separates luck egalitarians into two camps: one which accepts equality of welfare as a legitimate (if not the only) object of egalitarian concern (Arneson, Cohen, Roemer, probably Nagel), and one which only equalizes resources (Dworkin, Rakowski, Van Parijs). All parties accept an analysis of an individual's welfare in terms of the satisfaction of her informed preferences. The role of individual preferences in equality of fortune shall be a central object of my critique, so it pays to consider these differences.

Should egalitarians care whether people have equal opportunities for welfare, or only that their share of resources be equal? Resource egalitarians object to taking welfare as an equalisandum because of the problem of expensive tastes.[24] Some people – spoiled brats, snobs, sybarites – have preferences that are expensive to satisfy. It takes a lot more resources to satisfy them to the same degree that a modest, self-controlled person can be satisfied. If equalizing welfare or opportunities for welfare were the object of equality, then the satisfaction of self-controlled people would be held hostage to the self-indulgent. This seems unfair. Resource egalitarians argue, therefore, that people should be entitled to equal resources, but be held responsible for developing their tastes so that they can live satisfactorily within their means.

Against this view, those who believe welfare is a legitimate space of egalitarian concern offer three arguments. One is that people value resources for the welfare they bring. Shouldn't egalitarians care about what ultimately matters to people, rather than focusing on merely instrumental goods?[25] Second, they argue that resource egalitarians unfairly hold people responsible for all of their preferences and for the costs of satisfying them. Although some preferences are voluntarily cultivated by individuals, many others are shaped by genetic and environmental influences beyond their control and are highly resistant to deliberate change. Moreover, an individual may not be responsible for the fact that satisfying them is so expensive. For example, an unforeseeable event may cause a dramatic shortage of a once abundant means of satisfying some taste, and thereby escalate its price. Welfarists argue that it is unfair, and inconsistent with the basic premise of luck egalitarianism, to hold people responsible for their involuntary, or involuntarily expensive, tastes.[26] Third, they argue that people with handicaps are entitled to more resources (medical treatment, guide dogs, etc.) than others, on account of their handicap, and that resource egalitarians can't accommodate this intuition. This is because being handicapped is analytically equivalent to having preferences that are involuntarily expensive to satisfy. The preference for mobility may be the same between an ambulatory and a paraplegic person, but the cost of satisfying the latter's preference is much higher, although not by the choice of the paraplegic person. The paraplegic has an involuntarily expensive taste for mobility. If resource egalitarians accept the liberal requirement that theories of justice must be neutral among competing conceptions of the good, they cannot discriminate between involuntarily expensive tastes for mobility on the part of the handicapped and involuntarily expensive tastes for rare champagne on the part of gourmets.[27]

I shall consider the first and third defenses of welfarism later in this article. The second defense is open to the following reply by resource egalitarians. Justice demands that the claims that people are entitled to make on others should be sensitive not only to the benefits expected on the part of the claimants but to the burdens these claims place on others. These burdens are measured by the opportunity costs of the resources devoted to meeting them, which are a function of the preferences of others for the same resources. For egalitarian

purposes, the value of a bundle of external resources should thus be determined not by how much welfare the owner can get from it, but by the price it would fetch in a perfectly competitive market if everyone could bid for it and all enjoyed the same monetary assets.[28]

The importance of this reply is that it shows how even resource egalitarians give subjective preferences a central role to play in the measurement of equality. For the value of resources is measured by the market prices they would command in a hypothetical auction, and these prices are a function of everyone's subjective preferences for those resources. Everyone is said to have an equal bundle of resources when the distribution of resources is envy-free: no one prefers someone else's bundle of resources to their own. Resource egalitarians agree that unproduced external resources should be distributed equally in this envy-free sense and that such a distribution is identical to what would be achieved in a perfectly competitive auction open to everyone, if everyone had equal information, talents, bidding skills, and cash available for bidding.[29] The difference between resource egalitarians and welfare egalitarians thus does not consist in whether the measure of equality is based on subjective preferences. They differ only in that for welfare egalitarians, the claims a person makes are dependent on her tastes, whereas for resource egalitarians, they are a function of everyone's tastes.

The different conceptions of equality of fortune differ in many details which I cannot cover here. I have sketched what I take to be the crucial differences among them. My aim, however, has been to identify the features these conceptions of justice share, for I want to show that these features reflect a fundamentally flawed conception of justice. In the next two sections, I shall present a series of cases in which luck egalitarianism generates injustice. Not every version of equality of fortune is vulnerable to each counterexample; but each version is vulnerable to one or more counterexamples in each section.

The Victims of Bad Option Luck

The state, says Ronald Dworkin, should treat each of its citizens with equal respect and concern.[30] Virtually all egalitarians accept this formula, but rarely have they analyzed it. Instead, they invoke the formula, then propose their favored principle of egalitarian distribution as an interpretation of it, without providing an argument proving that their principle really does express equal respect and concern for all citizens. In this section, I will argue that the reasons luck egalitarians offer for refusing to come to the aid of the victims of bad option luck express a failure to treat these unfortunates with equal respect and concern. In the next section, I will argue that the reasons luck egalitarians offer for coming to the aid of the victims of bad brute luck express disrespect for them.

Luck egalitarians say that, assuming everyone had equal opportunity to run a particular risk, any outcomes due to voluntary choices whose consequences could reasonably be foreseen by the agent should be born or enjoyed by the agent. The inequalities they generate neither give rise to redistributive claims on others if the outcome is bad, nor are subject to redistributive taxation if the outcome is good.[31] This, at least, is the doctrine in its hard-line form. Let us start with Rakowski's version of equality of fortune, since his sticks most closely to the hard line.

Consider an uninsured driver who negligently makes an illegal turn that causes an accident with another car. Witnesses call the police, reporting who is at fault; the police transmit this information to emergency medical technicians. When they arrive at the scene and find that the driver at fault is uninsured, they leave him to die by the side of the road. According to Rakowski's doctrine, this action is just, for they have no obligation to give him emergency care. No doubt, there are sound policy reasons for not making snap judgments of personal responsibility at the scene of an emergency. The best policy is to rescue everyone and sort questions of fault out later. But this is of no help to the luck egalitarian. There is the uninsured driver, hooked up to a respirator, fighting for his life. A judicial hearing has found him at fault for the accident. According to Rakowski, the faulty driver has no claim of justice to continued medical care. Call this the problem of *abandonment of negligent victims*.

If the faulty driver survives, but is disabled as a result, society has no obligation to accommodate his disability. Arneson joins Rakowski on this point.[32] It follows that the post office must let the guide dogs of the congenitally blind guide their owners through the building, but it can with justice turn away the guide dogs of faulty drivers who lost their sight in a car accident. No doubt it would be too costly for the state to administer such a discriminatory system. But this administrative consideration is irrelevant to the question of whether luck egalitarianism identifies the right standard of what *justice* requires. Call this the problem of *discrimination among the disabled*.

Luck egalitarians abandon even prudent people to their fates when the risks they run turn sour. "If a citizen of a large and geographically diverse nation like the United States builds his house in a flood plain, or near the San Andreas fault, or in the heart of tornado country, then the risk of flood, earthquake, or crushing winds is one he chooses to bear, since those risks could be all but eliminated by living elsewhere."[33] We must not forget the threat of hurricanes devastating the Gulf and East Coasts. Shall all Americans be expected to crowd into Utah, say, to be entitled to federal disaster relief?[34] Rakowski's view effectively limits disaster relief to only those citizens who reside in certain portions of the country. Call this the problem of *geographical discrimination among citizens*.

Consider next the case of workers in dangerous occupations. Police officers, firefighters, members of the armed forces, farmers, fishers, and miners suffer from significantly higher than average risks of injury and death at work. But these are "exemplary instances of option luck" and hence can generate no claims to publicly subsidized medical care or aid to dependents if an accident occurs.[35] Rakowski would have to allow that people *drafted* into the armed forces would be entitled to veterans' disability payments. However, his doctrine implies that patriotic volunteers, having run the risks of battle by choice, could justly be required to pay for their rehabilitation themselves. Call this the problem of *occupational discrimination*.

Dependent caretakers and their children face special problems under equality of fortune. Many people who care for dependents – children, the ill and infirm – command no market wage for discharging their obligations to those who cannot take care of themselves, and lack the time and flexibility to earn a decent wage. For this reason, dependent caretakers, who are almost all women, tend to be either financially dependent on a wage earner, dependent on welfare payments, or extremely poor. Women's financial dependence on a male wage earner results in their systematic vulnerability to exploitation, violence, and domination.[36] But Rakowski's doctrine implies that this poverty and resulting subordination is by choice and therefore generates no claims of justice on others. It is a "lifestyle," perhaps taken up from deep conviction but precisely for that reason not something that can be pursued at the expense of those who don't share their "zeal" or "belief" that one owes duties of care to family members.[37] If women don't want to be subject to such poverty and vulnerability, they shouldn't choose to have children.

Nor do children have any claim to assistance from anyone but their parents. From the point of view of everyone else, they are an unwelcome intrusion, who would reduce the fair shares of natural resources to which the first comers are entitled were they allowed to lay a claim to such shares independently of their claim to their parents' shares. "It is … unjust to declare … that because two people decide to have a child … *everyone* is required to share their resources with the new arrival, and to the same extent as its parents. With what right can two people force all the rest, through deliberate behavior rather than bad brute luck, to settle for less than their fair shares after resources have been divided justly?"[38] The desire to procreate is just another expensive taste, which resource egalitarians need not subsidize.

Rakowski's view is, certainly, on the harsh end among luck egalitarians. Most luck egalitarians would consider the time at which a person enters society as irrelevant to their claim to their fair share of the bounties of nature. Children are not responsible either for their parents' lack of wealth or for their parents' decision to reproduce. Thus it is a matter of bad brute luck, requiring compensation, if their parents lack the means to give them their fair share. But the women who devote themselves to caring for children are another story. Since women are not on average less talented than men, but choose to develop and exercise talents that command little or no market wage, it is not clear whether luck egalitarians have any basis for remedying the injustices that attend their dependence on male wage earners. Call this the problem of *vulnerability of dependent caretakers*.

On Rakowski's hard-line version of equality of fortune, once people risk and lose their fair share of natural wealth, they have no claims against others to stop their free fall into misery and destitution. Equality of fortune imposes no constraints on the structure of opportunities generated by free markets. Nothing would prevent people, even those whose gambles were prudent but who suffered from bad option luck, from subjection to debt peonage, sweatshops, or other forms of exploitation. The inequalities and suffering permitted by this view are unlimited. Call these the problems of *exploitation* and the *lack of a safety net*.

Rakowski could insist that private or public insurance be made available to all to prevent such conditions. Then it would be the fault of individuals who failed to purchase such insurance that they were so destitute and vulnerable to exploitation. But justice does not permit the exploitation or abandonment of anyone, even the imprudent. Moreover, a person's failure to keep up with all of

the insurance payments needed to protect herself against innumerable catastrophes need not reflect imprudence. If her option luck is particularly bad, she may not be able to pay for all that insurance and still provide for her family's basic needs. Under these conditions, it is perfectly rational, and indeed morally obligatory, to serve the family's urgent needs over its speculative needs – for example, to drop some insurance in order to pay for food. Call this the problem of the *abandonment of the prudent*.

Rakowski's version of equality of fortune treats the victims of bad option luck most harshly. His distributive rules are considerably more harsh than even those found in the United States, which does not ration health care on the basis of fault, protects all the disabled from discrimination, provides federal disaster relief to all residents of the country, requires employers to provide worker disability plans, provides veterans' benefits and at least temporary welfare for impoverished families with dependent children, requires minimum wages, and forbids slavery, debt peonage, and at least some kinds of sweatshop exploitation. Do other luck egalitarians do a better job than Rakowski in shielding the victims of bad option luck from the worst fates? Dworkin's theory offers no better protection than Rakowski's against predatory practices in the free market, once people have lost their fair share of resources through bad option luck. Nor would it help dependent caretakers, or people who are disabled as a result of choices they made.

Van Parijs would guarantee everyone the maximum unconditional basic income that could be sustained in a society. If this income were significant, it would certainly help dependent caretakers, the disabled and involuntarily unemployed, and anyone else down on their luck.[39] However, Van Parijs concedes that the size of this income might be very low, even zero.[40] The chief difficulty with his proposal is that his basic income would be awarded to all unconditionally, regardless of whether they were able or performing socially useful work. Lazy, able-bodied surfers would be just as entitled to that income as dependent caretakers or the disabled. In order to offer an incentive for people to work and thereby provide the tax revenue to fund a basic income, there would have to be a substantial gap between the basic income and the wage provided by the lowest paid unskilled job. Such a low basic income might be satisfactory to footloose beach bums, who might be happy camping on the beach. But it would hardly be enough for struggling parents, the involuntarily unemployed, or the disabled, who have special expenses. Were the guaranteed basic income tied to a requirement that able-bodied people engage in socially useful work, it could be raised to a much higher level. Van Parijs's proposal effectively indulges the tastes of the lazy and irresponsible at the expense of others who need assistance.[41]

Arneson proposes that everyone be guaranteed equal opportunity for welfare. Upon reaching adulthood, everyone should face a range of choices such that the sum of expected utilities for each equally accessible life history is equal to the sum of utilities that any other person faces in their possible life histories. Once these opportunities are guaranteed, people's fates are determined by their choices and option luck.[42] Like Dworkin's and Rakowski's theories, Arneson's theory guarantees equality, indeed even a minimally decent life, only *ex ante*, before one has made any adult choices. This is small comfort to the person who led a cautious and prudent life, but still fell victim to extremely bad option luck.[43] Arneson might reply by incorporating into people's prospective decision-trees their preferences for facing (or not having to face) certain options at each moment in time. However, this could undermine personal responsibility altogether by allowing people to rule out even minor losses consequent upon whatever choices they may make.[44] In addition, we have seen that Arneson would not require accommodation of people who are disabled by their own fault. Dependent caretakers also would not get much help from Arneson. As Roemer says, explaining Arneson's and Cohen's position, "Society should not compensate people for their choice of [a more altruistic, self-sacrificing] path because it owes people no compensation on account of their moral views."[45] People who want to avoid the vulnerabilities that attend dependent caretaking must therefore decide to care only for themselves. This is egalitarianism for egoists alone. One wonders how children and the infirm are to be cared for, with a system that offers so little protection to their caretakers against poverty and domination.

Cohen's and Roemer's theories are the only ones to question the structure of opportunities generated by markets in response to people's choices. Cohen argues that equality demands equality of access to advantage, and defines advantage to include not just welfare but freedom from exploitation or subjection to unfair bargains.[46] Roemer's version of market socialism, in which households would share equally in the returns to capital through a universal grant, would also prevent the worst outcomes generated by laissez faire capitalism, such as debt peonage and sweatshop labor. However, as theorists from the marxist tradition, they focus on the exploitation of wage laborers to the exclusion of non-wage-earning dependent caretakers.[47]

What do luck egalitarians say in response to these problems? None recognize the sexist implications of assimilating the performance of moral obligations to care for dependents to the class of voluntarily expensive tastes. Most are sensitive to the fact that an egalitarian view that guarantees equality only *ex ante*, before adults start making choices for themselves, and makes no provision for people after that, will in fact generate substantial inequalities in people's fates as they lead their lives, to the point where the worst off will often be extremely badly off. They assume that the prudent will prevent such fates by taking advantage of the availability of private (or, where needed, public) insurance. All agree, then, that the chief difficulty for luck egalitarians is how to insure against the wretchedness of the imprudent.

Arneson has considered this problem most deeply within the terms of luck egalitarianism. He argues that it is sometimes unfair to hold people responsible for the degree to which they are responsible agents. The capacities needed for responsible choice – foresight, perseverance, calculative ability, strength of will, self-confidence – are partly a function of genetic endowments and partly of the good fortune of having decent parents. Thus, the imprudent are entitled to special paternalistic protection by society against their poor choices. This might involve, for example, mandatory contributions to a pension plan to provide for old age.[48] The other luck egalitarians agree that pure equality of fortune might have to be modified by a significant dose of paternalistic intervention, to save the imprudent from the worst consequences of their choices. However, in their view, *only* paternalistic reasons can justify making mandatory the various universal social insurance programs characteristic of modern welfare states: social security, health and disability insurance, disaster relief, and so forth. *Only* paternalistic reasons justify meting out individuals' basic income grant on a monthly basis, rather than in a lump sum upon coming of age.[49] Call this the problem of *paternalism*.

Let us pause to consider whether these policies express respect for citizens. Luck egalitarians tell the victims of very bad option luck that, having chosen to run their risks, they deserve their misfortune, so society need not secure them against destitution and exploitation. Yet a society that permits its members to sink to such depths, due to entirely reasonable (and, for dependent caretakers, even obligatory) choices, hardly treats them with respect. Even the imprudent don't deserve such fates. Luck egalitarians do entertain modifications of their harsh system, but only on paternalistic grounds. In adopting mandatory social insurance schemes for the reasons they offer, luck egalitarians are effectively telling citizens that they are too stupid to run their lives, so Big Brother will have to tell them what to do. It is hard to see how citizens could be expected to accept such reasoning and still retain their self-respect.

Against these objections, one might argue as follows.[50] First, given their concern that no one suffer undeserved misfortune, luck egalitarians ought to be able to argue that some outcomes are so awful that no one deserves to suffer them, not even the imprudent. Negligent drivers don't deserve to die from a denial of health care. Second, paternalism can be an honest and compelling rationale for legislation. For example, it is no great insult for a state to pass laws requiring the use of seat belts, so long as the law is democratically passed. Self-respecting people can endorse some paternalistic laws as simply protecting themselves from their own thoughtlessness.

I accept the spirit of these arguments. But they suggest desiderata for egalitarian theory that move us away from equality of fortune. The first argument points to the need to distinguish between goods that society guarantees to all citizens and goods that may be entirely lost without generating any claims to compensation. This is not simply a matter of defining minimum guaranteed aggregate levels of welfare or property endowments. A negligent driver might suffer far more from the death of her son in a car accident she caused than from denial of rehabilitative surgery to her injured leg. Society owes her no compensation for the worse suffering, even if it brings her below some threshold of welfare, but ought not to deprive her of health care, even if she would not drop below that level without it. Egalitarians must try to secure certain *kinds* of goods for people. This thought goes against the spirit of equality of fortune, which aims for comprehensive indemnification of people against undeserved losses of all kinds within the general space of equality they specify (welfare or resources). Arneson's argument for the indistinguishability of the needs of the handicapped from the desires of anyone with involuntarily expensive tastes illustrates this.

The second argument raises the question of how to justify liberty-limiting laws that aim to provide benefits to those whose liberty is limited. Seat belt laws are fine, but represent an insignificant case, because the liberty they limit is trifling. When the liberty being limited is significant, as in the case of mandatory participation in a social insurance scheme, citizens are owed a more

dignified explanation than that Big Brother knows better than they do where their interests lie. It is a desideratum of egalitarian theory that it be capable of supplying such an explanation.

The Victims of Bad Brute Luck

Consider now the victims of bad brute luck: those born with serious genetic or congenital handicaps, or who become significantly disabled due to childhood neglect, illness, or accidents for which they cannot be held responsible. Luck egalitarians assimilate to this category those who have little native talent and those whose talents do not command much market value. Van Parijs would also include in this group anyone who is dissatisfied with their other native endowments, whether of nonpecuniary talents, beauty and other physical features, or of agreeable personality traits.[51] Cohen and Arneson would add, also, those people who have involuntarily expensive tastes or chronically depressed psychic states.[52] Equality of fortune says that such victims of bad brute luck are entitled to compensation for their defective internal assets and internal states.

Where luck egalitarians tend to be either harsh or paternalistic toward the victims of bad option luck, they seem compassionate toward the victims of bad brute luck. The chief appeal of equality of fortune to those of an egalitarian bent lies in this appearance of humanitarianism. Equality of fortune says that no one should have to suffer from undeserved misfortune and that priority in distribution should be given to those who are blamelessly worst off. I shall argue here that the appearance of humanitarianism is belied by the doctrine of equality of fortune in two ways. First, its rules for determining who shall be included among the blamelessly worst off fail to express concern for everyone who is worst off. Second, the reasons it offers for granting aid to the worst off are deeply disrespectful of those to whom the aid is directed.

When is a deficit in internal assets so bad as to require compensation? One doesn't want anyone with any trivial personal dissatisfaction, such as having bad hair, to be entitled to compensation. Dworkin argues that the people who should be compensated for defects in internal assets are those who would have purchased insurance against their having the defect if they were behind a veil of ignorance and did not know whether they would have that defect. It follows, uncharitably, that people who have an extremely rare but severe disability could be ineligible for special aid just because the chances of anyone suffering from it were so minute that it was *ex ante* rational for people not to purchase insurance against it. The proposal discriminates between people with rare and common disabilities.[53] In addition, Dworkin's proposal would treat two people with the same disability differently, depending on their tastes.[54] A risk-averse blind person could be entitled to aid denied to a risk-loving blind person, on the grounds that the latter probably would not have insured against being blind, given the probabilities. These are further cases of discrimination among the disabled.

Dworkin's criterion of compensable disability, since it depends on people's individualized preferences for insurance, also falls prey to the problem of *expensive tastes*.[55] Suppose a vain person would get hysterical over the prospect of being genetically determined to have a hooked nose. A person's anxiety over this prospect might be enough to make it rational for her to take out insurance for plastic surgery before knowing how her nose would turn out. It is hard to see how such a preference could create an obligation on the part of society to pay for her plastic surgery. Moreover, many people don't see hooked noses as such a bad thing, and many of these people have hooked noses: they would rightly feel insulted if society treating having a hooked nose as such a grievous defect that it was entitled to compensation.

To avoid being held hostage to expensive, idiosyncratic, and frivolous tastes, Van Parijs, following Ackerman,[56] has proposed that the class of people whose internal asset deficiencies are entitled to compensation be determined by the principle of *undominated diversity*. The idea is to arrive at an objective criterion of disability to which everyone would assent, given the great heterogeneity in internal assets and in tastes for them. Consider the total internal assets of person A. If there exists a person B such that *everyone* would prefer having B's total set of internal assets to having A's, then A's diversity of assets is *dominated* by B's. A is then considered so wretched that no one thinks any of his internal assets is valuable enough to make up for his internal defects to the extent of making his assets at least equal to B's. This condition seems bad enough to warrant compensation, from anyone's point of view. The amount of compensation is set to the point at which for any B, at least one person prefers A's set of internal and external assets to B's.

Against the criterion of undominated diversity, one could complain that if an odd religious sect considered the severely disabled blessed because closer to God on account of their disabilities, then none of the disabled would be entitled to special aid, even those who rejected

the religion. Van Parijs finds this example far-fetched: only those who have a real appreciation of the disadvantages of having the disability, and whose preferences are intelligible to the wider public, should have their preferences count in the test. But a real case is ready to hand: most people who identify as members of the Deaf community do not believe that being Deaf is such a grievous defect that there is any hearing person whose abilities are preferable to theirs. Van Parijs bites the bullet at this point, and says that if this is so, then the deaf are not entitled to any special aid, whether they identify as part of the Deaf community or not. In their own judgment, they find their abilities to be satisfactory without the aid, so why provide it to them?[57]

A similar problem afflicts welfarist egalitarian theories such as Arneson's. Cohen objects that in Arneson's view, if Tiny Tim would still be happy without his wheelchair and sullen Scrooge would be consoled by having the money it costs, then Tim should have to give up his wheelchair to Scrooge.[58] The trouble is that these theories, in relying on subjective evaluations, and in aggregating over different dimensions of well-being, allow private satisfactions to count as making up for publicly imposed disadvantages. If people find happiness in their lives despite being oppressed by others, this hardly justifies continuing the oppression. Similarly, would it be all right to compensate for natural inequalities, such as being born ugly, by means of social advantages, such as getting preferential hiring over the beautiful?[59] Call this the problem of *using private (dis)satisfaction to justify public oppression*. It suggests a further desideratum of egalitarian theory, that the form of remedy it supplies match the type of injustice it addresses.

So far I have stressed the injustices equality of fortune inflicts upon those excluded from aid. Consider now those whom equality of fortune singles out as the exemplary beneficiaries of aid. Consider Thomas Nagel's view: "When racial and sexual injustice have been reduced, we shall still be left with the great injustice of the smart and the dumb, who are so differently rewarded for comparable effort. … Perhaps someone will discover a way to reduce the socially produced inequalities (especially the economic ones) between the intelligent and the unintelligent, the talented and the untalented, or even the beautiful and the ugly."[60] What do luck egalitarians have to say to those cursed by such defects in their internal assets? Suppose their compensation checks arrived in the mail along with a letter signed by the State Equality Board explaining the reasons for their compensation. Imagine what these letters would say.

> To the disabled: Your defective native endowments or current disabilities, alas, make your life less worth living than the lives of normal people. To compensate for this misfortune, we, the able ones, will give you extra resources, enough to make the worth of living your life good enough that at least *one* person out there thinks it is comparable to someone else's life.
>
> To the stupid and untalented: Unfortunately, other people don't value what little you have to offer in the system of production. Your talents are too meager to command much market value. Because of the misfortune that you were born so poorly endowed with talents, we productive ones will make it up to you: we'll let you share in the bounty of what we have produced with our vastly superior and highly valued abilities.
>
> To the ugly and socially awkward: How sad that you are so repulsive to people around you that no one wants to be your friend or lifetime companion. We won't make it up to you by being your friend or your marriage partner – we have our own freedom of association to exercise – but you can console yourself in your miserable loneliness by consuming these material goods that we, the beautiful and charming ones, will provide. And who knows? Maybe you won't be such a loser in love once potential dates see how rich you are.

Could a self-respecting citizen fail to be insulted by such messages? How dare the state pass judgment on its citizens' worth as workers and lovers! Furthermore, to require citizens to display evidence of personal inferiority in order to get aid from the state is to reduce them to groveling for support. Nor is it the state's business to pass judgment on the worth of the qualities of citizens that they exercise or display in their private affairs. Even if everyone thought that A was so ugly or socially unappealing that they preferred socially attractive B's personal qualities, it is none of the state's business to attach an official stamp of recognition on such private judgments. If it is humiliating to be widely regarded by one's associates as a social clod, think how much more degrading it would be for the state to raise such private judgments to the status of publicly recognized opinions, accepted as true for purposes of administering justice. Equality of fortune *disparages the internally disadvantaged* and *raises private disdain to the status of officially recognized truth*.

Let us not think that the problem here lies only in the consequences of sending the insulting notes along with

the compensatory checks. Of course, actually sending such notes would only add insult to injury. Even if such notes were not sent, general knowledge of the grounds upon which citizens laid claim to special aid would be stigmatizing. A consequentialist might therefore recommend that the State Equality Board conduct its investigations in secrecy and shroud its reasonings in euphemism and dissimulation. It is hard to see how the board could gather the information it needed to implement luck egalitarian principles without branding some of its citizens as inferior. How could one tell whether someone's state were so pitiable that everyone preferred someone else's internal assets to hers without taking a poll? Yet such objections to government house utilitarianism, however formidable, do not get to the core of the problem with equality of fortune.

Whether it communicates its reasons for aid or not, equality of fortune bases its distributive principles on considerations that can only express *pity* for its supposed beneficiaries. Look back at the reasons offered for distributing extra resources to the handicapped and those low in talent or personal appeal: in each case, it is some relative deficiency or defect in their persons or their lives. People lay claim to the resources of egalitarian redistribution in virtue of their inferiority to others, not in virtue of their equality to others. Pity is incompatible with respecting the dignity of others. To base rewards on considerations of pity is to fail to follow principles of distributive justice that express equal respect for all citizens. Luck egalitarianism therefore violates the fundamental expressive requirement of any sound egalitarian theory.[61]

One might argue that the concern expressed by equality of fortune is simple humanitarian compassion, not contemptuous pity. We must be clear about the difference. Compassion is based on an awareness of suffering, an intrinsic condition of a person. Pity, by contrast, is aroused by a comparison of the observer's condition with the condition of the object of pity. Its characteristic judgment is not "she is badly off" but "she is worse off than me." When the conditions being compared are internal states in which people take pride, pity's thought is "she is sadly inferior to me." Compassion and pity can both move a person to act benevolently, but only pity is condescending.

In virtue of their distinct cognitive bases, humanitarian compassion and pity motivate action on different principles. Compassion does not yield egalitarian principles of distribution: it aims to relieve suffering, not to equalize it. Once people have been relieved of suffering and neediness, compassion generates no further impetus toward equality of condition.[62] Furthermore, compassion seeks to relieve suffering wherever it exists, without passing moral judgment on those who suffer. International humanitarian organizations such as the Red Cross offer aid to all the victims of war, including even the aggressors. By contrast, equality of fortune seeks to equalize assets even when people are not actually suffering from internal deficits, but merely get fewer advantages from them than others get from theirs. And it restricts its sympathy to those who are blamelessly disadvantaged. Equality of fortune therefore does not express compassion. It focuses not on the absolute misery of a person's condition but on the gap between least and most fortunate. Thus, among the more fortunate who are moved by equality of fortune, it evokes the pathos of distance, a consciousness of the benefactors' own superiority to the objects of their compassion. This is pity.

If pity is the attitude the more fortunate express toward the less fortunate when they adopt luck egalitarianism as their principle of action, what is the attitude the less fortunate express toward the more fortunate when they make claims in accordance with the theory? The resourcist luck egalitarians are explicit on this point: it is envy. Their criterion of an equal distribution of resources is an envy-free distribution: one which is such that no one wants anyone else's bundle of resources.[63] The two attitudes are well-suited to each other: the most generous attitude the envied could appropriately have toward the envious is pity. While this makes equality of fortune emotionally consistent, it hardly justifies the theory Envy's thought is "I want what you have." It is hard to see how such wants can generate *obligations* on the part of the envied. To even offer one's own envy as a reason to the envied to satisfy one's desire is profoundly disrespectful.

Luck egalitarianism thus fails to express concern for those excluded from aid, and fails to express respect for those included among its beneficiaries as well as for those expected to pay for its benefits. It fails the most fundamental tests any egalitarian theory must meet.

The Ills of Luck Egalitarianism: A Diagnosis

We have seen that equality of fortune underwrites a hybrid institutional scheme: free markets, to govern the distribution of goods attributable to factors for which individuals are responsible, and the welfare state, to govern the distribution of goods attributable to factors

beyond the individual's control. Equality of fortune can thus be seen as an attempt to combine the best of capitalism and socialism. Its free market aspects promote efficiency, freedom of choice, "consumers' sovereignty," and individual responsibility. Its socialist aspects give everyone a fair start in life and protect the innocent against bad brute luck. Equality of fortune could be seen as a doctrine to which socialists might naturally gravitate, after learning the lessons of the follies of comprehensive centralized state economic planning and the considerable virtues of market allocations. By incorporating a very large role for market decisions within their institutional arrangements, luck egalitarians might appear to have disarmed the traditional conservative and libertarian critiques of egalitarianism.

But the counterintuitive judgments that luck egalitarians pass on the cases discussed above suggest a more dismal judgment: equality of fortune appears to give us some of the worst aspects of capitalism and socialism. Egalitarianism ought to reflect a generous, humane, cosmopolitan vision of a society that recognizes individuals as equals in all their diversity. It should promote institutional arrangements that enable the diversity of people's talents, aspirations, roles, and cultures to benefit everyone and to be recognized as mutually beneficial. Instead, the hybrid of capitalism and socialism envisioned by luck egalitarians reflects the mean-spirited, contemptuous, parochial vision of a society that represents human diversity hierarchically, moralistically contrasting the responsible and irresponsible, the innately superior and the innately inferior, the independent and the dependent. It offers no aid to those it labels irresponsible, and humiliating aid to those it labels innately inferior. It gives us the cramped vision of the Poor Laws, where unfortunates breathe words of supplication and submit to the humiliating moral judgments of the state.

How could luck egalitarians go so wrong? Consider first the ways equality of fortune invites problems in the ways it relies on market decisions. It offers a very inadequate safety net for the victims of bad option luck. This reflects the fact that equality of fortune is essentially a "starting-gate theory": as long as people enjoy fair shares at the start of life, it does not much concern itself with the suffering and subjection generated by people's voluntary agreements in free markets.[64] The fact that these evils are the product of voluntary choices hardly justifies them: free choice within a set of options does not justify the set of options itself. In focusing on correcting the supposed injustices of nature, luck egalitarians have forgotten that the primary subject of justice is the institutional arrangements that generate people's opportunities over time.

Some luck egalitarians, most notably Dworkin, also use market decisions to provide guidance on appropriate state allocations at the start of life. The guiding idea here is that individual autonomy is protected by "consumers' sovereignty." Thus, Dworkin suggests that the market prices people actually pay for insurance against bodily injury might be used as a guide for the state's awards of compensation for people who are blamelessly injured in the same ways.[65] But actual market prices for insurance reflect two factors irrelevant to determining the compensation the state might owe to the involuntarily injured: the need to keep compensation extremely low to reduce the moral hazard for nonfatal injuries (high compensation might tempt people to risk greater injuries), and the fact that people insure only against the costs of injury that the state does not already indemnify them against (e.g., workplace disability, public accommodations for the disabled).

Dworkin's resort to the hypothetical insurance purchases of people who don't know their abilities suffers from a larger problem: he never explains why such hypothetical market choices have any relevance at all to determining what citizens owe one another. Since these choices were not, in fact, made, the failure to reflect them in state allocations violates no one's actual autonomous choices. Individuals' market choices vary according to their tastes. But what one is obligated to do for others is not, in general, determined either by one's own or even by the beneficiaries' tastes. We have seen that such taste relativity licenses discrimination against citizens with rare disabilities and against risk-loving citizens. But even if certain people are willing to take risks with themselves, it doesn't follow that they give up their claim on fellow citizens to provide them with the same social insurance benefits against *involuntarily* caused disabilities to which their risk-averse fellows are entitled. Moreover, even if everyone would rationally purchase some insurance for themselves – say, for plastic surgery to correct minor defects in appearance – this fact is hardly sufficient to generate an *obligation* for society to pay for it. If everyone wants it, they could of course vote to include plastic surgery in a national health-care plan. But if they voted not to include it and leave everyone to purchase such insurance from their private resources, it is hard to see how any citizen could have a complaint of justice against the decision of the voters. It is one thing for everyone to decide that something is worth purchasing for their private consumption, quite another to

decide that citizens acting collectively are obligated to socialize the costs of providing it to everyone. I conclude that *people's real or hypothetical market choices offer no guidance whatsoever to what citizens are obligated to provide to one another on a collective basis*. This suggests another desideratum for egalitarian theory: it must supply principles for collective willing – that is, for what citizens should will together, not just for what each can will individually.

Now consider the ways luck egalitarianism invites problems in the ways it relies on socialist principles. Equality of fortune tells us that no one should suffer from undeserved misfortune. To implement its principles, the state must make judgments of moral desert or responsibility in assigning outcomes to brute or option luck. To determine whether a smoker who picked up the habit while a soldier shall get state-funded medical treatment for lung cancer, other people must judge whether he should have shown stronger resolve against smoking, given the social pressures he faced from peers and advertisers while serving in the army, the anxiety-reducing benefits of smoking in the highly stressful situation of combat, the opportunities he was offered to overcome his habit after the war, and so forth.[66]

F. A. Hayek has identified the central problem with such merit-based systems of reward: in order to lay a claim to some important benefit, people are forced to obey other people's judgments of what uses they should have made of their opportunities, rather than following their own judgments.[67] Such a system requires the state to make grossly intrusive, moralizing judgments of individual's choices. Equality of fortune thus *interferes with citizens' privacy and liberty*. Furthermore, as Arneson and Roemer make clear, such judgments require the state to determine how much responsibility each citizen was capable of exercising in each case. But it is disrespectful for the state to pass judgment on how much people are responsible for their expensive tastes or their imprudent choices.[68]

Furthermore, equality of fortune would not really promote personal responsibility in the way that it claims. To be sure, it denies compensatory rewards to people who are judged responsible for their bad fortune. But this gives individuals an *incentive to deny personal responsibility for their problems*, and to represent their situation as one in which they were helpless before uncontrollable forces. Better social conditions for fostering the spread of a passive, whining victim's mentality could hardly be constructed. They allow citizens to lay claim to such goods as basic medical benefits only at the cost of making an undignified spectacle of themselves. Moreover, it is easier to construct a sob story recounting one's undeserved misfortunes than it is to engage in productive work that is valued by others. In giving people an incentive to channel their self-seeking energies in the former rather than the latter direction, equality of fortune generates a huge *deadweight loss* to society.

In promoting such an unhappy combination of capitalist and socialist institutions, equality of fortune succeeds not in establishing a society of equals, but only in reproducing the stigmatizing regime of the Poor Laws, in which citizens lay claim to aid from the state only on condition that they accept inferior status. Poor Law thinking pervades the reasoning of luck egalitarians. This is most evident in their distinction between the deserving and the undeserving disadvantaged – between those who are not responsible for their misfortune and those who are. Like the Poor Law regime, it abandons those disadvantaged through their own choices to their miserable fates, and defines the deserving disadvantaged in terms of their innate inferiority of talent, intelligence, ability, or social appeal.

Moreover, in classifying those who devote the bulk of their energies to caring for dependents with those who have a voluntarily expensive taste for charity, equality of fortune *assumes atomistic egoism and self-sufficiency as the norm for human beings*. It promises equality only to those who tend only to their own self-interest, who avoid entering into relationships with others that might generate obligations to engage in dependent caretaking, and who therefore can manage to take care of themselves though their own wage earning, without having to depend on market-generated income provided by anyone else. But such a norm for human beings cannot be universalized. Long periods of dependency on others' caretaking are a normal and inevitable part of everyone's life cycle. It is therefore an indispensable condition of the continuation of human society that many adults devote a great deal of their time to such caretaking, however poorly such work may be remunerated in the market. And this, in turn, entails some dependency of caretakers on income generated by others. Equality of fortune, in representing the dependency of caretakers as voluntary deviance from a falsely universalized androcentric norm, ends up justifying the subordination of women to male wage earners and the stigmatization of dependent caretaking relative to self-sufficient wage earning. A more perfect reproduction of Poor Law thinking, including its sexism and its conflation of responsible work with market wage-earning, could hardly be imagined.[69]

What Is the Point of Equality?

There must be a better way to conceive of the point of equality. To do so, it is helpful to recall how egalitarian political movements have historically conceived of their aims. What have been the inegalitarian systems that they have opposed? Inegalitarianism asserted the justice or necessity of basing social order on a hierarchy of human beings, ranked according to intrinsic worth. Inequality referred not so much to distributions of goods as to relations between superior and inferior persons. Those of superior rank were thought entitled to inflict violence on inferiors, to exclude or segregate them from social life, to treat them with contempt, to force them to obey, work without reciprocation, and abandon their own cultures. These are what Iris Young has identified as the faces of oppression: marginalization, status hierarchy, domination, exploitation, and cultural imperialism.[70] Such unequal social relations generate, and were thought to justify, inequalities in the distribution of freedoms, resources, and welfare. This is the core of inegalitarian ideologies of racism, sexism, nationalism, caste, class, and eugenics.

Egalitarian political movements oppose such hierarchies. They assert the equal moral worth of persons. This assertion does not mean that all have equal virtue or talent. Negatively, the claim repudiates distinctions of moral worth based on birth or social identity – on family membership, inherited social status, race, ethnicity, gender, or genes. There are no natural slaves, plebeians, or aristocrats. Positively, the claim asserts that all competent adults are equally moral agents: everyone equally has the power to develop and exercise moral responsibility, to cooperate with others according to principles of justice, to shape and fulfill a conception of their good.[71]

Egalitarians base claims to social and political equality on the fact of universal moral equality. These claims also have a negative and a positive aspect. Negatively, egalitarians seek to abolish oppression – that is, forms of social relationship by which some people dominate, exploit, marginalize, demean, and inflict violence upon others. Diversities in socially ascribed identities, distinct roles in the division of labor, or differences in personal traits, whether these be neutral biological and psychological differences, valuable talents and virtues, or unfortunate disabilities and infirmities, never justify the unequal social relations listed above. Nothing can justify treating people in these ways, except just punishment for crimes and defense against violence. Positively, egalitarians seek a social order in which persons stand in relations of equality. They seek to live together in a democratic community, as opposed to a hierarchical one. Democracy is here understood as collective self-determination by means of open discussion among equals, in accordance with rules acceptable to all. To stand as an equal before others in discussion means that one is entitled to participate, that others recognize an obligation to listen respectfully and respond to one's arguments, that no one need bow and scrape before others or represent themselves as inferior to others as a condition of having their claim heard.[72]

Contrast this democratic conception of equality with equality of fortune. First, democratic equality aims to abolish socially created oppression. Equality of fortune aims to correct what it takes to be injustices generated by the natural order. Second, democratic equality is what I shall call a relational theory of equality: it views equality as a social relationship. Equality of fortune is a distributive theory of equality: it conceives of equality as a pattern of distribution. Thus, equality of fortune regards two people as equal so long as they enjoy equal amounts of some distributable good – income, resources, opportunities for welfare, and so forth. Social relationships are largely seen as instrumental to generating such patterns of distribution. By contrast, democratic equality regards two people as equal when each accepts the obligation to justify their actions by principles acceptable to the other, and in which they take mutual consultation, reciprocation, and recognition for granted. Certain patterns in the distribution of goods may be instrumental to securing such relationships, follow from them, or even be constitutive of them. But democratic egalitarians are fundamentally concerned with the relationships within which goods are distributed, not only with the distribution of goods themselves. This implies, third, that democratic equality is sensitive to the need to integrate the demands of equal recognition with those of equal distribution.[73] Goods must be distributed according to principles and processes that express respect for all. People must not be required to grovel or demean themselves before others as a condition of laying claim to their share of goods. The basis for people's claims to distributed goods is that they are equals, not inferiors, to others.

This gives us a rough conception of equality. How do we derive principles of justice from it? Our investigation of equality of fortune has not been completely fruitless: from its failures, we have gleaned some desiderata for egalitarian principles. First, such principles must identify certain goods to which all citizens must have effective access over the course of their whole lives. Some

goods are more important from an egalitarian point of view than others, within whatever space of equality is identified as of particular concern for egalitarians. And starting-gate theories, or any other principles that allow law-abiding citizens to lose access to adequate levels of these goods, are unacceptable. Second, egalitarians should be able to justify such guarantees of lifetime accessibility without resorting to paternalism. Third, egalitarian principles should offer remedies that match the type of injustice being corrected. Private satisfactions cannot make up for public oppression. Fourth, egalitarian principles should uphold the responsibility of individuals for their own lives without passing demeaning and intrusive judgments on their capacities for exercising responsibility or on how well they have used their freedoms. Finally, such principles should be possible objects of collective willing. They should be capable of supplying sufficient reasons for citizens acting together to collectively guarantee the particular goods of concern to egalitarians.

Let us take up the last desideratum first. The determination of what can or must be collectively willed has been the traditional task of social contract theory. In liberal democratic versions of social contract theory, the fundamental aim of the state is to secure the liberty of its members. Since the democratic state is nothing more than citizens acting collectively, it follows that the fundamental obligation of citizens to one another is to secure the social conditions of everyone's freedom.[74] Because libertarians also embrace this formula, it might be thought to lead to inegalitarian implications. Instead of repudiating this formula, democratic equality interprets it. It claims that the social condition of living a free life is that one stand in relations of equality with others.

This claim might seem paradoxical, given the prevailing view that represents equality and freedom as conflicting ideals. We can see how it is true by considering the oppressive relationships that social equality negates. Equals are not subject to arbitrary violence or physical coercion by others. Choice unconstrained by arbitrary physical coercion is one of the fundamental conditions of freedom. Equals are not marginalized by others. They are therefore free to participate in politics and the major institutions of civil society. Equals are not dominated by others; they do not live at the mercy of others' wills. This means that they govern their lives by their own wills, which is freedom. Equals are not exploited by others. This means they are free to secure the fair value of their labor. Equals are not subject to cultural imperialism: they are free to practice their own culture, subject to the constraint of respecting everyone else. To live in an egalitarian community, then, is to be free from oppression to participate in and enjoy the goods of society, and to participate in democratic self-government.

Egalitarians thus differ from libertarians in advocating a more expansive understanding of the social conditions of freedom. Importantly, they view private relations of domination, even those entered into by consent or contract, as violations of individual freedom. Libertarians tend to identify freedom with formal, negative freedom: enjoying the legal right to do what one wants without having to ask anyone else's permission and without interference from others. This definition of freedom neglects the importance of having the means to do what one wants. In addition, the definition implicitly assumes that, given the material means and internal capacity to do what one wants, the absence of interference from others is all one needs to do what one wants. This ignores the fact that most of the things people want to do require participation in social activities, and hence communication and interaction with others. One cannot do these things if others make one an outcast. A libertarian might argue that freedom of association entails the right of people to refuse to associate with others on any grounds. Yet, a society embodying such an unconditional right hardly needs physical coercion to force others to obey the wishes of those with the power to exclude others from participation in social life. The same point applies to a society in which property is so unequally distributed that some adults live in abject dependence on others, and so live at the mercy of others. Societies that permit the creation of outcasts and subordinate classes can be as repressive as any despotic regime.

Equality in the Space of Freedom: A Capabilities Approach

Amartya Sen has proposed a better way to understand freedom. Consider the states of being and doing that constitute a person's well-being: a person can be healthy, well-nourished, physically fit, literate, an active participant in community life, mobile, happy, respected, confident, and so forth. A person may also care about other states of being and doing that reflect her autonomous ends: she may want to be outgoing, to raise children, practice medicine, play soccer, make love, and so forth. Call such states *functionings*. A person's *capabilities* consist of the sets of functionings she can achieve, given the personal, material, and social resources available to her.

Capabilities measure not actually achieved functionings, but a person's freedom to achieve valued functionings. A person enjoys more freedom the greater the range of effectively accessible, significantly different opportunities she has for functioning or leading her life in ways she values most.[75] We can understand the egalitarian aim to secure for everyone the social conditions of their freedom in terms of capabilities. Following Sen, I say that egalitarians should seek equality for all in the space of capabilities.

Sen's capability egalitarianism leaves open a large question, however. *Which* capabilities does society have an obligation to equalize? Some people care about playing cards well, others about enjoying luxury vacations in Tahiti. Must egalitarians, in the name of equal freedom, offer free card-playing lessons and state subsidized vacations in exotic lands? Surely there are limits to which capabilities citizens are obligated to provide one another. We should heed our first desideratum, to identify particular goods within the space of equality that are of special egalitarian concern.

Reflection on the negative and positive aims of egalitarianism helps us meet this requirement. Negatively, people are entitled to whatever capabilities are necessary to enable them to avoid or escape entanglement in oppressive social relationships. Positively, they are entitled to the capabilities necessary for functioning as an equal citizen in a democratic state. While the negative and positive aims of egalitarianism overlap to a large extent, they are not identical. If functioning as an equal citizen were all that egalitarians cared about, they could not object to forced clitoridectomy, by which men control women's sexuality in private relations. But egalitarians also aim at abolishing private relations of domination, and therefore support the functionings needed for individual sexual autonomy. If having the capabilities needed to avoid oppression were all that mattered, then egalitarians would not oppose discrimination among the relatively privileged – for example, the glass ceiling for female executives. But egalitarians also aim at enabling all citizens to stand as equals to one another in civil society, and this requires that careers be open to talents.

Democratic equality thus aims for equality across a wide range of capabilities. But it does not support comprehensive equality in the space of capabilities. Being a poor card player does not make one oppressed. More precisely, the social order can and should be arranged so that one's skill at cards does not determine one's status in civil society. Nor is being a good card player necessary for functioning as a citizen. Society therefore has no obligation to provide free card lessons to citizens. Democratic equality satisfies the first desideratum of egalitarian theory.

Consider further the capabilities that democratic equality does guarantee to citizens. Let us focus on the capabilities necessary for functioning as an equal citizen. Citizenship involves functioning not only as a political agent – voting, engaging in political speech, petitioning government, and so forth – but participating as an equal in civil society. Civil society is the sphere of social life that is open to the general public and is not part of the state bureaucracy, in charge of the administration of laws. Its institutions include public streets and parks, public accommodations such as restaurants, shops, theaters, buses and airlines, communications systems such as broadcasting, telephones, and the Internet, public libraries, hospitals, schools, and so forth. Enterprises engaged in production for the market are also part of civil society, because they sell their products to any customer and draw their employees from the general public. One of the important achievements of the civil rights movement was to vindicate an understanding of citizenship that includes the right to participate as an equal in civil society as well as in government affairs. A group that is excluded from or segregated within the institutions of civil society, or subject to discrimination on the basis of ascribed social identities by institutions in civil society, has been relegated to second-class citizenship, even if its members enjoy all of their political rights.

So, to be capable of functioning as an equal citizen involves not just the ability to effectively exercise specifically political rights, but also to participate in the various activities of civil society more broadly, including participation in the economy. And functioning in these ways presupposes functioning as a human being. Consider, then, three aspects of individual functioning: as a human being, as a participant in a system of cooperative production, and as a citizen of a democratic state. To be capable of functioning as a human being requires effective access to the means of sustaining one's biological existence – food, shelter, clothing, medical care – and access to the basic conditions of human agency – knowledge of one's circumstances and options, the ability to deliberate about means and ends, the psychological conditions of autonomy, including the self-confidence to think and judge for oneself, freedom of thought and movement. To be capable of functioning as an equal participant in a system of cooperative production requires effective access to the means of production, access to the education needed to develop one's talents, freedom of

occupational choice, the right to make contracts and enter into cooperative agreements with others, the right to receive fair value for one's labor, and recognition by others of one's productive contributions. To be capable of functioning as a citizen requires rights to political participation, such as freedom of speech and the franchise, and also effective access to the goods and relationships of civil society. This entails freedom of association, access to public spaces such as roads, parks, and public accommodations including public transportation, the postal service, and telecommunications. This also entails the social conditions of being accepted by others, such as the ability to appear in public without shame, and not being ascribed outcast status. The freedom to form relationships in civil society also requires effective access to private spaces, since many such relationships can only function when protected from the scrutiny and intrusions of others. Homelessness – that is, having only public dwelling – is a condition of profound unfreedom.

Three points should be made about the structure of egalitarian guarantees in the space of freedom or capabilities. First, democratic equality guarantees not actual levels of functioning, but effective access to those levels. Individuals are free to choose to function at a lower level than they are guaranteed. For example, they might choose to join a religious group that discourages political participation. Moreover, democratic equality can make access to certain functionings – those requiring an income – conditional upon working for them, provided that citizens have effective access to those conditions – they are physically capable of performing the work, doing so is consistent with their other duties, they can find a job, and so forth. Effective access to a level of functioning means that people can achieve that functioning by deploying means already at their disposal, not that the functioning is unconditionally guaranteed without any effort on their own part. Thus, democratic equality is consistent with constructing the incentive systems needed for a modern economy to support the production needed to support egalitarian guarantees in the first place.

Second, democratic equality guarantees not effective access to equal levels of functioning but effective access to levels of functioning sufficient to stand as an equal in society. For some functionings, equal citizenship requires equal levels. For example, each citizen is entitled to the same number of votes in an election as everyone else. But for other functionings, standing as an equal does not require equal levels of functioning. To be capable of standing as an equal in civil society requires literacy. But in the US context, it does not require literacy in any language other than English, nor the ability to interpret obscure works of literary theory Democratic equality does not object if not everyone knows a for-foreign language, and only a few have a PhD-level training in literature. In other countries, multilingual literacy might be required for equal standing.

Third, democratic equality guarantees effective access to a package of capabilities sufficient for standing as an equal over the course of an entire life. It is not a starting-gate theory, in which people could lose their access to equal standing through bad option luck. Access to the egalitarian capabilities is also market-inalienable: contracts whereby individuals irrevocably transfer their fundamental freedoms to others are null and void.[76] The rationale for establishing such inalienable rights might seem difficult to grasp from the point of view of the rights holder. Why shouldn't she be free to trade some of her egalitarian-guaranteed freedoms for other goods that she prefers? Isn't it paternalistic to deny her the freedom to trade?

We can avoid this thought by considering the point of view of the obligation holder. The counterpart to an individual's inalienable right to the social conditions of her freedom is the unconditional obligation of others to respect her dignity or moral equality. Kant would put the point as follows: every individual has a worth or dignity that is not conditional upon anyone's desires or preferences, not even the individual's own desires. This implies that there are some things one may never do to other people, such as to enslave them, even if one has their permission or consent. Contracts into slavery or servitude are therefore invalid. In basing inalienable rights on what others are obligated to do rather than on the rights bearer's own subjective interests, democratic equality satisfies the second desideratum of egalitarian theory: to justify lifetime guarantees without resorting to paternalism.

One advantage of the capabilities approach to equality is that it allows us to analyze injustices in regard to other matters besides the distribution of resources and other divisible goods. One's capabilities are a function not just of one's fixed personal traits and divisible resources, but of one's mutable traits, social relations and norms, and the structure of opportunities, public goods, and public spaces. Egalitarian political movements have never lost sight of the whole range of targets of egalitarian assessment. For example, feminists work to overcome the internal obstacles to choice – self-abnegation, lack of confidence, and low self-esteem – that women often face

from internalizing norms of femininity. Gays and lesbians seek the ability to publicly reveal their identities without shame or fear, which requires significant changes in social relations of contempt and hostility, and changes in norms of gender and sexuality. The disabled aim to reconfigure public spaces to make them accessible and adapt work situations to their needs, so that they can participate in productive activity. No mere redistribution of divisible resources can secure the freedoms these groups seek.

Of course, democratic equality is also concerned with the distribution of divisible resources. It requires that everyone have effective access to enough resources to avoid being oppressed by others and to function as an equal in civil society. What counts as "enough" varies with cultural norms, the natural environment, and individual circumstance. For example, cultural norms and climate influence what kind of clothing one needs to be able to appear in public without shame and with adequate protection from the elements. Individual circumstances, such as disabilities, influence how much resources one needs to function as an equal. People without use of their legs may need more resources – wheelchairs, specially adapted vans – to achieve mobility comparable to that of ambulatory persons. Equality in the space of capabilities may therefore demand an unequal division of resources to accommodate the disabled.[77] What citizens ultimately owe one another is the social conditions of the freedoms people need to function as equal citizens. Because of differences in their internal capacities and social situations, people are not equally able to convert resources into capabilities for functioning. They are therefore entitled to different amounts of resources so they can enjoy freedom as equals.

Suppose we abstract from the fact that people have different internal physical and mental capabilities. Would democratic equality demand that external resources be divided equally from the start, as equality of fortune holds? There is no reason to think so. The capabilities relevant to functioning as a human being, as a participant in the system of social cooperation, and as an equal citizen do not include all functionings or all levels of functioning. To function as a human being, one needs adequate nutrition. To eat without being relegated to a subhuman status, one needs access to sources of nutrition besides pet food or the dumpster. But to be able to function as a dignified human being, one does not need the quantity or quality of food intake of a gourmet. Democratic equality therefore requires that everyone have effective access to adequate nutrition, as well as sources of nutrition that one's society considers dignified – fit for consumption in social gatherings. It does not require that everyone have the resources needed for an equal opportunity to function as a gourmet. It therefore does not require criteria for equality of resources that depend on the morally dubious idea that the distribution of resources should be sensitive to considerations of envy.

Participation as an Equal in a System of Cooperative Production

So far we have considered what citizens are obligated to provide one another. But how are such things to be produced, and by what means and principles shall they be distributed? In stressing the concept of obligation, democratic equality heads off the thought that in an egalitarian society everyone somehow could have a right to receive goods without anyone having an obligation to produce them. Democratic equality seeks equality in the capability or effective freedom to achieve functionings that are part of citizenship, broadly construed. For those capable of working and with access to jobs, the actual achievement of these functionings is, in the normal case, conditional on participating in the productive system. Contrary to Van Parijs's view, citizens do not owe one another the real freedom to function as beach bums. Most able-bodied citizens, then, will get access to the divisible resources they need to function by earning a wage or some equivalent compensation due to them on account of their filling some role in the division of labor.

In deciding principles for a just division of labor and a just division of the fruits of that labor, workers are to regard the economy as a system of cooperative, joint production.[78] I want to contrast this image of joint production with the more familiar image that invites us to regard the economy as if it were a system of self-sufficient Robinson Crusoes, producing everything all by themselves until the point of trade. By "joint production," I mean that people regard every product of the economy as jointly produced by everyone working together. From the point of view of justice, the attempt, independent of moral principles, to credit specific bits of output to specific bits of input by specific individuals represents an arbitrary cut in the causal web that in fact makes everyone's productive contribution dependent on what everyone else is doing. Each worker's capacity to labor depends on a vast array of inputs produced by other people – food, schooling, parenting, and the like. It even depends on workers in the recreation and

entertainment industries, since enjoyment of leisure activities helps restore energy and enthusiasm for work. In addition, the productivity of a worker in a specific role depends not only on her own efforts, but on other people performing their roles in the division of labor. Michael Jordan could not make so many baskets if no one kept the basketball court swept clean. Millions of people could not even get to work if public transportation workers went on strike. The comprehensiveness of the division of labor in a modern economy implies that no one produces everything, or indeed anything, they consume by their own efforts alone. In regarding the division of labor as a comprehensive system of joint production, workers and consumers regard themselves as collectively commissioning everyone else to perform their chosen role in the economy. In performing their role in an efficient division of labor, each worker is regarded as an agent for the people who consume their products and for the other workers who, in being thereby relieved from performing that role, become free to devote their talents to more productive activities.

In regarding the economy as a cooperative venture, workers accept the demand of what G. A. Cohen has defined as the principle of interpersonal justification:[79] any consideration offered as a reason for a policy must serve to justify that policy when uttered by anyone to anyone else who participates in the economy as a worker or a consumer. The principles that govern the division of labor and the assignment of particular benefits to the performance of roles in the division of labor must be acceptable to everyone in this sense. To see how interpersonal justification works within the context of the economy considered as a system of cooperative, joint production, consider three of the cases equality of fortune gets wrong: disability compensation for workers in dangerous occupations, federal disaster relief, and dependent caretakers with their children.

Rakowski argues that workers who choose particularly dangerous occupations, such as farming, fishing, mining, forestry, firefighting, and policing, have no claims to medical care, rehabilitation, or compensation if they are injured on the job.[80] Since they engage in these occupations by choice, any bad fortune they suffer on the job is a form of option luck, the consequences of which must be borne by the worker alone. Cohen's test invites us to consider how persuasive this argument is, when uttered to the disabled workers by the consumers who eat the food, use the metal and wood, and enjoy the protection from fire and crime that these workers provide. These consumers are not free to disclaim all responsibility for the bad luck that befalls workers in dangerous occupations. For they commissioned these workers to perform those dangerous tasks on their own behalf. The workers were acting as agents for the consumers of their labor. It cannot be just to designate a work role in the division of labor that entails such risks and then assign a package of benefits to performance in the role that fails, given the risks, to secure the social conditions of freedom to those who occupy the role. The principle "let us be served by occupations so inadequately compensated that those in them shall lack the means necessary to secure their freedom, given the risks and conditions of their work" cannot survive the test of interpersonal justification.

Similar reflections apply to those who choose to live and work in areas prone to particularly severe natural disasters, such as residents near the San Andreas fault. Rakowski argues that such residents should be excluded from federal disaster relief because they live there by choice.[81] But they live there because other citizens have, through their demand for California products, commissioned them to exploit the natural resources in California. To deny them federal disaster relief is to invoke the rejected principle above. Economists may object that, on balance, it may not be efficient to continue production in a particular region, and that disaster relief, in subsidizing the costs of living in disaster-prone regions, perpetuates a costly error. However, if, on balance, citizens decide that a region should be designated uninhabitable, because the costs of relief are too high, the proper response is not to leave its residents in the lurch but to designate their relief toward helping them relocate. Citizens are not to be deprived of basic capabilities on account of where they live.[82]

The case of non-wage-earning dependent caretakers and children might seem to fall outside the purview of society as system of cooperation. But this is to confuse the economy with the market sector.[83] Non-wage-earning dependent caretakers contribute to production in at least three ways. First, most engage in household production – cleaning, cooking, and so forth – which services, if not performed, would have to be hired out. Second, they raise the future workers of the economy and help rehabilitate the sick and injured ones so they can return to work. Third, in discharging the obligations everyone has to dependents, considered as human beings, and the obligations all family members have toward their dependent kin, they relieve others of such responsibility and thereby free them to participate in the market economy. Fathers would not be so productive in the market if the non-wage-earning or part-time

working mothers of their children did not relieve them of so much of their responsibility to engage in direct caretaking.[84] The principle "let us assign others to discharge our caretaking obligations to dependents, and attach such meager benefits to performance in this role that these caretakers live at our mercy" cannot survive interpersonal justification, either. Dependent caretakers are entitled to enough of a share of their partner's income that they are not vulnerable to domination and exploitation within the relationship. This principle supports Okin's proposal that paychecks be split between husband and wife.[85] If this is not sufficient to eliminate caretakers' vulnerability in domestic partnership, a case can be made for socializing some of the costs of dependent care through a child-care (or elder-care) subsidy, as is common in western Europe. Ultimately, full equality may not be achievable simply through the redistribution of material resources. Equality may require a change in social norms, by which men as well as women would be expected to share in caretaking responsibilities.[86]

Against the proposal to socialize the costs of dependent care, Rakowski insists that children are entitled only to resources from their parents, not from others. Even if they will provide benefits to others when they grow up and participate in the economy, it is unjust to make people pay for benefits they never asked for, and in any event most of those benefits will accrue to other family members.[87] If the economy consisted of isolated, economically self-sufficient family groups, as in a primitive hunter-gatherer society, one could see Rakowski's point. But in a society with an extensive division of labor, his assumptions make no sense. As long as one doesn't plan to commit suicide once the next generation enters the workforce, one can't help but demand the labor services of future generations. Moreover, most of what people produce in a market economy is consumed by non-family members. In regarding the whole society as a system of cooperation that jointly produces the economy's entire output, democratic equality acknowledges everyone's profound mutual dependency in modern society. It rejects the atomistic norm of individual self-sufficiency as based on a failure to recognize the dependency of wage earners on the work of those whose labor is not for sale. In adjusting entitlements to account for the fact that adults have moral responsibilities to take care of dependents, democratic equality also rejects equality of fortune's reduction of moral obligations to expensive tastes and its consequent guarantee of equality only to egoists. Democratic equality says that no one should be reduced to an inferior status because they fulfill obligations to care for others.

The conception of society as a system of cooperation provides a safety net through which even the imprudent are never forced to fall. It provides that no role in the productive system shall be assigned such inadequate benefits that, given the risks and requirements of the job, people could be deprived of the social conditions of their freedom because they have fulfilled its requirements. Society may not define work roles that amount to peonage or servitude, nor, if it can avoid it, pay them so little that an able-bodied person working full time would still lack basic capabilities.[88] One mechanism for achieving a decent minimum would be a minimum wage. A minimum wage need not raise unemployment if low-wage workers are given sufficient training to make them more productive or if the higher wage induces employers to supply their workers with productivity-enhancing tools. Benefits could also be attached to work by other means, such as socially provided disability and old age pension schemes, and tax credits for earned income. Democratic equality also favors a qualified entitlement to work on the part of willing, able-bodied adults. Unemployment insurance is a poor substitute for work, given the central importance of participation in productive activity to living life as an equal in civil society. So is "workfare," if, as is typically the case in the United States, it means forcing people to engage in make-work for aid while depriving them of the dignity of a real job with a real wage.

It is instructive to consider what democratic equality says to those with low talents. Equality of fortune would offer compensation to those with low talents, precisely because their innate inferiority makes their labor so relatively worthless to others, as judged by the market. Democratic equality calls into question the very idea that inferior native endowments have much to do with observed income inequalities in capitalist economies. The biggest fortunes are made not by those who work but by those who own the means of production. Even among wage workers, most of the differences are due to the fact that society has invested far more in developing some people's talents than others and that it puts very unequal amounts of capital at the disposal of each worker. Productivity attaches mainly to work roles, not to individuals. Democratic equality deals with these facts by stressing the importance of educating the less advantaged and by offering firms incentives to increase the productivity of low-wage jobs through capital investment.

Moreover, in regarding society as a system of cooperation, democratic equality has a less demeaning rationale than equality of fortune for state interventions designed to raise the wages of low-wage workers. Society need not try

to make the impossible and insulting judgment of whether low-wage workers are there by choice or by the fact that their meagre native endowments prevent them from getting better work. Instead, it focuses on appreciation for the roles that low-wage workers fill. In performing routine, low-skill tasks, these workers free other people to make more productive uses of their talents. Those occupying more productive roles owe much of their productivity to the fact that those occupying less productive roles have freed them from the need to spend their time on low-skill tasks. Fancy corporate executives could not cut so many lucrative deals if they had to answer their own telephone calls. Such reflections express appreciation for the ways that everyone benefits from the diversity of talents and roles in society. They also undermine the thought that workers at the top make a lopsided contribution to the social product and thereby help motivate a conception of reciprocity that would squeeze the gap between the highest- and lowest-paid workers.

Would democratic equality support a wage-squeezing policy as demanding as Rawls's difference principle? This would forbid all income inequalities that do not improve the incomes of the worst off.[89] In giving absolute priority to the worst off, the difference principle might require considerable sacrifices in the lower middle ranks for trifling gains at the lowest levels. Democratic equality would urge a less demanding form of reciprocity. Once all citizens enjoy a decent set of freedoms, sufficient for functioning as an equal in society, income inequalities beyond that point do not seem so troubling in themselves. The degree of acceptable income inequality would depend in part on how easy it was to convert income into status inequality – differences in the social bases of self-respect, influence over elections, and the like. The stronger the barriers against commodifying social status, political influence, and the like, the more acceptable are significant income inequalities.[90] The moral status of free market allocations is strengthened, then the more carefully defined is the domain in which these allocations have free rein.

Democratic Equality, Personal Responsibility, and Paternalism

Democratic equality guarantees effective access to the social conditions of freedom to all citizens, regardless of how imprudently they conduct their lives. It does not deprive negligent or self-destructive citizens of necessary medical care. It does not discriminate among the disabled depending on how much they can be held responsible for their disability. Under democratic equality, citizens refrain from making intrusive, moralizing judgments about how people ought to have used the opportunities open to them or about how capable they were of exercising personal responsibility. It need not make such judgements, because it does not condition citizen's enjoyment of their capabilities on whether they use them responsibly. The sole exception to this principle concerns criminal conduct. Only the commission of a crime can justify taking away a person's basic liberties and status as an equal in civil society. Even convicted criminals, however, retain their status as equal human beings, and so are still entitled to basic human functionings such as adequate nutrition, shelter, and medical care.

One might object to democratic equality on the grounds that all these guarantees invite personal irresponsibility, just as critics of equality have long suspected. If people are going to be bailed out of the situations they get into because of their own imprudence, then why act prudently? Egalitarians must face up to the need to uphold personal responsibility, if only to avoid bankrupting the state. There are two general strategies for doing so. One is to insure only against certain causes of loss: to distinguish between the losses for which people are responsible and those for which they are not, and to indemnify individuals only against the latter. This is the approach of luck egalitarianism, which leads to Poor Law thinking, and intrusive and disrespectful judgments of individuals. The second strategy is to insure only against the losses of certain types of goods: to distinguish between guaranteed and unguaranteed types of goods within the space of egalitarian concern, and to insure individuals only against the loss of the former. This is the approach of democratic equality.

Democratic equality does not indemnify individuals against all losses due to their imprudent conduct. It only guarantees a set of capabilities necessary to functioning as a free and equal citizen and avoiding oppression. Individuals must bear many other losses on their own. For example, a person who smokes would be entitled to treatment for resulting lung cancer, regardless of their degree of responsibility for smoking. But she would not be entitled to compensation for the loss of enjoyment of life brought about by her confinement in the hospital and reduced lung capacity, for the dread she feels upon contemplating her mortality, or for the reproach of her relatives who disapprove of her lifestyle. Individuals thus have plenty to lose from their irresponsible conduct, and therefore have an incentive to behave

prudently. Luck egalitarianism can't take advantage of this incentive structure, because it indemnifies individuals against the loss of all kinds of goods (kinds of resources or sources of welfare) within its space of egalitarian concern. It therefore must resort to moral judgments about the cause of loss in order to promote individual responsibility.

Democratic equality has two further strategies for promoting individual responsibility. First, it offers equality in the space of capabilities, which is to say opportunities or freedoms. Individuals still have to exercise responsible agency to achieve most of the functionings effective access to which society guarantees. In the typical case of an able-bodied adult, for instance, access to a decent income would be conditioned on responsible performance of one's duties in one's job, assuming a job was available.

Second, most of the freedoms that democratic equality guarantees are prerequisites to exercising responsible agency. Responsible agency requires real options, awareness of these options, deliberative skills, and the self-respect needed to trust one's own judgment. Democratic equality guarantees the education needed to know and deliberate about one's options, and the social bases of self-respect. Moreover, people will do almost anything to secure what they need to survive. In ensuring effective access to the means of subsistence through legitimate routes, democratic equality prevents the criminal behavior that would be spurred by a society that let people fall below subsistence or that deprived people of dignified legitimate means of subsistence. It also avoids the powerful incentives to deny personal responsibility that are built into equality of fortune, because it ensures that people will always have legitimate means at their disposal to get access to their basic capabilities, without having to resort to deception about their role in getting into their predicament.

It might be objected that democratic equality, in guaranteeing such goods as medical care to all, still requires an objectionable subsidy of irresponsible behavior. Why should prudent nonsmokers have to pay more for universal health insurance, because so many fools choose to smoke? If the costs of some particularly dangerous activity are high, and if the activity is not performed in one's capacity as a participant in the productive system, then justice permits a tax on that activity to cover the extra costs of medical care for those injured by engaging in it. A tax on each pack of cigarettes, adjusted to cover the medical costs of treating smokers, would force smokers to absorb the extra costs of their behavior.

If it is just to force smokers to absorb these costs *ex ante*, why isn't it equally just to force them to absorb these costs *ex post*, as some luck egalitarians hold? Roemer's plan does this, by discounting the medical subsidy people are entitled to according to their degree of personal responsibility.[91] Besides entangling the state in intrusive moralizing judgments of personal responsibility, Roemer's plan leaves people vulnerable to such a deprivation of their capabilities that they cannot function as an equal. This is unjust. By making smokers pay for the costs of their behavior *ex ante*, democratic equality preserves their freedom and equality over the course of their whole lives.

It might be objected that democratic equality, in guaranteeing a specific set of capabilities to citizens, paternalistically violates the freedom of citizens and violates the requirement of liberal neutrality among conceptions of the good. Suppose a smoker would prefer to have cheaper cigarettes than to be provided medical care? Shouldn't citizens be free to choose what goods they prefer to have? Thus, citizens should be entitled to the welfare equivalent of medical care and not be forced to consume medical care at the cost of other things they might prefer. This line of thought supports equality in the space of opportunities for welfare, rather than in capabilities for equal citizenship.

These objections fail to appreciate the distinction between what people want and what other people are obligated to give them. The basic duty of citizens, acting through the state, is not to make everyone happy but to secure the conditions of everyone's freedom. In securing for citizens only the capabilities they need to function as equal citizens, the state is not declaring that these capabilities are more important for individual happiness than some others that they might prefer. It leaves individuals free to decide for themselves how useful or important are the goods that the state guarantees to them. It guarantees certain capabilities to citizens not because these are the most important ones as judged from the standpoint of the best conception of the good but because these are the ones citizens are obligated to provide one another in common.

But why can't any given citizen waive his right to guaranteed health care, in return for its welfare equivalent? Citizens can, with justice, refuse to provide what any individual regards as the welfare equivalent of health care. As Thomas Scanlon has stressed, the fact that someone would rather have help in building a temple to his god than to be decently fed does not generate a greater claim on others to subsidize his temple than to ensure his access to adequate nutrition.[92] Furthermore,

the obligation to provide health care is unconditional and can't be rescinded, even with the permission of the person to whom the obligation is owed. We are not permitted to abandon people dying by the side of the road, just because they gave us permission to deny them emergency medical care.[93]

One might object that democratic equality fails to respect neutrality among competing conceptions of the good. Some citizens will find the capability sets guaranteed them far more useful than others. For example, those whose conception of the good involves widespread participation in civil society will find their good more fully secured by democratic equality than those who prefer to lead their lives in insular religious cults. Democratic equality is therefore biased in favor of certain conceptions of the good.

This objection misunderstands the point of neutrality. As Rawls has stressed, given the fact the people hold conflicting conceptions of the good, liberal states need some basis for judging claims of justice that does not rest on partisan views of the good. The point of view of citizens acting collectively – the political point of view – does not claim authority in virtue of promoting the objectively best or most important goods but in virtue of being a possible object of collective willing. Neutral goods are the goods we can reasonably agree to collectively provide, given the fact of pluralism.[94] Thus, the capabilities citizens need to function as equals in civil society count as neutral goods for purposes of justice not because everyone finds these capabilities equally valuable, but because reasonable people can recognize that these form a legitimate basis for making moral claims on one another.[95] By contrast, reasonable persons need not recognize the desire to build a temple to their god as a legitimate basis for a claim to public subsidy. A person who does not worship that god could reasonably object to the state taxing her to subsidize someone else's involuntarily expensive religious desires.

Consider now what equality of fortune and democratic equality have to say to the person who decides, prudently or imprudently, not to purchase health insurance for himself. According to equality of fortune, there are two options. One is to allow the person to decline health insurance and abandon him if he needs emergency care. The other is to tell him, "You are too stupid to run you own life. Therefore, we will force you to purchase health insurance, because we know better than you what is for your own good." Democratic equality passes no judgment on whether it would be prudent or imprudent for any given individual to purchase health insurance. It tells the person who would not purchase insurance for himself: "You have a moral worth that no one can disregard. We recognize this worth in your inalienable right to our aid in an emergency. You are free to refuse this aid once we offer it. But this freedom does not absolve you of the obligation to come to the aid of others when their health needs are urgent. Since this is an obligation we all owe to our fellow citizens, everyone shall be taxed for this good, which we shall provide to everyone. This is part of your rightful claim as an equal citizen." Which rationale for providing health insurance better expresses respect for its recipients?

The Disabled, the Ugly, and other Victims of Bad Luck

According to democratic equality, the distribution of nature's good or bad fortune is neither just nor unjust. Considered in itself, nothing in this distribution calls for any correction by society. No claims to compensation can be generated by nature's effects alone. This may seem an unduly harsh doctrine. Does it not leave the congenitally disabled, ugly, and stupid out in the cold, even though they do not deserve their sorry fates?

Democratic equality says no. Although the distribution of natural assets is not a matter of justice, what people do in response to this distribution is.[96] People may not make the possession of a disability, repugnant appearance, or low intelligence the occasion for excluding people from civil society, dominating them, beating them up, or otherwise oppressing them. In a liberal democratic state, all citizens are entitled to the social conditions of their freedom and standing as equals in civil society, regardless of handicap, physical appearance, or intelligence.[97] Moreover, these conditions are sensitive to variations in people's circumstances, including their disabilities. People who can't walk are entitled to accommodation in civil society: to wheelchairs, ramps on public buildings, and so forth. However, these conditions are not sensitive to variations in people's tastes. Everyone has an entitlement to the same package of capabilities, whatever else they may have, and regardless of what they would prefer to have. Thus, if a person who needs a wheelchair to get around has an involuntarily expensive taste for engaging in particular religious rituals, and would prefer having this taste satisfied to having a wheelchair, democratic equality does not substitute a subsidy for her rituals for the wheelchair. For individuals need to be able to move around civil society to have equal

standing as citizens, but they do not need to be able to worship in particularly expensive ways in order to function as equals.

Richard Arneson objects to this distinction between disabled people and people with involuntarily expensive tastes. For disabilities are just another kind of involuntarily expensive taste. It's not the disabled individual's fault that it costs more for her to get around in a wheelchair than it takes ambulatory people to make the same journey. Once we see that it is the involuntariness of the costs of her tastes that entitles her to special subsidy, one must allow people with other involuntarily expensive tastes to make equal claims on behalf of their preferences. Arneson claims that only an illegitimate perfectionist doctrine – the claim that mobility is intrinsically more important than worship – can support discrimination between the disabled and those with other involuntarily expensive tastes.[98]

Democratic equality takes no stand on what goods individuals should value more, when they are thinking only of their own interests. It provides the social conditions for equal citizenship, and not the conditions for equal ability to fulfill the demands of one's gods, because citizens are obligated to provide the first and are not obligated to provide the second. Arneson argues that capabilities are diverse, and the resources available to provide them scarce. Some trade-offs among capabilities must therefore be accepted. Some index is therefore needed to rank the importance of different capabilities. If one rejects perfectionist doctrines, the only basis for constructing an index of capabilities is subjective, based on the importance to the individual of having that capability.[99]

Against Arneson, democratic equality follows Scanlon in insisting that the weight that a citizen's claim has on others depends solely on the content of her interest and not on the importance she places on it in her own conception of the good.[100] In some cases, the weight of an interest can be determined by considering its impact on a person's standing as an equal in society. Some deprivations of capabilities express greater disrespect than others, in ways any reasonable person can recognize. From a public point of view, it is more disrespectful to deny a person in a wheelchair access to the public schools than it is to deny her access to an amusement park ride that only accommodates the walking. This is true even if she'd rather go through the Fun House than learn how to read. In other cases, where the concepts of equal standing and respect don't yield a determinate answer to how capabilities should be ranked, the ranking may legitimately be left up to democratic legislation. Even here, voters are not to ask themselves what priorities they give to different capabilities for citizenship in their private choices, but what priorities they want the state to assign to these different capabilities, given that these goods shall be provided in common. The answers to the questions are likely to diverge, if only because many capabilities are more valuable to others than to their possessors. Most people gain much more from other people's freedom of speech than from their own.[101]

It might be argued that democratic equality is still too harsh to those who are disabled through bad brute luck. It would not compensate them for all of the miseries they face. For example, democratic equality would ensure that the deaf have equal access to civil society, but not that they be compensated for the loss of the pleasures of hearing itself. Yet the lives of the deaf are less happy for lacking these pleasures, and should be compensated on that account.

It is useful to ask what the deaf demand on their own account, in the name of justice. Do they bemoan the misery of not being able to hear, and demand compensation for this lack? On the contrary: like the disabled more generally, they resent being cast as poster children for the abled to pity, because they do not want to have to cast their claims as appeals to the condescending benevolence of kindly patrons. Many deaf people identify as part of a separate Deaf community that repudiates the intrinsic choiceworthiness of hearing itself. They insist that sign language is just as valuable a form of communication as is speech and that the other goods obtainable through hearing, such as appreciation of music, are dispensable parts of any conception of good. One needn't pass judgment on the intrinsic choiceworthiness of hearing to appreciate the rhetorical uses of denying it: the Deaf want to cut the hearing down to size, to purge the arrogant assumption of the hearing that the lives of the Deaf are somehow less worth living. They want to make claims on the hearing in a manner that expresses the dignity they see in their lives and community, rather than in a manner that appeals to pity for their condition.[102] They do this by denying that their condition, considered in itself, is anything to be pitied.

Equality of fortune, despite the fact that it considers the treatment of the disabled as a core case, has difficulty with such ideas. This is due to the fact that it relies on subjective measures of welfare or of the worth of personal assets. Subjective measures invite all the wrong thoughts on the part of the abled. Van Parijs's criterion of undominated diversity allows the disabled to make claims of justice regarding their disability only if

everyone regards their condition as so wretched that everyone would prefer being someone else. This test asks the abled to take the horror they feel upon imagining that they had a disability as their reason for compensating the disabled. To regard the condition of the disabled as intrinsically horrible is insulting to the disabled people who lead their lives with dignity. Arneson's criterion of equal opportunity for welfare implies that as long as the disabled have equal chances for happiness, they have no claims to special accommodation. Survey research shows that the disabled experience the same range of happiness as the abled.[103] Thus, by Arneson's criterion, it is all right to exclude the disabled from public life because they are happy enough without being included.

Subjective measures of people's condition generate either pity for the disabled or reluctance to consider their claims of justice. The way to escape this dilemma is to take seriously what the disabled are actually complaining about. They do not ask that they be compensated for the disability itself. Rather, they ask that the social disadvantages others impose on them for having the disability be removed. "The inequality of people mobilizing in wheelchairs … manifests itself not in the inability to walk but in exclusion from bathrooms, theaters, transportation, places of work, [and] life-saving medical treatment."[104] Democratic equality can handle this distinction. It demands, for instance, that the disabled have good enough access to public accommodations that they can function as equals in civil society. To be capable of functioning as an equal does not require that one's access be equally fast, comfortable, or convenient, or that one gets equal subjective utility from using public accommodations. There may be no way to achieve this. But the fact that, with current technology, it takes an extra minute to get into city hall does not compromise one's standing as an equal citizen.

Democratic equality thus supports the use of objective tests of unjust disadvantage. Such tests fit the claims of justice that the disabled make on their own behalf. For example, what the Deaf find objectionable is not that they can't hear, but that everyone else has rigged the means of communication in ways that leave them out of the conversation. One can detect this injustice without investigating anyone's preferences or subjective states. The test for a satisfactory remedy is equally objective. The Americans with Disabilities Act, for example, embodies an objective standard of accommodation. "Rather than speculating on how the *subjective personal response* of unimpaired agents would be transfigured by the onset of physical or mental impairment, this standard calls for projecting how *objective social practice* would be transformed were unimpaired functioning so *atypical* as to be of merely marginal importance for social policy."[105] The act asks us to imagine how communications in civil society would be arranged if nearly everyone were deaf, and then try to offer to the deaf arrangements approximating this.

The objective standards of injustice and remedy proposed by democratic equality have several advantages over those proposed by equality of fortune. They match the remedy to the injustice: if the injustice is exclusion, the remedy is inclusion. Democratic equality does not attempt to use private satisfactions to justify public oppression. Objective standards do not insultingly represent the disabled as deserving aid because of their pitiful internal condition. They locate the unjust disadvantage of disability in the way others treat the disabled. Democratic equality also does not assimilate the disabled to the situation of those suffering from involuntarily expensive tastes. Having a disability is not like being so spoiled that one can't help wanting expensive toys.

Should other victims of bad brute luck be treated like the handicapped? Equality of fortune thinks so – it extends its concern to the ugly, the stupid, and the untalented as well. Democratic equality does not pass judgment on the worth of people's native endowments, and so has nothing special to say to the stupid and the untalented. Instead, it focuses on the productive roles that people occupy, in recognition of the fact that society attaches economic benefits to performance in a role rather than to the possession of talent in itself. Democratic equality requires that sufficient benefits be attached to performance in every role that all workers can function as equals in society. Talent brings noneconomic advantages as well, such as the admiration of others. Democratic equality finds no injustice in this advantage, because one doesn't need to be admired to be able to function as an equal citizen. As justice requires, most residents of modern democracies live in a state of civilization where the attainment of honor is not a condition of enjoying basic freedoms. In places where this is not so, such as certain tough inner-city neighborhoods, it is clear that the injustice lies not in the fact that some individuals are unfortunately born with lower native endowments of courage, but that the social order is arranged so that only those willing to display uncommonly high degrees of ruthlessness can enjoy personal security.

What about the ugly? Are they not entitled to compensation for their repugnant appearance, which makes them so unwelcome in social settings? Some luck

egalitarians would view this bad luck as calling for a remedy, perhaps in the form of publicly subsidized plastic surgery. Democratic equality refuses to publicly endorse the demeaning private judgments of appearance which are the basis of such claims to compensation. Instead, it asks whether the norms based on such judgments are oppressive. Consider a birth defect, affecting only a person's appearance, that is considered so abhorrent by current social norms that people tend to shun those who have it. Since the capability to participate in civil society as an equal citizen is a fundamental freedom, egalitarians demand that some remedy be provided for this. But the remedy need not consist in plastic surgery that corrects the defect. An alternative would be to persuade everyone to adopt new norms of acceptable physical appearance, so that people with the birth "defect" were no longer treated as pariahs. This is not to call for the abolition of norms of beauty altogether. The norms need only be flexible enough to deem the person an acceptable presence in civil society. They need not entitle such a person to claim equal beauty to others, since successful functioning as a contestant in a beauty pageant, or as a hot prospect for a Saturday night date, are not among the capabilities one needs to function as an equal citizen.

By directing attention to oppressive social norms of beauty, democratic equality avoids the disparaging scrutiny of the ugly through the lens of the oppressive norms themselves. This lets us see that the injustice lies not in the natural misfortune of the ugly but in the social fact that people shun others on account of their appearance. To change the person rather than the norm insultingly suggests that the defect lies in the person rather than in society. Other things equal, then, democratic equality prefers altering social norms to redistributing material resources in response to the disadvantages faced by the unsightly. Of course, other things are often not equal. It may be very difficult and costly to change prevailing norms of beauty that cruelly dictate who cannot appear in public without provoking shock and rejection. The liberal state can't do too much in this regard without overstepping its proper bounds; thus, this task must be delegated mainly to egalitarian social movements, which vary in their abilities to transform social norms. Under these conditions the better option may well be to supply the plastic surgery. Democratic equality, in focusing on equality as a social relationship, rather than simply as a pattern of distribution, at least enables us to see that we have a choice between redistributing material resources and changing other aspects of society to meet the demands of equality.

Democratic Equality and the Obligations of Citizens

Democratic equality refocuses egalitarian theorizing in several ways. It conceives of justice as a matter of obligations that are not defined by the satisfaction of subjective preferences. This ensures that people's rights do not depend on arbitrary variations in individual tastes and that people may not claim rights without accepting corresponding obligations to others. Democratic equality applies judgments of justice to human arrangements, not to the natural order. This helps us see that people, not nature, are responsible for turning the natural diversity of human beings into oppressive hierarchies. It locates unjust deficiencies in the social order rather than in people's innate endowments. Instead of lamenting the human diversity of talents and trying to make up for what is represented as innate deficiencies in talent, democratic equality offers a way of conceiving and harnessing human diversity so that it benefits everyone and is recognized as doing so. Democratic equality conceives of equality as a relationship among people rather than merely as a pattern in the distribution of divisible goods. This helps us see how egalitarians can take other features of society besides the distribution of goods, such as social norms, as subject to critical scrutiny. It lets us see how injustices may be better remedied by changing social norms and the structure of public goods than by redistributing resources. And it allows us to integrate the demands of equal distribution and equal respect, ensuring that the principles by which we distribute goods, however equal resulting patterns may be, do not in fact express contemptuous pity for the beneficiaries of egalitarian concern. Democratic equality thus offers a superior way to understand the expressive demands of justice – the demand to act only on principles that express respect for everyone. Finally, in refocusing academic egalitarian theorizing, democratic equality holds out the promise of reestablishing connections with actually existing egalitarian movements. It is not a moral accident that beach bums and people who find themselves slaves to their expensive hobbies are not organizing to make claims of justice on behalf of their lifestyles. Nor is it irrelevant that the disabled are repudiating forms of charity that appeal to pity for their condition and are struggling for respect from others, not just handouts. Democratic equality helps articulate the demands of genuine egalitarian movements in a framework that offers some hope of broader appeal.

Notes

1 Ronald Dworkin, "What Is Equality? II. Equality of Resources," *Philosophy and Public Affairs* 10 (1981): 283–345, p. 285.
2 Philippe Van Parijs, "Why Surfers Should Be Fed: The Liberal Case for an Unconditional Basic Income," *Philosophy and Public Affairs* 20 (1991): 101–31.
3 Richard Arneson, "Equality and Equality of Opportunity for Welfare," in *Equality: Selected Readings*, ed. Louis Pojman and Robert Westmoreland (New York: Oxford University Press, 1997), p. 231.
4 G. A. Cohen, "On the Currency of Egalitarian Justice," *Ethics* 99 (1989): 906–44, pp. 922–3, 930–1.
5 Phillipe Van Parijs, *Real Freedom for All* (Oxford: Clarendon, 1995), p. 127.
6 Thomas Nagel, "The Policy of Preference," in his *Mortal Questions* (Cambridge: Cambridge University Press, 1979), pp. 91–105.
7 Richard Arneson, "Rawls, Responsibility, and Distributive Justice," in *Justice, Political Liberalism, and Utilitarianism: Themes from Harsanyi*, ed. Marc Fleurbaey, Maurice Salles and John A. Weymark (Cambridge: Cambridge University Press, 2008).
8 John Rawls, *A Theory of Justice* (Cambridge, MA: Harvard University Press, 1971), pp. 100–4.
9 Thomas Nagel, *Equality and Partiality* (New York: Oxford University Press, 1991), p. 71; Eric Rakowski, *Equal Justice* (New York: Oxford University Press, 1991); John Roemer, "A Pragmatic Theory of Responsibility for the Egalitarian Planner," in his *Egalitarian Perspectives* (Cambridge: Cambridge University Press, 1994), pp. 179–80.
10 Friedrich August von Hayek, *The Constitution of Liberty* (Chicago: University of Chicago Press, 1960), p. 87.
11 Joseph Raz, *The Morality of Freedom* (Oxford: Clarendon, 1986), p. 227.
12 Robert Nozick, *Anarchy, State, and Utopia* (New York: Basic, 1974), p. 229.
13 G. A. Cohen, "Incentives, Inequality, and Community," in *Equal Freedom*, ed. Stephen Darwall (Ann Arbor: University of Michigan Press, 1995), p. 335; Van Parijs, *Real Freedom for All*, p. 5.
14 Arneson, "Equality and Equality of Opportunity for Welfare," p. 230; Dworkin, "Equality of Resources," pp. 311–12; Rakowski, p. 2; Van Parijs, *Real Freedom for All*, p. 25.
15 P. T. Bauer, *Equality, the Third World, and Economic Delusion* (Cambridge, MA: Harvard University Press, 1981).
16 Lawrence Mead, *Beyond Entitlement: The Social Obligations of Citizenship* (New York: Free Press, 1986).
17 Arneson, "Equality and Equality of Opportunity for Welfare," p. 235.
18 Dworkin, "Equality of Resources," p. 293.
19 Cohen is the only prominent luck egalitarian to regard society's reliance on capitalist markets as an unfortunate if, in the foreseeable future, necessary compromise with justice, rather than as a vital instrument of just allocation. See Cohen, "Incentives, Inequality, and Community," p. 395. John Roemer, *Egalitarian Perspectives* (Cambridge: Cambridge University Press, 1994), supports a complex version of market socialism on distributive grounds, but these grounds do not appear sufficient to demonstrate the superiority of market socialism to, say, Van Parijs's version of capitalism.
20 See Hayek.
21 Dworkin, "Equality of Resources."
22 Rakowski, pp. 80–1.
23 Arneson, "Equality and Equality of Opportunity for Welfare," p. 239; Dworkin, "Equality of Resources," p. 295; Rakowski, p. 76.
24 Ronald Dworkin, "What Is Equality? I. Equality of Welfare," *Philosophy and Public Affairs* 10 (1981): 228–40.
25 Arneson, "Equality and Equality of Opportunity for Welfare," p. 237.
26 Ibid., pp. 230–1; Cohen, "On the Currency of Egalitarian Justice," pp. 522–3.
27 Richard Arneson, "Liberalism, Distributive Subjectivism, and Equal Opportunity for Welfare," *Philosophy and Public Affairs* 19 (1990): 158–94, pp. 185–7, 190–1.
28 Dworkin, "Equality of Resources," pp. 285–9.
29 Ibid., 285–9; Rakowski, p. 69; Van Parijs, *Real Freedom for All*, p. 51.
30 Ronald Dworkin, *Taking Rights Seriously* (Cambridge, MA: Harvard University Press, 1977), pp. 272–3.
31 Rakowski, pp. 74–5.
32 Arneson, "Liberalism, Distributive Subjectivism, and Equal Opportunity for Welfare," p. 187.
33 Rakowski, p. 79.
34 Rakowski allows that, in areas that suffer from no more than average risk of natural disaster, "any losses resulting from whatever risk was a necessary concomitant to the ownership of property essential to live a moderately satisfying life" would be fully compensable, "as instances of bad brute luck." But once private insurance becomes available, brute luck converts to option luck and uninsured parties are on their own again (p. 80).
35 Ibid., p. 79.
36 Susan Moller Okin, *Justice, Gender, and the Family* (New York: Basic, 1989), pp. 134–69.
37 Rakowski, p. 109.
38 Ibid., p. 153.
39 Van Parijs, "Why Surfers Should Be Fed," p. 131.
40 Van Parijs, *Real Freedom for All*, p. 76.
41 Brian M. Barry, "Equality, Yes, Basic Income, No," in *Arguing for Basic Income*, ed. Philippe Van Parijs (New York: Verso, 1992), p. 138.
42 Arneson, "Equality and Equality of Opportunity for Welfare."

43 John Roemer, *Theories of Distributive Justice* (Cambridge, MA: Harvard University Press, 1996), p. 270.
44 Rakowski, p. 47.
45 Roemer, *Theories of Distributive Justice*, p. 270.
46 Cohen, "On the Currency of Egalitarian Justice," p. 908.
47 John Roemer, "The Morality and Efficiency of Market Socialism," *Ethics* 102 (1992): 448–64.
48 Arneson, "Equality and Equality of Opportunity for Welfare," p. 239.
49 Van Parijs, *Real Freedom for All*, p. 47; Richard Arneson, "Is Socialism Dead? A Comment on Market Socialism and Basic Income Capitalism," *Ethics* 102 (1992): 485–511, p. 510.
50 Amy Gutmann made these points in her public comments on an earlier version of this article, delivered at the thirty-first annual Philosophy Colloquium at Chapel Hill, NC.
51 Van Parijs, *Real Freedom for All*, p. 68.
52 Arneson, "Liberalism, Distributive Subjectivism, and Equal Opportunity for Welfare"; Cohen, "On the Currency of Egalitarian Justice," pp. 930–1.
53 Rakowski, p. 99.
54 Van Parijs, *Real Freedom for All*, p. 70.
55 Ibid.
56 Bruce Ackerman, *Social Justice in the Liberal State* (New Haven, CT: Yale University Press, 1980), pp. 115–21.
57 Van Parijs, *Real Freedom for All*, p. 77.
58 Cohen, "On the Currency of Egalitarian Justice," pp. 917–18.
59 Thomas Pogge, "Three Problems with Contractarian-Consequentialist Ways of Assessing Social Institutions," in *The Just Society*, ed. Ellen Frankel Paul, Fred Miller, Jr., and Jeffrey Paul (Cambridge: Cambridge University Press, 1995), pp. 247–8.
60 Nagel, "The Policy of Preference," p. 105.
61 This is a concern with what attitudes the theory expresses, not with the consequences of expressing those attitudes. Self-respecting citizens would reject a society based on principles that treat them as inferiors, even if the principles are kept secret. Government house utilitarianism is thus no solution. Nor is it a satisfactory defense of equality of fortune to recommend that society adopt more generous distributive policies than the theory requires so as to avoid insulting people. The question is not whether to deviate from what justice requires so as to avoid bad consequences. It is whether a theory of justice based on contemptuous pity for its supposed beneficiaries satisfies the egalitarian requirement that justice must be founded on equal respect for persons.
62 Raz, *The Morality of Freedom*, p. 242.
63 Dworkin, "Equality of Resources," p. 285; Rakowski, pp. 65–6; Van Parijs, *Real Freedom for All*, p. 51.
64 Dworkin denies that his is a "starting-gate theory," but only because he would allocate compensation for unequal talents over the course of a lifetime ("Equality of Resources," pp. 309–11).
65 Ibid., p. 299.
66 What if someone runs a health risk that only increases her already significant chance of illness? Let scientific studies apportion the risks of illness due to involuntary causes (e.g., faulty genes) and voluntary causes (e.g., eating a fatty diet), and discount the resources contributed to care for the ill by the proportion to which their risk was one they ran voluntarily (Rakowski, p. 75). Roemer accepts this logic, but insists that people's responsibility for their conditions should be discounted by unchosen sociological as well as genetic influences. Thus, if two people with lung cancer smoke the median number of years for their sociological type (determined by sex, race, class, occupation, parents' smoking habits, etc.), then they are entitled, other things equal, to equal indemnification against the costs of their cancer, even if one smoked for eight years and the other for twenty-five years (Roemer, "A Pragmatic Theory of Responsibility for the Egalitarian Planner," p. 183). His intuition is that people who exercise comparable degrees of responsibility, adjusted to make up for the different social influences on their behavior, should be entitled to equal degrees of compensation against the costs of their behavior. Roemer does not consider the expressive implications of the state assuming that different classes of citizens should be held to different standards of responsible behavior.
67 Hayek, pp. 95–7.
68 Christine Korsgaard, "Commentary on G. A. Cohen and Amartya Sen," in *The Quality of Life*, ed. Martha Nussbaum and Amartya Sen (Oxford: Clarendon, 1993), p. 61.
69 Iris Marion Young, "Mothers, Citizenship, and Independence: A Critique of Pure Family Values," *Ethics* 105 (1995): 535–56, makes a similar critique, unconnected to luck egalitarianism, of contemporary welfare reform movements. Van Parijs's version of luck egalitarianism might seem to escape from Poor Law thinking because it promises an unconditional income to everyone, regardless of whether they work for a wage. However, as noted above, even his view implicitly takes the tastes of the egoistic adult without caretaking responsibilities as the norm. For the gap between the minimum wage and the unconditional income will be set by the incentives needed to bring the marginal footloose egoist into the labor market. The fate of non-wage-earning dependent caretakers will thus depend on the labor/leisure trade-offs of beach bums, rather than on their own needs. The more attached to leisure the beach bum is, the lower must the unconditional income be.
70 Iris Marion Young, *Justice and the Politics of Difference* (Princeton, NJ: Princeton University Press, 1990).
71 John Rawls, "Kantian Constructivism in Moral Theory," *Journal of Philosophy* 77 (1980): 515–72, p. 525. The use of "equally" to modify "moral agents" might seem otiose: why not just say that all competent adults are moral agents? Egalitarians deny a hierarchy of types of moral

agency – e.g., any theory that says there is a lower type of human only able to follow moral commands issued by others and a higher type able to issue or discover moral commands for themselves.

72 Elizabeth Anderson, "The Democratic University: The Role of Justice in the Production of Knowledge," *Social Philosophy and Policy* 12 (1995): 186–219. Does this requirement mean that we must always listen patiently to those who have proven themselves to be stupid, cranky, or dishonest? No. It means (1) that everyone must be granted the initial benefit of the doubt, (2) a person can be ignored or excluded from discussion only on demonstrated grounds of communicative incompetence or unwillingness to engage in fair discussion, and (3) reasonable opportunities must be available to the excluded to demonstrate their communicative competence and thereby win back a place in the conversation.

73 Nancy Fraser, "From Redistribution to Recognition? Dilemmas of Justice in a 'Postsocialist' Age," in her *Justice Interruptus* (New York: Routledge, 1997), pp. 11–39; Axel Honneth, *The Struggle for Recognition*, trans. Joel Anderson (Cambridge: Polity Press, 1995).

74 Korsgaard.

75 Amartya Sen, *Inequality Reexamined* (Cambridge, MA: Harvard University Press, 1992), pp. 39–42, 49.

76 Margaret Radin, "Market Inalienability," *Harvard Law Review* 100 (1987): 1849–1937. A person might have to forfeit some of her market inalienable freedoms, however, if she is convicted of a serious crime.

77 Sen, *Inequality Reexamined*, pp. 79–84.

78 I shift from talk of "citizens" to talk of "workers" in part because the moral implications of regarding the economy as a system of cooperative production cross international boundaries. As the economy becomes global, we are all implicated in an international division of labor subject to assessment from an egalitarian point of view. We have obligations not only to the citizens of our country but to our fellow workers, who are now found in virtually every part of the globe. We also have global humanitarian obligations to everyone, considered simply as human beings – to relieve famine and disease, avoid fomenting or facilitating aggressive warfare, and the like. Alas, I do not have the space to consider the international implications of democratic equality.

79 Cohen, "Incentives, Inequality, and Community," p. 348.

80 Rakowski, p. 79.

81 Ibid.

82 What about rich people who build their vacation homes in disaster-prone areas? They haven't been commissioned by others to live there, nor does it seem fair to force taxpayers to insure their luxurious estates. Democratic equality cannot allow even unproductive citizens to lose everything, but it does not indemnify them against all their losses either. It only guarantees sufficient relief to get them back on their feet, not to shod them in luxurious footwear. If even this relief seems too expensive, an egalitarian state can forbid people from inhabiting disaster-prone areas, or tax people who do to cover the excess costs of disaster relief. What it may not do is let them live there at their own risk and then abandon them in their hour of need. Such action treats even the imprudent with impermissible contempt.

83 Marilyn Waring, *If Women Counted* (San Francisco: HarperCollins, 1990).

84 Joan Williams, "Is Coverture Dead?" *Georgetown Law Journal* 82 (1994): 2227–90, p. 2227.

85 Okin, pp. 180–2

86 Nancy Fraser, "After the Family Wage: A Postindustrial Thought Experiment," in her *Justice Interruptus*, pp. 41–66.

87 Rakowski, p. 153.

88 It might be thought that poor societies cannot afford even basic capabilities for all workers. However, Sen's studies of the standard of living in India and China show that even extremely poor societies can supply an impressive set of basic capabilities – decent nutrition, health, literacy, and the like – to all of their members, if they apply themselves to the task. See, e.g., Amartya Sen, *Commodities and Capabilities* (Amsterdam: North-Holland, 1985).

89 Rawls, *A Theory of Justice*, pp. 75–8.

90 Michael Walzer, *Spheres of Justice* (New York: Basic, 1983); Mickey Kaus, *The End of Equality* (New York: Basic, 1992).

91 Roemer, "A Pragmatic Theory of Responsibility for the Egalitarian Planner," pp. 179–96.

92 Thomas Scanlon, "Preference and Urgency," *Journal of Philosophy* 72 (1975): 655–69, pp. 659–60.

93 This point is entirely distinct from the right to refuse medical care. It is one thing for an individual to exercise the right to refuse medical care when offered, quite another for others to refuse to offer medical care when needed.

94 John Rawls, *Political Liberalism* (New York: Columbia University Press, 1993).

95 Peter De Marneffe, "Liberalism, Liberty, and Neutrality," *Philosophy and Public Affairs* 19 (1990): 253–74, pp. 255–8.

96 Rawls, *A Theory of Justice*, p. 102.

97 Some exceptions would have to be made for those so severely mentally disabled or insane that they cannot function as agents. In addition, children are entitled not immediately to all of the freedoms of adults, but to the social conditions for the development of their capacities to function as free and equal citizens.

98 Arneson, "Liberalism, Distributive Subjectivism, and Equal Opportunity for Welfare," pp. 159, 187, 190–4.

99 Arneson, "Equality and Equality of Opportunity for Welfare," pp. 236–7.

100 Scanlon, p. 659.
101 Joseph Raz, "Rights and Individual Well-Being," in his *Ethics in the Public Domain* (Oxford: Clarendon, 1994), pp. 52–5.
102 Owen Wrigley, *The Politics of Deafness* (Washington, DC: Gallaudet University Press, 1996), discusses the potentials and problems of reconceiving disability (being deaf) as community (being Deaf) after the manner of identity politics.
103 Anita Silvers, "Reconciling Equality to Difference: Caring (f)or Justice for People with Disabilities," *Hypatia* 10 (1995): 30–55, p. 54, n. 9.
104 Ibid., p. 48.
105 Ibid., p. 49.

PART VIII

Oppression

36

Power, Right, Truth

Michel Foucault

The course of study that I have been following until now – roughly since 1970/71 – has been concerned with the *how* of power. I have tried, that is, to relate its mechanisms to two points of reference, two limits: on the one hand, to the rules of right that provide a formal delimitation of power; on the other, to the effects of truth that this power produces and transmits, and which in their turn reproduce this power. Hence we have a triangle: power, right, truth.

Schematically, we can formulate the traditional question of political philosophy in the following terms: how is the discourse of truth, or quite simply, philosophy as that discourse which *par excellence* is concerned with truth, able to fix limits to the rights of power? That is the traditional question. The one I would prefer to pose is rather different. Compared to the traditional, noble and philosophic question it is much more down to earth and concrete. My problem is rather this: what rules of right are implemented by the relations of power in the production of discourses of truth? Or alternatively, what type of power is susceptible of producing discourses of truth that in a society such as ours are endowed with such potent effects? What I mean is this: in a society such as ours, but basically in any society, there are manifold relations of power which permeate, characterise and constitute the social body, and these relations of power cannot themselves be established, consolidated nor implemented without the production, accumulation, circulation and functioning of a discourse. There can be no possible exercise of power without a certain economy of discourses of truth which operates through and on the basis of this association. We are subjected to the production of truth through power and we cannot exercise power except through the production of truth. This is the case for every society, but I believe that in ours the relationship between power, right and truth is organised in a highly specific fashion. If I were to characterise, not its mechanism itself, but its intensity and constancy, I would say that we are forced to produce the truth of power that our society demands, of which it has need, in order to function: we *must* speak the truth; we are constrained or condemned to confess or to discover the truth. Power never ceases its interrogation, its inquisition, its registration of truth: it institutionalises, professionalises and rewards its pursuit. In the last analysis, we must produce truth as we must produce wealth, indeed

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we must produce truth in order to produce wealth in the first place. In another way, we are also subjected to truth in the sense in which it is truth that makes the laws, that produces the true discourse which, at least partially, decides, transmits and itself extends upon the effects of power. In the end, we are judged, condemned, classified, determined in our undertakings, destined to a certain mode of living or dying, as a function of the true discourses which are the bearers of the specific effects of power.

So, it is the rules of right, the mechanisms of power, the effects of truth or if you like, the rules of power and the powers of true discourses, that can be said more or less to have formed the general terrain of my concern, even if, as I know full well, I have traversed it only partially and in a very zigzag fashion. I should like to speak briefly about this course of research, about what I have considered as being its guiding principle and about the methodological imperatives and precautions which I have sought to adopt. As regards the general principle involved in a study of the relations between right and power, it seems to me that in Western societies since medieval times it has been royal power that has provided the essential focus around which legal thought has been elaborated. It is in response to the demands of royal power, for its profit and to serve as its instrument or justification, that the juridical edifice of our own society has been developed. Right in the West is the King's right. Naturally everyone is familiar with the famous, celebrated, repeatedly emphasised role of the jurists in the organisation of royal power. We must not forget that the re-vitalisation of Roman Law in the twelfth century was the major event around which, and on whose basis, the juridical edifice which had collapsed after the fall of the Roman Empire was reconstructed. This resurrection of Roman Law had in effect a technical and constitutive role to play in the establishment of the authoritarian, administrative, and, in the final analysis, absolute power of the monarchy. And when this legal edifice escapes in later centuries from the control of the monarch, when, more accurately, it is turned against that control, it is always the limits of this sovereign power that are put in question, its prerogatives that are challenged. In other words, I believe that the King remains the central personage in the whole legal edifice of the West. When it comes to the general organisation of the legal system in the West, it is essentially with the King, his rights, his power and its eventual limitations, that one is dealing. Whether the jurists were the King's henchmen or his adversaries, it is of royal power that we are speaking in every case when we speak of these grandiose edifices of legal thought and knowledge.

There are two ways in which we do so speak. Either we do so in order to show the nature of the juridical armoury that invested royal power, to reveal the monarch as the effective embodiment of sovereignty, to demonstrate that his power, for all that it was absolute, was exactly that which befitted his fundamental right. Or, by contrast, we do so in order to show the necessity of imposing limits upon this sovereign power, of submitting it to certain rules of right, within whose confines it had to be exercised in order for it to remain legitimate. The essential role of the theory of right, from medieval times onwards, was to fix the legitimacy of power; that is the major problem around which the whole theory of right and sovereignty is organised.

When we say that sovereignty is the central problem of right in Western societies, what we mean basically is that the essential function of the discourse and techniques of right has been to efface the domination intrinsic to power in order to present the latter at the level of appearance under two different aspects: on the one hand, as the legitimate rights of sovereignty, and on the other, as the legal obligation to obey it. The system of right is centred entirely upon the King, and it is therefore designed to eliminate the fact of domination and its consequences.

My general project over the past few years has been, in essence, to reverse the mode of analysis followed by the entire discourse of right from the time of the Middle Ages. My aim, therefore, was to invert it, to give due weight, that is, to the fact of domination, to expose both its latent nature and its brutality. I then wanted to show not only how right is, in a general way, the instrument of this domination – which scarcely needs saying – but also to show the extent to which, and the forms in which, right (not simply the laws but the whole complex of apparatuses, institutions and regulations responsible for their application) transmits and puts in motion relations that are not relations of sovereignty, but of domination. Moreover, in speaking of domination I do not have in mind that solid and global kind of domination that one person exercises over others, or one group over another, but the manifold forms of domination that can be exercised within society. Not the domination of the King in his central position, therefore, but that of his subjects in their mutual relations: not the uniform edifice of sovereignty, but the multiple forms of subjugation that have a place and function within the social organism.

The system of right, the domain of the law, are permanent agents of these relations of domination, these polymorphous techniques of subjugation. Right should be viewed, I believe, not in terms of a legitimacy to be established, but in terms of the methods of subjugation that it instigates.

The problem for me is how to avoid this question, central to the theme of right, regarding sovereignty and the obedience of individual subjects in order that I may substitute the problem of domination and subjugation for that of sovereignty and obedience. Given that this was to be the general line of my analysis, there were a certain number of methodological precautions that seemed requisite to its pursuit. In the very first place, it seemed important to accept that the analysis in question should not concern itself with the regulated and legitimate forms of power in their central locations, with the general mechanisms through which they operate, and the continual effects of these. On the contrary, it should be concerned with power at its extremities, in its ultimate destinations, with those points where it becomes capillary, that is, in its more regional and local forms and institutions. Its paramount concern, in fact, should be with the point where power surmounts the rules of right which organise and delimit it and extends itself beyond them, invests itself in institutions, becomes embodied in techniques, and equips itself with instruments and eventually even violent means of material intervention. To give an example: rather than try to discover where and how the right of punishment is founded on sovereignty, how it is presented in the theory of monarchical right or in that of democratic right, I have tried to see in what ways punishment and the power of punishment are effectively embodied in a certain number of local, regional, material institutions, which are concerned with torture or imprisonment, and to place these in the climate – at once institutional and physical, regulated and violent – of the effective apparatuses of punishment. In other words, one should try to locate power at the extreme points of its exercise, where it is always less legal in character.

A second methodological precaution urged that the analysis should not concern itself with power at the level of conscious intention or decision; that it should not attempt to consider power from its internal point of view and that it should refrain from posing the labyrinthine and unanswerable question: 'Who then has power and what has he in mind? What is the aim of someone who possesses power?' Instead, it is a case of studying power at the point where its intention, if it has one, is completely invested in its real and effective practices. What is needed is a study of power in its external visage, at the point where it is in direct and immediate relationship with that which we can provisionally call its object, its target, its field of application, there – that is to say – where it installs itself and produces its real effects.

Let us not, therefore, ask why certain people want to dominate, what they seek, what is their overall strategy. Let us ask, instead, how things work at the level of ongoing subjugation, at the level of those continuous and uninterrupted processes which subject our bodies, govern our gestures, dictate our behaviours etc. In other words, rather than ask ourselves how the sovereign appears to us in his lofty isolation, we should try to discover how it is that subjects are gradually, progressively, really and materially constituted through a multiplicity of organisms, forces, energies, materials, desires, thoughts etc. We should try to grasp subjection in its material instance as a constitution of subjects. This would be the exact opposite of Hobbes' project in *Leviathan*, and of that, I believe, of all jurists for whom the problem is the distillation of a single will – or rather, the constitution of a unitary, singular body animated by the spirit of sovereignty – from the particular wills of a multiplicity of individuals. Think of the scheme of Leviathan: insofar as he is a fabricated man, Leviathan is no other than the amalgamation of a certain number of separate individualities, who find themselves reunited by the complex of elements that go to compose the State; but at the heart of the State, or rather, at its head, there exists something which constitutes it as such, and this is sovereignty, which Hobbes says is precisely the spirit of Leviathan. Well, rather than worry about the problem of the central spirit, I believe that we must attempt to study the myriad of bodies which are constituted as peripheral *subjects* as a result of the effects of power.

A third methodological precaution relates to the fact that power is not to be taken to be a phenomenon of one individual's consolidated and homogeneous domination over others, or that of one group or class over others. What, by contrast, should always be kept in mind is that power, if we do not take too distant a view of it, is not that which makes the difference between those who exclusively possess and retain it, and those who do not have it and submit to it. Power must be analysed as something which circulates, or rather as something which only functions in the form of a chain. It is never localised here or there, never in anybody's hands, never appropriated as a commodity or piece of wealth. Power is employed and exercised through a net-like

organisation. And not only do individuals circulate between its threads; they are always in the position of simultaneously undergoing and exercising this power. They are not only its inert or consenting target; they are always also the elements of its articulation. In other words, individuals are the vehicles of power, not its points of application.

The individual is not to be conceived as a sort of elementary nucleus, a primitive atom, a multiple and inert material on which power comes to fasten or against which it happens to strike, and in so doing subdues or crushes individuals. In fact, it is already one of the prime effects of power that certain bodies, certain gestures, certain discourses, certain desires, come to be identified and constituted as individuals. The individual, that is, is not the *vis-à-vis* of power; it is, I believe, one of its prime effects. The individual is an effect of power, and at the same time, or precisely to the extent to which it is that effect, it is the element of its articulation. The individual which power has constituted is at the same time its vehicle.

There is a fourth methodological precaution that follows from this: when I say that power establishes a network through which it freely circulates, this is true only up to a certain point. In much the same fashion we could say that therefore we all have a fascism in our heads, or, more profoundly, that we all have a power in our bodies. But I do not believe that one should conclude from that that power is the best distributed thing in the world, although in some sense that is indeed so. We are not dealing with a sort of democratic or anarchic distribution of power through bodies. That is to say, it seems to me – and this then would be the fourth methodological precaution – that the important thing is not to attempt some kind of deduction of power starting from its centre and aimed at the discovery of the extent to which it permeates into the base, of the degree to which it reproduces itself down to and including the most molecular elements of society. One must rather conduct an *ascending* analysis of power, starting, that is, from its infinitesimal mechanisms, which each have their own history, their own trajectory, their own techniques and tactics, and then see how these mechanisms of power have been – and continue to be – invested, colonised, utilised, involuted, transformed, displaced, extended etc., by ever more general mechanisms and by forms of global domination. It is not that this global domination extends itself right to the base in a plurality of repercussions: I believe that the manner in which the phenomena, the techniques and the procedures of power enter into play at the most basic levels must be analysed, that the way in which these procedures are displaced, extended and altered must certainly be demonstrated; but above all what must be shown is the manner in which they are invested and annexed by more global phenomena and the subtle fashion in which more general powers or economic interests are able to engage with these technologies that are at once both relatively autonomous of power and act as its infinitesimal elements. In order to make this clearer, one might cite the example of madness. The descending type of analysis, the one of which I believe one ought to be wary, will say that the bourgeoisie has, since the sixteenth or seventeenth century, been the dominant class; from this premise, it will then set out to deduce the internment of the insane. One can always make this deduction, it is always easily done and that is precisely what I would hold against it. It is in fact a simple matter to show that since lunatics are precisely those persons who are useless to industrial production, one is obliged to dispense with them. One could argue similarly in regard to infantile sexuality – and several thinkers, including Wilhelm Reich have indeed sought to do so up to a certain point. Given the domination of the bourgeois class, how can one understand the repression of infantile sexuality? Well, very simply – given that the human body had become essentially a force of production from the time of the seventeenth and eighteenth century, all the forms of its expenditure which did not lend themselves to the constitution of the productive forces – and were therefore exposed as redundant – were banned, excluded and repressed. These kinds of deduction are always possible. They are simultaneously correct and false. Above all they are too glib, because one can always do exactly the opposite and show, precisely by appeal to the principle of the dominance of the bourgeois class, that the forms of control of infantile sexuality could in no way have been predicted. On the contrary, it is equally plausible to suggest that what was needed was sexual training, the encouragement of a sexual precociousness, given that what was fundamentally at stake was the constitution of a labour force whose optimal state, as we well know, at least at the beginning of the nineteenth century, was to be infinite: the greater the labour force, the better able would the system of capitalist production have been to fulfil and improve its functions.

I believe that anything can be deduced from the general phenomenon of the domination of the bourgeois class. What needs to be done is something quite different. One needs to investigate historically, and beginning from the lowest level, how mechanisms of power have been able to function. In regard to the confinement of the insane, for example, or the repression and

interdiction of sexuality, we need to see the manner in which, at the effective level of the family, of the immediate environment, of the cells and most basic units of society, these phenomena of repression or exclusion possessed their instruments and their logic, in response to a certain number of needs. We need to identify the agents responsible for them, their real agents (those which constituted the immediate social *entourage*, the family, parents, doctors etc.), and not be content to lump them under the formula of a generalised bourgeoisie. We need to see how these mechanisms of power, at a given moment, in a precise conjuncture and by means of a certain number of transformations, have begun to become economically advantageous and politically useful. I think that in this way one could easily manage to demonstrate that what the bourgeoisie needed, or that in which its system discovered its real interests, was not the exclusion of the mad or the surveillance and prohibition of infantile masturbation (for, to repeat, such a system can perfectly well tolerate quite opposite practices), but rather, the techniques and procedures themselves of such an exclusion. It is the mechanisms of that exclusion that are necessary, the apparatuses of surveillance, the medicalisation of sexuality, of madness, of delinquency, all the micro-mechanisms of power, that came, from a certain moment in time, to represent the interests of the bourgeoisie. Or even better, we could say that to the extent to which this view of the bourgeoisie and of its interests appears to lack content, at least in regard to the problems with which we are here concerned, it reflects the fact that it was not the bourgeoisie itself which thought that madness had to be excluded or infantile sexuality repressed. What in fact happened instead was that the mechanisms of the exclusion of madness, and of the surveillance of infantile sexuality, began from a particular point in time, and for reasons which need to be studied, to reveal their political usefulness and to lend themselves to economic profit, and that as a natural consequence, all of a sudden, they came to be colonised and maintained by global mechanisms and the entire State system. It is only if we grasp these techniques of power and demonstrate the economic advantages or political utility that derives from them in a given context for specific reasons, that we can understand how these mechanisms come to be effectively incorporated into the social whole.

To put this somewhat differently: the bourgeoisie has never had any use for the insane; but the procedures it has employed to exclude them have revealed and realised – from the nineteenth century onwards, and again on the basis of certain transformations – a political advantage, on occasion even a certain economic utility, which have consolidated the system and contributed to its overall functioning. The bourgeoisie is interested in power, not in madness, in the system of control of infantile sexuality, not in that phenomenon itself. The bourgeoisie could not care less about delinquents, about their punishment and rehabilitation, which economically have little importance, but it is concerned about the complex of mechanisms with which delinquency is controlled, pursued, punished and reformed etc.

As for our fifth methodological precaution: it is quite possible that the major mechanisms of power have been accompanied by ideological productions. There has, for example, probably been an ideology of education, an ideology of the monarchy, an ideology of parliamentary democracy etc.; but basically I do not believe that what has taken place can be said to be ideological. It is both much more and much less than ideology. It is the production of effective instruments for the formation and accumulation of knowledge – methods of observation, techniques of registration, procedures for investigation and research, apparatuses of control. All this means that power, when it is exercised through these subtle mechanisms, cannot but evolve, organise and put into circulation a knowledge, or rather apparatuses of knowledge, which are not ideological constructs.

By way of summarising these five methodological precautions, I would say that we should direct our researches on the nature of power not towards the juridical edifice of sovereignty, the State apparatuses and the ideologies which accompany them, but towards domination and the material operators of power, towards forms of subjection and the inflections and utilisations of their localised systems, and towards strategic apparatuses. We must eschew the model of Leviathan in the study of power. We must escape from the limited field of juridical sovereignty and State institutions, and instead base our analysis of power on the study of the techniques and tactics of domination.

This, in its general outline, is the methodological course that I believe must be followed, and which I have tried to pursue in the various researches that we have conducted over recent years on psychiatric power, on infantile sexuality, on political systems, etc. Now as one explores these fields of investigation, observing the methodological precautions I have mentioned, I believe that what then comes into view is a solid body of historical fact, which will ultimately bring us into confrontation with the problems of which I want to speak this year.

This solid, historical body of fact is the juridical-political theory of sovereignty of which I spoke a moment ago, a theory which has had four roles to play. In the first place, it has been used to refer to a mechanism of power that was effective under the feudal monarchy. In the second place, it has served as instrument and even as justification for the construction of the large scale administrative monarchies. Again, from the time of the sixteenth century and more than ever from the seventeenth century onwards, but already at the time of the wars of religion, the theory of sovereignty has been a weapon which has circulated from one camp to another, which has been utilised in one sense or another, either to limit or else to reinforce royal power: we find it among Catholic monarchists and Protestant anti-monarchists, among Protestant and more-or-less liberal monarchists, but also among Catholic partisans of regicide or dynastic transformation. It functions both in the hands of aristocrats and in the hands of parliamentarians. It is found among the representatives of royal power and among the last feudatories. In short, it was the major instrument of political and theoretical struggle around systems of power of the sixteenth and seventeenth centuries. Finally, in the eighteenth century, it is again this same theory of sovereignty, re-activated through the doctrine of Roman Law, that we find in its essentials in Rousseau and his contemporaries, but now with a fourth role to play: now it is concerned with the construction, in opposition to the administrative, authoritarian and absolutist monarchies, of an alternative model, that of parliamentary democracy. And it is still this role that it plays at the moment of the Revolution.

Well, it seems to me that if we investigate these four roles there is a definite conclusion to be drawn: as long as a feudal type of society survived, the problems to which the theory of sovereignty was addressed were in effect confined to the general mechanisms of power, to the way in which its forms of existence at the higher level of society influenced its exercise at the lowest levels. In other words, the relationship of sovereignty, whether interpreted in a wider or a narrower sense, encompasses the totality of the social body. In effect, the mode in which power was exercised could be defined in its essentials in terms of the relationship sovereign – subject. But in the seventeenth and eighteenth centuries we have the production of an important phenomenon, the emergence, or rather the invention, of a new mechanism of power possessed of highly specific procedural techniques, completely novel instruments, quite different apparatuses, and which is also, I believe, absolutely incompatible with the relations of sovereignty.

This new mechanism of power is more dependent upon bodies and what they do than upon the Earth and its products. It is a mechanism of power which permits time and labour, rather than wealth and commodities, to be extracted from bodies. It is a type of power which is constantly exercised by means of surveillance rather than in a discontinuous manner by means of a system of levies or obligations distributed over time. It presupposes a tightly knit grid of material coercions rather than the physical existence of a sovereign. It is ultimately dependent upon the principle, which introduces a genuinely new economy of power, that one must be able simultaneously both to increase the subjected forces and to improve the force and efficacy of that which subjects them.

This type of power is in every aspect the antithesis of that mechanism of power which the theory of sovereignty described or sought to transcribe. The latter is linked to a form of power that is exercised over the Earth and its products, much more than over human bodies and their operations. The theory of sovereignty is something which refers to the displacement and appropriation on the part of power, not of time and labour, but of goods and wealth. It allows discontinuous obligations distributed over time to be given legal expression but it does not allow for the codification of a continuous surveillance. It enables power to be founded in the physical existence of the sovereign, but not in continuous and permanent systems of surveillance. The theory of sovereignty permits the foundation of an absolute power in the absolute expenditure of power. It does not allow for a calculation of power in terms of the minimum expenditure for the maximum return.

This new type of power, which can no longer be formulated in terms of sovereignty, is, I believe, one of the great inventions of bourgeois society. It has been a fundamental instrument in the constitution of industrial capitalism and of the type of society that is its accompaniment. This non-sovereign power, which lies outside the form of sovereignty, is disciplinary power. Impossible to describe in the terminology of the theory of sovereignty from which it differs so radically, this disciplinary power ought by rights to have led to the disappearance of the grand juridical edifice created by that theory. But in reality, the theory of sovereignty has continued not only to exist as an ideology of right, but also to provide the organising principle of the legal codes which Europe acquired in the nineteenth century, beginning with the Napoleonic Code.

Why has the theory of sovereignty persisted in this fashion as an ideology and an organising principle of

these major legal codes? For two reasons, I believe. On the one hand, it has been, in the eighteenth and again in the nineteenth century, a permanent instrument of criticism of the monarchy and of all the obstacles that can thwart the development of disciplinary society. But at the same time, the theory of sovereignty, and the organisation of a legal code centred upon it, have allowed a system of right to be superimposed upon the mechanisms of discipline in such a way as to conceal its actual procedures, the element of domination inherent in its techniques, and to guarantee to everyone, by virtue of the sovereignty of the State, the exercise of his proper sovereign rights. The juridical systems – and this applies both to their codification and to their theorisation – have enabled sovereignty to be democratised through the constitution of a public right articulated upon collective sovereignty, while at the same time this democratisation of sovereignty was fundamentally determined by and grounded in mechanisms of disciplinary coercion.

To put this in more rigorous terms, one might say that once it became necessary for disciplinary constraints to be exercised through mechanisms of domination and yet at the same time for their effective exercise of power to be disguised, a theory of sovereignty was required to make an appearance at the level of the legal apparatus, and to re-emerge in its codes. Modern society, then, from the nineteenth century up to our own day, has been characterised on the one hand, by a legislation, a discourse, an organisation based on public right, whose principle of articulation is the social body and the delegative status of each citizen; and, on the other hand, by a closely linked grid of disciplinary coercions whose purpose is in fact to assure the cohesion of this same social body. Though a theory of right is a necessary companion to this grid, it cannot in any event provide the terms of its endorsement. Hence these two limits, a right of sovereignty and a mechanism of discipline, which define, I believe, the arena in which power is exercised. But these two limits are so heterogeneous that they cannot possibly be reduced to each other. The powers of modern society are exercised through, on the basis of, and by virtue of, this very heterogeneity between a public right of sovereignty and a polymorphous disciplinary mechanism. This is not to suggest that there is on the one hand an explicit and scholarly system of right which is that of sovereignty, and, on the other hand, obscure and unspoken disciplines which carry out their shadowy operations in the depths, and thus constitute the bedrock of the great mechanism of power. In reality, the disciplines have their own discourse. They engender, for the reasons of which we spoke earlier, apparatuses of knowledge (*savoir*) and a multiplicity of new domains of understanding. They are extraordinarily inventive participants in the order of these knowledge-producing apparatuses. Disciplines are the bearers of a discourse, but this cannot be the discourse of right. The discourse of discipline has nothing in common with that of law, rule, or sovereign will. The disciplines may well be the carriers of a discourse that speaks of a rule, but this is not the juridical rule deriving from sovereignty, but a natural rule, a norm. The code they come to define is not that of law but that of normalisation. Their reference is to a theoretical horizon which of necessity has nothing in common with the edifice of right. It is human science which constitutes their domain, and clinical knowledge their jurisprudence.

In short, what I have wanted to demonstrate in the course of the last few years is not the manner in which at the advance front of the exact sciences the uncertain, recalcitrant, confused dominion of human behaviour has little by little been annexed to science: it is not through some advancement in the rationality of the exact sciences that the human sciences are gradually constituted. I believe that the process which has really rendered the discourse of the human sciences possible is the juxtaposition, the encounter between two lines of approach, two mechanisms, two absolutely heterogeneous types of discourse: on the one hand there is the re-organisation of right that invests sovereignty, and on the other, the mechanics of the coercive forces whose exercise takes a disciplinary form. And I believe that in our own times power is exercised simultaneously through this right and these techniques and that these techniques and these discourses, to which the disciplines give rise invade the area of right so that the procedures of normalisation come to be ever more constantly engaged in the colonisation of those of law. I believe that all this can explain the global functioning of what I would call a *society of normalisation*. I mean, more precisely, that disciplinary normalisations come into ever greater conflict with the juridical systems of sovereignty: their incompatibility with each other is ever more acutely felt and apparent; some kind of arbitrating discourse is made ever more necessary, a type of power and of knowledge that the sanctity of science would render neutral. It is precisely in the extension of medicine that we see, in some sense, not so much the linking as the perpetual exchange or encounter of mechanisms of discipline with the principle of right. The developments of medicine, the general medicalisation of behaviours, conducts, discourses,

desires etc., take place at the point of intersection between the two heterogeneous levels of discipline and sovereignty. For this reason, against these usurpations by the disciplinary mechanisms, against this ascent of a power that is tied to scientific knowledge, we find that there is no solid recourse available to us today, such being our situation, except that which lies precisely in the return to a theory of right organised around sovereignty and articulated upon its ancient principle. When today one wants to object in some way to the disciplines and all the effects of power and knowledge that are linked to them, what is it that one does, concretely, in real life, what do the Magistrates Union[1] or other similar institutions do, if not precisely appeal to this canon of right, this famous, formal right, that is said to be bourgeois, and which in reality is the right of sovereignty? But I believe that we find ourselves here in a kind of blind alley: it is not through recourse to sovereignty against discipline that the effects of disciplinary power can be limited, because sovereignty and disciplinary mechanisms are two absolutely integral constituents of the general mechanism of power in our society.

If one wants to look for a non-disciplinary form of power, or rather, to struggle against disciplines and disciplinary power, it is not towards the ancient right of sovereignty that one should turn, but towards the possibility of a new form of right, one which must indeed be anti-disciplinarian, but at the same time liberated from the principle of sovereignty. It is at this point that we once more come up against the notion of repression, whose use in this context I believe to be doubly unfortunate. On the one hand, it contains an obscure reference to a certain theory of sovereignty, the sovereignty of the sovereign rights of the individual, and on the other hand, its usage introduces a system of psychological reference points borrowed from the human sciences, that is to say, from discourses and practices that belong to the disciplinary realm. I believe that the notion of repression remains a juridical-disciplinary notion whatever the critical use one would make of it. To this extent the critical application of the notion of repression is found to be vitiated and nullified from the outset by the two-fold juridical and disciplinary reference it contains to sovereignty on the one hand and to normalisation on the other.

Note

1 This Union, established after 1968, has adopted a radical line on civil rights, the law and the prisons.

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The Domination Contract

Charles Mills

Carole Pateman's *The Sexual Contract* (1988) has become a classic text of second-wave feminist theory, and it is widely and deservedly seen as constituting one of the most important challenges of the last twenty years to the frameworks and assumptions of "malestream" political theory. Moreover, its influence is not restricted to gender issues, since it was the inspiration for my own book, *The Racial Contract* (1997), in the field of critical race theory. The impact of both books, of course, originates in part from their refusal respectively of "pink" and "black" theoretical ghettoization for a frontal conceptual engagement with a (male, white) intellectual apparatus, social contract theory, that has historically been central to the modern Western political tradition, and which has been spectacularly revived in the past three decades as a result of John Rawls's *A Theory of Justice* ([1971] 1999). Pateman and I assert that the history of gender and racial subordination requires a rethinking of how we do political theory, that it cannot be a matter of some minor, largely cosmetic changes – a few "she's" sprinkled in where there were previously only "he's," a pro forma deploring of the racism of Enlightenment theorists – before continuing basically as before. Rather, contract theory must take as its starting point not the presumed state of nature populated by individuals with no social or political ties, but rather actual societies populated by individuals who are members of socially constructed groups (e.g., of class, race, and sex) already in relationships of domination and subordination. How does this new perspective challenge contract theory in general, and Rawlsian normative theory in particular? Without at all presuming that we are in complete agreement on these issues, I want to offer a possible reconstruction, elaboration, and extrapolation of Pateman's "sexual contract" argument that makes explicit the theoretical innovation involved, and clarifies what the implications are for the theorizing of gender and racial justice.[1]

The "Contract" as Protean

Let me begin – in the "underlaborer" tradition of analytic philosophy – with some preliminary clarifying distinctions. The diverse and contradictory interpretations of Pateman's book arise from three ambiguities in Pateman's revisionist contractarianism: one endemic to the literature in general, even just the mainstream variety; one arising distinctively from her radical and

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unfamiliar nonmainstream use of the idea of contract; and one generated by her own choice of terminology.

The general problem is the astonishing range of the ways in which the idea of the "contract" has historically been employed, ironically – or then again, not ironically at all – coupled with the fact that in most cases it is actually doing no work, and is, in effect, otiose, a disposable part of the argument. (With only slight exaggeration, one could quip that in the long history of social contract theory, very few actual social contract theorists can be found!) To begin with, there is the notion of the contract as in some sense, whether stronger or weaker, descriptive or factual: the contract as ur-sociology or anthropology, providing us with a literal account of what actually happened. Or, more weakly, the contract as a plausible hypothetical reconstruction of what might have happened. Or, weaker still, the contract as a useful way of thinking about what happened – the contract "as if" – though we know perfectly well it did *not* happen that way. Then within this "descriptive" sense, whether robustly or thinly conceived, there are additional differences (cross-cutting the above) of, so to speak, the object of the contract. Is it a contract to create society, the state, or both? And, to introduce further complications within these categories, is society envisaged as an aggregate of individuals or a transformed collective community, and are rights alienated to the state or merely delegated to it? Then there is the contract as normative. For example, the contract as the outcome of a collective bargaining agreement that brings morality into existence as a conventionalist set of principles. Or the contract as a way of elucidating and codifying preexisting and objective moral principles, whether grounded in natural law or human interests. Or the contract as a thought-experiment, a device for generating moral intuitions about justice through the strategy of combining prudential motivation with ignorance of crucial features of the self and the social order.

So the concept has been used in radically different ways – the contract as literal, metaphorical, historical, hypothetical, descriptive, prescriptive, prudential, moral, constitutional, civil, regulative ideal, device of representation. It is no wonder then, that, as David Boucher and Paul Kelly (1994b, 2) conclude in an introductory overview of social contract theory. "The idea of the social contract when examined carefully is seen to have very few implications, and is used for all sorts of reasons, and generates quite contrary conclusions." Will Kymlicka (1991, 196) concurs in an encyclopedia essay, "In a sense, there is no contract tradition in ethics, only a contract *device* which many different traditions have used for many different reasons."

Moreover, as if this bewildering array of distinctions were not enough, Pateman's peculiar use of the contract idea revives a strand of the contract tradition that has been so marginalized and ignored that it does not even have a name in the secondary literature: what I have called elsewhere the "domination contract" (Mills 2000). Though Pateman herself does not explicitly make the connection in her own book, and though I have never seen them linked in discussions of her work, a case can be made that the sexual contract develops an idea whose nucleus is actually originally to be found in Rousseau's "class contract" of his 1755 *Discourse on the Origin and Foundations of Inequality among Men*, commonly known as *Discourse on Inequality* ([1755] 1997). Seven years before publishing the *Social Contract* ([1762] 1968), Rousseau condemned and set out to explain the *nonnatural* "political" inequalities of class society, which are the result of "a sort of convention," and that consist in "the different Privileges which some enjoy to the prejudice of the others, such as to be more wealthy, more honored, more Powerful than they" ([1755] 1997, 131). He offered a "hypothetical and conditional" (132) history of technological progress in the state of nature, which eventually led to the development of nascent society, private property, growing divisions between rich and poor, and a state of war. In Rousseau's reconstruction, the wealthy, alarmed by this threat to their property and security, promised to the poor new social institutions that pretended to offer justice, peace, and impartial social rules for the mutual benefit of all. But in actuality these institutions "irreversibly destroyed natural freedom, forever fixed the Law of property and inequality, transformed a skillful usurpation into an irrevocable right, and for the profit of a few ambitious men henceforth subjugated the whole of Mankind to labor, servitude and misery" (173).

Rousseau's contract is therefore a bogus contract, contract as scam, which in its uncompromising demystification of the consensual illusions of mainstream contractarianism anticipates by a century Marx's later critique of supposedly egalitarian liberalism as a mask for the differential power of a capitalist ruling class. In the later 1762 *Social Contract* (1968), of course, Rousseau would go on to outline an ideal contract that prescribed how society *should* be founded and what kinds of institutions would, through the "general will," be necessary to achieve genuine political egalitarianism. But in *Discourse on Inequality*, he is describing, if only in a "hypothetical and conditional" sense analogous to a "Physicist"

"reasoning" about "the formation of the World" ([1755] 1997, 132) what might *actually* have happened.

The point is, then, that a clear precedent exists in the Western contract tradition for the idea of an exclusionary manipulative contract deployed by the powerful to subordinate others in society under the pretext of including them as equals. Yet whether because of the unacceptable radicalism of the idea; its polar incongruity with a mainstream conception for which, underneath all the variations listed above, a legitimizing consensuality is the crucial common factor; or the brevity of his treatment, Rousseau's first contract is hardly discussed in the secondary literature, whether on contractarianism in general or on Rousseau in particular. It is mentioned, for example, neither in David Boucher and Paul Kelly's (1994a) anthology on social contract theory, nor Christopher Morris's (1999a) anthology, nor Stephen Darwall's (2003) anthology, nor in three encyclopedia essays on the subject (Laslett 1967; Kymlicka 1991; Hampton 1993). Even *The Cambridge Companion to Rousseau* (Riley 2001) devotes only a few paragraphs to it – not an entire essay, nor even a subsection of an essay.

So given this absence of any developed analysis in the literature, it is perhaps less surprising that the distinctive features of Pateman's "contract" should not have been recognized as homologous to Rousseau's, though centered on gender rather than class. I want to suggest that we remedy this deficiency and formally recognize this use of social contract theory as a strategy for theorizing domination within a contractarian framework, since, as I will argue below, it provides a conceptual entry point for importing the concerns and aims of radical democratic political theory into a mainstream apparatus. And since the formal act of naming an entity helps to make it more real for us, incorporating it into our discursive universe, I move that we call it the "domination contract" (Mills 2000).

Finally, the third factor accounting for misinterpretations of Pateman's position is terminological. "Contractarianism" is usually taken in political theory to be coextensive with social contract theory in general, and as such to be a very broad umbrella covering many different variants. In particular, as both Will Kymlicka (1991) and Jean Hampton (1993; 2001) point out, the Hobbesian variety of contract theory, which derives morality from prudence as a conventionalist set of rules for coordinating the constrained advancing of our interests in a social framework, is radically different in its crucial assumptions from the Kantian variety, for which the contract is merely a regulative ideal, and morality inheres in the objective categorical imperative to respect others' personhood. The former kind leads to David Gauthier's *Morals by Agreement* (1986), the latter to John Rawls's *A Theory of Justice* ([1971] 1999), two books obviously quite different in their prescriptions for social justice despite their common contractarian identity. For this reason, some ethicists and political philosophers, such as T. M. Scanlon and Stephen Darwall, think the distinction is so crucial that it needs to be made explicit in our terminology, and they differentiate accordingly between *contractarianism* (the Hobbesian use of the contract idea) and *contractualism* (the Kantian use of the contract idea) (Darwall 2003). In this vocabulary, Rawls would then be a contractualist rather than a contractarian.

Now Pateman (1988) speaks generally about "contract theory" in her opening pages. But it turns out that she is using the term in a restricted sense, for she specifies that "property" is crucial to her argument, though this is not "property in the sense in which 'property' commonly enters into discussions of contract theory," as including material goods and civil freedom. Rather, "The subject of all the contracts with which I am concerned is a very special kind of property, the property that individuals are held to own in their persons" (5). And she goes on to say:

> I shall refer to the [most radical form of contract doctrine], which has its classical expression in Hobbes' theory, as *contractarian* theory or *contractarianism* (in the United States it is usually called libertarianism …). … For contemporary contractarians … social life and relationships not only originate from a social contract but, properly, are seen as an endless series of discrete contracts. … From the standpoint of contract, in social life there are contracts all the way down. (14–15)

When Pateman uses the term *contractarianism*, then, it is really this restricted version of contract she has in mind (Hobbesian/libertarian), involving contracts "all the way down," not social contract theory in general.[2] And obviously this would not be an accurate characterization of Kantian contract theory, for which the will is to be determined not by subjective inclination "all the way down" but objective universal moral law, which – the respecting of others as ends in themselves – is supposed to be the normative bedrock of societal interaction. So when she writes that in contract theory "universal freedom" is always "a political fiction," since "contract always generates political right in the form of relations of domination and subordination" (8), one has to remember that this is not supposed to be, as it might seem,

a general indictment of social contract theory, but only contract in the specific term-of-art sense she has previously stipulated. But for careless readers (among whom, embarrassingly, I include myself [Mills 1997, 136–7n9]) who are interpreting "contract" in the all-inclusive sense, it will seem as if Pateman is issuing a principled rejection of contractarianism *simpliciter*. Moreover, this mistaken interpretation is unfortunately reinforced by the jacket copy on the paperback edition of *The Sexual Contract:* "One of the main targets of the book is those who try to turn contractarian theory to progressive use, and a major thesis of the book is that this is not possible." The portrayal of Pateman in the secondary literature as one of the feminist theorists most resolutely opposed to any attempt to modify social contract theory to advance a feminist agenda, then, arises from this multiply determined misreading of her theoretical claims.

Hampton, Pateman, Okin: Toward a Theoretical Synthesis

What I now want to do is to argue for a version of the sexual contract that does not preclude using "contractarianism" (henceforth in the standard all-inclusive general sense) to address issues of gender justice, and that can be seen as a particular instantiation of the domination contract. So if Pateman (1999) has been insistent – as for example, she was in a 1999 American Political Science Association panel we were on together – that the widespread view of her as anticontractarian in principle is mistaken, then perhaps she will accept this as a possible development of the sexual contract idea for positive normative ends. Since two of the most prominent feminist advocates of social contract theory were the late Jean Hampton and the late Susan Moller Okin, I will try to show that, suitably modified, Pateman's sexual contract is not at all in necessary theoretical opposition to their views, as is conventionally supposed, but can in fact be thought of as *complementing* them, and should indeed be synthesized with them to produce a distinctively feminist contractarianism that is all the more powerful *precisely for* its recognition of the historic (and ongoing) patriarchal restriction of the terms of the contract.

Consider first Jean Hampton. In her essays on contractarianism, Hampton (1990; 1993; 2001) makes a crucial point that will be useful for us in developing the idea of the domination contract. She reminds us that unlike the contemporary Rawlsian contract, which is merely a normative thought-experiment, at least some of the classic contractarians (though not Kant) "intended simultaneously to describe the nature of political societies, and to prescribe a new and more defensible form for such societies" (Hampton 1993, 382). So for them the contract was both descriptive and prescriptive. Moreover, Hampton believes that – suitably attenuated – this descriptive side of the contract should be revived, since once we realize that contract is basically a matter of "imagery," a "picture," we should recognize that it is not vulnerable to standard objections (e.g., that no promises are explicitly exchanged to support governmental structures), as it is essentially just expressing the insight that "authoritative political societies are human creations," "conventionally-generated" (379, 382–3).

So the first great virtue of contract theory for Hampton is its capturing of the crucial factual/descriptive truth that society and the polity are human-made – not organic "natural" growths or the product of divine creation. And this insight is, of course, distinctively modern, demarcating the conceptual universe of the modern period from that of antiquity and medievalism, as manifested in Hobbes's ([1651] 1996, 9) famous anti-Aristotelian characterization of the commonwealth as "an Artificiall Man; though of greater stature and strength than the Naturall." Similarly, contemporary commentators such as Michael Walzer (1995, 164) suggest that: "Perhaps the most significant claim of social contract theory is that political society is a human construct … and not an organic growth." Banal as it may seem to us now, this insight was revolutionary in its own time, and I will argue below that indeed its full revolutionary significance has yet to be fully appreciated and exploited, since once we understand how far the "construction" extends, we will recognize that it can be shown to apply to gender and race also.

The second important truth is, of course, the one that the contemporary contract *does* focus on: the moral equality of the contracting parties and its normative implications for sociopolitical structures. Here Hobbes is not the appropriate representative figure since, as noted above (Kymlicka 1991; Hampton 1993, 2001; Darwall 2003), commentators standardly point out that the Hobbesian contract, rooted in the rough physical and mental (rather than moral) equality of the contractors in the state of nature, leads to rational prudence rather than the altruistic regard for others for their own sake, as beings of intrinsic moral worth, that we associate with Kant. Thus, in the most famous contemporary version of the moral contract, John Rawls's ([1971] 1999, 10) thought-experiment to determine what "the principles that free and rational persons concerned to further

their own interests would accept in an initial position of equality as defining the fundamental terms of their association," this scenario is not set up to be a process of *bargaining*, but rather, through the veil of ignorance, the modeling of an impartial other-regardingness.

Now it should be obvious that in this weak and minimal sense – contract as committed to society's being a human construct created by morally equal contractors whose interests should be given equal weight in the sociopolitical institutions thereby established – there is nothing that anybody, including those wishing to theorize gender and racial subordination, should find objectionable about contractarianism. Certainly it is not the case that feminists and critical race theorists want to argue, on the contrary, that sociopolitical institutions *are* natural rather than humanly created or that some humans *are* morally superior to others. At this highly abstract level of characterization, social contract theory is unexceptionable.

The problem really inheres, I suggest, in the assumptions that begin to be incorporated, the conceptual infrastructure that begins to be installed, at a *lower* level of abstraction, and the ways in which, whether explicitly or tacitly, they both vitiate the accuracy of the descriptive mapping, obfuscate crucial social realities, embed a certain conceptual partitioning (e.g., the private/public distinction), and thereby undercut the transformative normative egalitarian potential of the apparatus. So my claim is that our critical attention should really be directed at these "thicker" auxiliary shaping assumptions rather than the "thin" idea of the contract itself (in the minimal sense sketched above).

To begin with, on the factual/descriptive side, while it is true that society and the state are human creations, it is obviously false, as mainstream contractarianism classically implies, that all (adult) humans are equal contractors, have equal causal input into this process of creation, and freely give informed consent to the structures and institutions thereby established. The repudiation of this picture was, of course, the whole point of Rousseau's critique in his depiction of what could be termed the "class contract." The wealthy have differential power, and they manipulate the rest of the population into accepting sociopolitical arrangements to which they would not actually consent were they aware of their real consequences. So the human equality of the state of nature becomes the unnatural "political" inequality of a class society ruled by the rich. But this plutocratic polity is not to be thought of as the outcome of free and informed choice among symmetrically positioned individuals, but rather as the outcome of the collusion amongst themselves of *a social group* with far greater influence who have their own self-seeking agenda. The real "contractors" (in the sense of those who are controlling things and know what is going on) are the rich. Similarly, in Pateman's sexual contract and my racial contract, men and whites, through a mixture of force and ideology, subordinate women and people of color under the banner of a supposedly consensual contract. So the latter are the victims, the objects, of the resulting "contract" rather than subjects, freely contracting parties, and are oppressed by the resulting sociopolitical institutions.

But note that there is not the least inconsistency between pointing out these usually unacknowledged facts of class, gender, and racial subordination and continuing to affirm the "weak" (arguably defining) contractarian assertion of a humanly created society and polity. Contractarianism in *this* minimal sense is not refuted by the actual history of social oppression and political exclusion since it is still true that it is humans who have been responsible for this history. The problem is that the *actual* "contracts" and their agents have been quite different from how they have been represented in the mainstream literature. But far from the subordinated being motivated as a result to want to *deny* the role of human agency in creating the resulting polity, surely this is all the more reason for them to want to affirm, indeed insist upon it! Class society, patriarchy, and white supremacy come into being not "naturally" but as the result of collective human causality – in which, however, some humans have a far greater causal role than others, and subsequently benefit far more from the sociopolitical and economic institutions thereby established. The social contract in its guise as the domination contract captures these crucial "descriptive" realities while simultaneously, by emphasizing their "artificial" genesis, bringing them across the conceptual border from the realm of the natural into the realm of the political. Class society, patriarchy, and white supremacy are themselves "unnatural," and are just as "political" and oppressive as the (formally and overtly political) white male absolutist rule, predicated on white male hierarchy and moral inequality, that is the exclusive target of mainstream contractarians, and which the contract apparatus prescribes abolishing.

Similarly, on the normative/prescriptive side, the problem is obviously not that moral egalitarianism among humans is an unattractive moral ideal, but rather that in these actual contracts moral egalitarianism was never realized. Pateman (1988) and numerous other feminist

theorists over the past three decades (Clark and Lange 1979; Okin 1992; Pateman and Gross [1987] 1997) have documented the ways in which women have been seen as unequal by virtually all the male theorists of the classic canon, including (with the qualified and ambiguous exception of Hobbes) the very contractarians who, as paradigmatic theorists of modernity, so loudly proclaimed human equality as their foundational assumption. Moreover, this inequality has been manifest in their drawing of the public/private distinction, their conceptions of marriage, and their view of the appropriate place of women in the sociopolitical institutions supposedly "contractually" established. Though the literature on race is less extensive, a comparable body of work is now emerging (Goldberg 1993; Outlaw 1996; Mills 1997; Mehta 1999; Valls 2005). It argues similarly that people of color have generally been excluded from equal status in liberal thought, and have been seen (in my phrase) as "sub-persons" rather than full persons, thereby justifying their subordination in the various racialized sociopolitical structures – Native American and Australian expropriation, African slavery, Third World colonization – imposed on non-Europeans by Europe in the modern epoch.

But obviously neither feminists nor critical race theorists are seeking to reject moral egalitarianism as such. Rather, their complaint is that this egalitarianism has been *denied* to women and nonwhites both in theory and in practice, and that – at least for those of us still sympathetic to contractarianism – a genuinely inclusive "contract" would need to recognize this legacy and prescribe appropriate corrective and transformational measures in the light of its historic injustice.

The real source of the problem should now have emerged clearly. The mainstream story of the contract builds on top of, or conflates with, the eminently reasonable *minimal* assumptions of human sociopolitical agency and human egalitarianism an *additional* set of assumptions that are quite false, radically untrue to the historical record. Only some humans had effective causal input; only some humans had their moral equality recognized. In this fashion, it completely mystifies the creation (in the ongoing rather than *ab initio* sense) of society, denying or obfuscating the various structures of domination that are either transformed (class, gender), or that come into existence (race), in the modern period. Thus when Christopher Morris (1999b, x), in his introduction to his social contract anthology, writes: "There may, however, be some explanatory import to the idea of states of nature and social contracts that should not be overlooked. … our political institutions and arrangements are, in some sense, our creations," the obvious and classic retort is: Just who are "we"? ("What do you mean *we*, white man?") Did women create patriarchy? Did nonwhites create white supremacy? Obviously not – these "political institutions and arrangements" were created by *some* humans, not all. By its undifferentiated individualism, by its failure to advert to the existence of, and need to eliminate, "political institutions and arrangements" of group domination, the mainstream version of the contract sabotages the radical potential of the apparatus.

And it is here, I would suggest, that Hampton's contract theory becomes deficient and needs supplementation. Normatively, Hampton (2001) endorses a feminist Kantian contractarianism based on the intrinsic worth of all persons (as part, though not all, of a comprehensive ethic). Moreover, as noted at the start, she also argues for the revival of the descriptive dimension of contract theory. This proposal is in keeping with her emphasis elsewhere, for example in her book on political philosophy (Hampton 1997, xiii–xv), that the subject should not be thought of as purely normative, but as extending to factual issues as well. The political philosopher, Hampton argues, should seek to understand the "political and social 'deep structure' which generates not only forms of interaction that make certain kinds of distributions [of resources] inevitable but also moral theories that justify those distributions." But she never brings these insights together, in the sense of asking how the revived descriptive contractarianism she advocates would need to be rethought in the light of sexist exclusions, or how the descriptive and the normative sides of the contract would now need to be related given patriarchy as a "deep structure" with such a fundamental shaping influence on society (including, reflexively, the very contractarian moral theories generated about its founding). Instead, like Morris, she speaks of "political societies as conventionally-generated human creations" (Hampton 1993, 383) and, without asking who these "humans" and these "people" are, glosses the contractarian claim as equivalent to the assertion that "Certain institutions, practices and rules become conventionally entrenched (in a variety of ways) in a social system, and in so far as the people continue to support them, these conventions continue to prevail, and thus comprise the political and legal system in the country" (382).

Despite her feminism, then, Hampton does not press the further question of how we should think of this supposedly contract-equivalent "support" once the gender

subordination of half the population is taken into account. Pateman's *sexual* contract fills this theoretical gap, making clear that a "contract" of gender domination would more accurately illuminate than the mainstream version not merely the "deep structure" of a society based on patriarchy, but also its justificatory moral theories and how they become "conventionally entrenched." We would then be better positioned theoretically not merely to apply, in a gender-inclusive way, the Kantian contractarianism Hampton endorses, but to understand, on the metatheoretical level, why its previous (male) application has been so systematically and structurally, not just contingently, exclusionary. For we would then be in a position to recognize gender *itself* as a political system established by the contract, and prescribing accordingly its own ground rules about the cartography of the social and the appropriate distribution of rights, privileges, and freedoms in the polity.[3]

The relation between the normative contract and the descriptive aspects of the contract is thus necessarily more complicated in this revisionist contract theory than it is in mainstream contractarianism. In the mainstream contract, a (supposedly) consensual founding establishes an egalitarian moral code. But once this contract is unmasked as really a contract of domination, this code itself needs to become an object of scrutiny for us. Under cover of egalitarianism, the domination contract generates norms, and stipulations about how to apply these norms, that will themselves reinforce domination, and so which need to be interrogated by those seeking to end their subordination by the contract. A greater degree of reflexivity, of self-conscious metatheoretical distancing from and questioning of concepts and values, is therefore required, insofar as the new normative contract has to take account of realities ignored or misdescribed by the terms of the old normative contract – certainly in its original form, but also later, even when nominally updated and purged of its original sexism and racism.

For even when the contemporary contract seems to drop the descriptive dimension, as in Rawls's thought-experiment, it continues tacitly to manifest itself, if only by default, in an underlying factual picture, a version of history, and a set of assumptions about society that continue to reproduce the inequities and obfuscations of the historic contract, and, correspondingly, an apparatus that retains many of its deficiencies. The famous early feminist critique of Rawls was, of course, that knowledge of gender was not one of the things listed as being stripped from us behind the veil. Nor was there any awareness, in the "general" social and historical facts we take with us there, of the historic subordination of half the human race – surely "general" enough to have made the cut! By assuming heads of households as the representative contractors, by taking the family as ideal, by not challenging the role of the public/private distinction, Rawls naturalized the family in the same way the classic contractarians did.

Consider now the reclamatory work of Susan Moller Okin (1989). Okin's insight was to recognize that Rawls's moral contractarian apparatus had the potential to go beyond Rawls's own conclusions, once we admit a "veiled" knowledge of crucial nonideal facts on gender:

> There is strikingly little indication, throughout most of *A Theory of Justice*, that the modern liberal society to which the principles of justice are to be applied is deeply and pervasively gender-structured. Thus an ambiguity runs throughout the work…. On the one hand, as I shall argue, a consistent and wholehearted application of Rawls's liberal principles of justice can lead us to challenge fundamentally the gender system of our society. On the other hand, in his own account of his theory, this challenge is barely hinted at, much less developed. … [This] potential critique of gender-structured social institutions … can be developed by taking seriously the fact that those formulating the principles of justice do not know their sex [behind the veil]. (89, 105)

Okin thus seeks to appropriate the contract for feminism, and in the closing chapter of her book shows how such a critique of a gender-structured social order can be developed from behind the veil. Correspondingly, in her review essay (1990) on *The Sexual Contract*, she criticizes Pateman for rejecting in principle (as Okin sees it) the attempt "to employ contractual thinking in the service of feminism" (659). But we can now appreciate that there need be no principled opposition at all between their two approaches once we recognize that they are engaged in different tasks, with Pateman's view of the contract as intrinsically subordinating paradigmatically meant as a specific characterization of the Hobbesian/proprietarian contract in particular. Okin's skepticism about the sexual contract idea – "it is not clear to me what we gain in understanding by tracing [the forms of patriarchal power] to a supposed contract made by men" (660) – misses the value of a theoretical innovation that can provide the very knowledge behind the veil that Rawls's idealized contractarianism avoids. The gender-structured social institutions Okin cites are precisely

what are summarized in Pateman's nonideal contract: the sexual contract. So we can bring them together under a division of conceptual labor in a *common* enterprise: Pateman doing the actual nonideal contract, Okin doing the normative contract. As emphasized, the relation between the descriptive and normative sides of the contract becomes radically different once the descriptive contract is acknowledged to be a domination contract. For as a "contractor" in the original position, one is now making a prudential choice informed by the possibility of ending up female in a society structured by the sexual contract. Gender subordination in its manifold dimensions and institutions can thus become the object of normative critique, since these "general facts" are not ignored as in the mainstream contract. The full ramifications of patriarchy not just for the family but society in general (the state, the legal system, the differential status of men and women), as well as typical male moral psychology and dominant androcentric ideology, can all now legitimately be considered within a "contractual" framework.

In this fashion, I claim, we could bring together the crucial insights of Hampton, Pateman, and Okin to produce a feminist contractarianism stronger than any of them individually: Hampton's *moral* Kantian contractarianism, informed behind the veil by Pateman's *factual* Rousseauean contract, synthesized so as to generate an expanded variant of Okin's *nonideal* version of Rawlsian contractarianism, all deployed to achieve gender justice. From Hampton, the idea of contract as a descriptive metaphor capturing the key insight of society as a human creation, and the normative endorsement of Kantian contractarianism. From Pateman, the idea that the actual (factual) contract is an exclusionary sexual contract, not a gender-inclusive one, that incorporates assumptions of female inequality and inferiority, thereby shaping both society and, reflexively, our ideas about society. From Okin, the idea that a feminist agenda on justice can nonetheless still be promoted in a contractarian framework by imagining oneself behind Rawls's veil with knowledge of these nonideal gender realities. So if in the mainstream contract the circumstances of the creation of the sociopolitical imply the moral endorsement of the institutions thereby created, in the radical use of the domination contract, this is inverted. The characterization of the descriptive contract here serves to alert us to the structures of institutional oppression, which need to be dismantled.

The Domination Contract

Let me now turn to a more detailed account of the contrast between these two contracts, and the ways I think progressives can use the domination contract to address issues of gender justice, and social justice more generally. Consider the following table, which summarizes what I see as the crucial differences:

MAINSTREAM CONTRACT		*DOMINATION CONTRACT*
Ideal theory	*Ethical Framework*	Nonideal theory
Ground zero (state of nature, original position)	*Starting Point*	Unjust stage of society
None presupposed	*Role in History*	Historical account presupposed
People as pre-social atomic individuals	*Basic Agents*	People as members of social groups in relations of domination and subordination
Equality (ostensibly)	*Status Norm in Society*	Inequality (explicitly)
Typically mutually beneficial	*Economic Transactions*	Typically exploitative
Egalitarian	*Juridico-Political Sphere*	Biased toward dominant groups
Class, race, and gender as natural	*Human Divisions*	Class, race, and gender as artificial
Basically imported from nature	*Human Psychology*	Fundamentally transformed by society (*amour de soi* → *amour propre*)
Individual bias, "passions," "inclination," short-term self-interest	*Obstacles to Accurate Social Cognition*	Dominant-group interests, dominant-group ideation
Human nature	*Locus of Problems*	Corrupting social institutions
To create a just society (laws, government, etc.)	*Goal of Contract*	To reinforce and codify unjust institutions
Readers' endorsement of the contract as creating an ideally just society	*Heuristic Purpose for Us*	Readers' condemnation of the contract, and corresponding awakening to systematic social injustice and the need for appropriate corrective measures to realize a just society

The key points are as follows:

(i) The overarching framework is nonideal theory. In the historic version of the mainstream contract, conceived of (though falsely) as consensual and inclusive, the circumstances of the polity's founding are supposed to confer on it a positive normative status. As such, the mainstream contract assumes ideal circumstances: society and government are brought into existence in a way that is fair, respecting the rights of those involved. By contrast, we know perfectly well from history that oppression of one kind or another has been the social norm since humanity left the hunting-and-gathering stage. The domination contract begins from this simple reality. Though the contemporary Rawlsian contract drops any historical claims, it nonetheless inherits this orientation in that Rawls sets out to ask what principles people *would* choose in ideally just circumstances. Thus he makes clear throughout the book that his contract is an exercise in ideal theory, intended to work out "the principles of justice … defining a perfectly just society, given favorable conditions," and presuming "strict compliance" ([1971] 1999, 308–9). However, he claims that this starting-point is ultimately intended to illuminate the nonideal: "If ideal theory is worthy of study, it must be because, as I have conjectured, it is the fundamental part of the theory of justice and essential for the nonideal part as well" (343).

But a case can be made that, however well-intentioned, such a starting-point handicaps his enterprise, and certainly the manifest failure in his own work, and in the thousands of articles it has inspired over the last thirty-plus years, to apply his theory to the "nonideal" realities of gender and race does not encourage confidence in it. By definition, problems arise in nonideal theory that do not arise in ideal theory, and one will need mapping concepts and data sets that are not readily extrapolatable from those of ideal theory. So it raises the question of how useful, let alone "essential," it actually is. The mainstream contract – unsurprisingly given its conceptual ancestry – tends to abstract away from issues of social subordination, since historically it is really predicated on the experience of the bourgeois white male subject, that subsection of the population emancipated by modernity. By contrast, the revisionist contract, through utilizing the device of the domination contract, makes such issues its primary focus, since (following Rousseau) it starts not from the state of nature but from an *already-existing* unjust society, and then asks what measures of justice would be necessary to correct for them.

At the very least, then, Rawlsian ideal theory needs to be informed by the nonideal. As just pointed out, to the extent that Rawls's method has been found useful in theorizing gender justice, most notably in Okin's (1989) work, it has been precisely through the *repudiation* of the key Rawlsian assumption of the ideal nature of the family, as a supposed paradigm of human interaction to be sharply contrasted with the interaction of strangers, and thus not requiring justice to regulate it. The disadvantaging of female children and women is only able to appear on the conceptual radar screen through the rethinking of the public/private boundary, and the unsentimental scrutiny of the actual, real-life family. In the case of racial justice, the nonideal looms even more definitively, since measures of compensatory justice (affirmative action, reparations) presume by definition the need to correct for a history of *injustice* that Rawls's ideal-theory focus avoids (Pateman and Mills 2007, ch. 4). In other words, ideally, behind the veil, one would not choose a white-supremacist society, since one would not know whether one was white or not. But this does not help us in determining – given the historic fact of white supremacy – what compensatory measures justice demands of us now. It is noteworthy that while in *The Cambridge Companion to Rawls* (Freeman 2003) there is at least a chapter by Martha Nussbaum (2003) called "Rawls and Feminism," there is no comparable chapter – indeed no section in *any* chapter – on race. And apart from the fact that the whiteness of the profession is even more overwhelming than its maleness, apart from the fact that most white political theorists, whether political scientists or political philosophers, take for granted what Rogers Smith (1997) describes as the misleading "anomaly" view of American racism, the role of the ideal-theory framework itself must surely be a major contributory factor to this pattern of systematic omission and evasion. What has supposedly been intended to facilitate discussion of the remediation of injustice has served instead to obstruct it.

(ii) Relatedly, the domination contract is necessarily *historical*. Though contemporary poststructuralism is something of an exception, radical political theory, whether of class, gender, or race, traditionally emphasizes the importance of investigating the real history that has brought us to this point, and that explains who the political players are and what are their agendas. Thus it seeks to contest both mystified histories and ahistorical naturalized accounts that deny *any* history, which simply sever the present from the past. Marx (to cite a very unfashionable figure) was famous for excoriating liberals

and those he dubbed the "vulgar" economists for their timeless and decontextualized portrayal of the "free exchange" between capitalist and worker, without attention to the sequence of events (for example, the enclosures in Britain) that had reduced people who had previously been able to make a living from the land to workers with only their labor-power to sell. In the radical use of contract he pioneers, Rousseau establishes the precedent by giving an alternative narrative – naïve by our standards, but expressing underlying truths nonetheless – of the origins of class inequality. Similarly, Pateman offers a conjectural account of the origins of patriarchy, while I – comparatively advantaged by the fact that European expansionism takes place in the modern period, accompanied by massive documentation – was able to draw on actual events in describing how global white supremacy was established. But in all three cases, the crucial point is that the nonideal structure of domination in question, whether of class, gender, or race, is not "natural," not the outcome of the state of nature, but a sociohistorical product. The greater realism of radical contractarianism as against mainstream contractarianism is manifested in its recognition that the "contract" is really (à la Hampton) a way of talking about the human creation of sociopolitical institutions as the result of previous sociohistorical processes, not ex nihilo from the state of nature.

(iii) And this history is, of course, one of group domination and subordination rather than the classically individualist social ontology, and of transactions among equal individuals, of the mainstream contract. The general facts of history and society that people take behind Rawls's veil apparently do not include the subordination of women or the subordination of nonwhites. (There is, of course, some sensitivity to class issues.) But we are certainly not bound by Rawls's ignorance. What makes radical contractarianism better suited to make use of the device of the veil is its demystified, nonidealized view of recent human history as largely a history of social oppression, so that groups in interlocking patterns of domination constitute the real social ontology. The class, sexual, and racial contracts each capture particular aspects of social domination (while missing others), so that, whether singly or (ideally) in combination, they register the obvious fact that society is shaped by the powerful acting together, not individuals acting singly.

As such, the domination contract, which makes groups the key players, is obviously truer to the actual history of the world. If, as argued at the start, contractarianism in the minimal sense does not specify who the crucial human actors are that create the sociopolitical, then a group-based contractarianism is not a contradiction in terms, and we should embrace it as a more useful philosophical concept for political theory. While it may be an interesting intellectual exercise to work out just how Hobbesian individuals would be able to self-interestedly come together to create Leviathan, this conundrum sheds so little light on the actual history of humanity that it is an exercise largely without point outside of very restricted circumstances, and so – if not to be abandoned altogether – is surely not deserving of the huge amount of attention it has received in the secondary literature. The descriptive side of the contract is more accurately represented in the domination contract, and is certainly vastly more illuminating as a conceptual framework for orienting the normative contract, since it points us toward the really important moral issues, namely, how do we dismantle these structures so as to achieve genuine egalitarianism? With such knowledge behind the veil, Rawlsian contractors would not be able to ignore gender and racial subordination as they currently do.

As a corollary, in understanding human motivation, one needs to take account of people's group membership, and how, whether as privileged or subordinated, it shapes their psychology and their cognition. Rousseau's famous critique of his contractarian predecessors was that they attributed to natural man what was really the psychology of civil man. A healthy *amour de soi* had been corrupted into an unhealthy *amour propre*, which contractarians like Hobbes, not recognizing its social genesis, then took to be part of the human condition as such. Similarly, in Marx's critique of a specifically bourgeois vision of *homo economicus*, in feminist theorists' work on the production of "male" and "female" traits by gendered parental upbringing, in critical race theorists' analyses of "whiteness" and its influence on its possessors, the conceptual door is opened to a much richer set of resources for theorizing actual human motivation and its social shaping than in the impoverished psychological framework of mainstream contractarianism.

(iv) The relation between equality as a value and the contract also needs to be rethought. The mainstream contract is, of course, famous for its nominal egalitarianism, its emphasis that in the state of nature all men are equal, whether in physical and mental abilities, as in Hobbes, or in moral status, as in Locke and Kant. And this equality is then supposed to translate itself (in the societies created by these equal men) into a juridico-political equality, equality before the law and equality of

citizenship, and in economic (and other) transactions that are nonexploitative in nature.

But however attractive this may be as an ideal, it obviously bears no correspondence with real life for the majority of the population, even in the modern period. Rousseau's concern is that the artificial class inequalities of society undermine this moral equality, and in Marx's more sophisticated treatment, this is elaborated into the point that formal equality at the level of the relations of exchange is substantively undercut by economic compulsion at the level of the relations of production. But for gender and race, the situation is even worse. As feminists have long documented, in the case of gender the "equality" was originally not even nominal, let alone substantive, since with the qualified exception of Hobbes, all the classic contractarians saw women as inferior to men, and so as appropriately to be regulated by male authority. Moreover, this theoretical inferiority was, of course, also manifest practically, in real life, in legal and political institutions. So the value that is perhaps most intimately associated with the social contract tradition – equality – was not at all meant to be extended to half the human race. Likewise, as various theorists of race and imperialism have pointed out, once one examines the representations ("savages," "barbarians") and the experiences of people of color in the modern period – expropriated and exterminated Native Americans and Australians, enslaved and later Jim-Crowed blacks, colonized Third Worlders – it becomes clear that both in theory and in practice, only white men were equal. Not merely as a matter of fact, but as a matter of proclaimed moral and legal norms, nonwhites had a schedule of rights that was inferior to nonexistent – and were thus non- or at best second-class citizens. How, then, can it make sense to conceptualize society as if, in the modern period, equality becomes the generally accepted norm, when in fact such a small section of the population was actually seen as equal?

In the domination contract, by contrast, this reality is frankly faced: *inequality* is the actual social norm obtaining for the majority. The evasive conceptual assimilation of the status of white women and nonwhites to the status of white men that is embedded in the mainstream contract, thereby burying the distinctive problems the former groups face, is thus precluded. Correspondingly, the radical contract recognizes that the crucial juridico-political institutions are not egalitarian in their functioning either, but biased in various ways by class, gender, and racial privilege. The huge body of literature standardly ignored by contractarians – the original left analyses of the workings of the state in capitalist society, the more recent work on the gendered and racial state (MacKinnon 1989; Marx 1998; Goldberg 2002), as well as all the biases in the legal system – can then legitimately enter here, rather than being conceptually blocked by the otherworldly and completely fanciful pictures of a neutral juridico-political realm assumed by mainstream contractarianism. And far from fair and reciprocal advantage being the norm – Rawls suggests, absurdly, that we think of society as *actually* "a cooperative venture for mutual advantage" ([1971] 1999, 4) – exploitation of various kinds – of class, gender, and race – is the norm (Sample 2003). Accordingly, one of the main aims of the normative contract will be the elimination of these structures of exploitation – unequal chances for the poor and working class, sexual exploitation, differential white advantage and corresponding wealth (Barry 1984; Oliver and Shapiro 1995; Shipler 2004) – that the individualist perspective of mainstream contractarianism tends to obfuscate.[4] In addition, the group interests of the privileged, and their resulting desire to maintain their privilege, will become both a material obstacle to progressive change and an ideational obstacle to achieving social transparency, which will need to be taken into account in theorizing the dynamics of social cognition and the possibilities for social transformation. So again, one will be equipped with a far more sophisticated and realistic view of the workings of the polity and its dominant illusory self-conceptions than in the mainstream contract.

(v) Finally, apart from (I would claim) all of these obvious merits, the domination contract has the great and overwhelming virtue of conceptualizing class, gender, and race as *themselves artificial*, not natural as in the mainstream contract. So it is not merely that society is seen as a complex of groups in dominance and subordination, but that the formation of the groups *themselves* is a product of the contract(s). The familiar claim of recent radical democratic theory that gender and race are "constructed" – not just the systems (patriarchy, white supremacy) organized around them, but what we take to be gender and race themselves – is thus perfectly accommodated.

Rousseau deserves the credit for this too, though, as noted, the lack of discussion in the secondary literature of his class contract, and his own notorious sexism, means that he has not been fully recognized for it. As emphasized at the start, the social contract as it comes into its own in the modern period emphasizes the "artificiality" of society and the polity. These are human-made, not organic growths as in the discourse of antiquity, and the

descriptive side of the contract expresses that insight. But Rousseau goes a startlingly radical step further: he suggests that in a sense humans themselves are artificial, human-created products. What to his predecessors were "natural" divisions of class he sees as a result of domination and convention. Extended to gender and race, this gives us the sexual and racial contracts, which in a dialectical relationship both consolidate in an oppositional relationship with one another the entities of men and women, whites and nonwhites, and create these groups themselves. So the (bad) contractual transformation of the nonideal descriptive domination contract is far more thoroughgoing than in the mainstream descriptive contract: it is social institutions that form and corrupt us. And the implications for the (good) contractual transformation envisaged in the ideal prescriptive contract are, correspondingly, far more sweeping than in the mainstream version, since radical contractarianism then points us toward the necessity not merely of dismantling these structures of domination, but *the contractors themselves* as intrinsically gendered and raced beings. As Marx envisaged a classless society, so the sexual and racial contracts, emphasizing the constructed nature of gender and race, open up for us the possibility and desirability of a genderless and raceless society.

Appropriating the Contract

My recommendation, then, is that we – egalitarians, feminists, critical race theorists, and all progressives in political theory concerned about real social justice issues – work toward a paradigm shift in contractarian theory, not conceding the contract to mainstream theorists, but seeking to appropriate it and turn it to emancipatory ends. Recall Kymlicka's observation (1991, 196) that contract is really just a "*device* which many different traditions have used for many different reasons." Rawls ([1971] 1999, 19), similarly, sometimes refers to his updating of the contract (the veil, the original position) as an "expository device." So given this essentially instrumental identity of the contract, there is no principled barrier to developing it in a radical way: the domination contract as an "expository device" for nonideal theory. Once one recognizes how protean the contract has historically been, and how politically pivotal is its insight of the human creation of society and of ourselves *as* social beings, one should be able to appreciate that its conservative deployment is a result not of its intrinsic features, but of its use by a privileged white male group hegemonic in political theory who have had no motivation to extrapolate its logic. Far from being a necessarily bourgeois or necessarily sexist or necessarily racist apparatus, contractarianism has a radical potential barely tapped, and can serve as a vehicle for translating into conventional discourse most, if not all, of the crucial claims of radical democratic political theory.

The key conceptual move is to strip away the assumptions and corresponding conceptual infrastructure of an individualism once restricted to bourgeois white males and still shaping the contract's features today, and replace it with an ontology of groups (Young 1990). Rousseau's class contract, Pateman's sexual contract, my racial contract (ideally, at some future stage, combined, of course – see for example Pauline Schloesser's [2002] work on "racial patriarchy"), can all then be conceptualized as still being within the contractarian tradition in the minimal defining sense outlined above, viz, the assertion of, indeed insistence upon, the historic role of human causality in shaping the polity and the commitment to the substantive realization of moral egalitarianism in its necessary transformation. By contrast, the assumptions of the mainstream contract in its contemporary form, presuming universal inclusion and general input, handicap the apparatus in tackling the necessary task of corrective justice by, in a sense, assuming the very thing that needs to be substantively achieved. Once one adds women of all races, and male people of color (to say nothing of the white male working class), one is actually talking about the *majority* of the population's being excluded in one way or another from the historical contract, and its present descendant! A theoretical device whose classic pretensions are to represent universal sociopolitical inclusion actually captures the experience of just a minority of the population. Inequality is not the *exception* but the *norm* in modern societies.

Far from the "domination contract" representing "minority" concerns, it actually provides an accurate depiction of the situation for the majority. And far from being anti-Enlightenment, it has a much better claim to be carrying on the Enlightenment legacy. Getting the facts right is supposed to be an essential part of the Enlightenment mission, and in its mystified picture of the origins and workings of modern polities, mainstream contractarianism certainly does not do that. And if the Enlightenment is supposed to be committed to moral egalitarianism and a transformation of society to realize this imperative, then ignoring the ways in which class, gender, and race void nominal egalitarianism of real substance is hardly the way to achieve such equality. Through the more accurate mapping of the domination version of the

descriptive contract, the emancipatory reach of the egalitarianism of the prescriptive contract can then gain its full leveling scope rather than being, as at present, effectively confined to achieving the freedom and equality of a few.

In sum, a case can be made that radical contractarianism, which deploys the domination contract as its descriptive mapping device, is, far from being a theoretical usurper, the *true heir* to the social contract tradition at its best, and it is mainstream contractarianism that has betrayed its promise. If war is too important to be left to the generals, one could say that social contract theory is too important to be left to the contractarians. We should reclaim it.

Notes

1 Pateman and I have now written a book together (Pateman and Mills 2007).

2 This hybrid formulation raises further complications, since property in the person is, of course, famously associated with Locke, not Hobbes, and it is Locke who is centrally invoked by libertarian theorists in the United States. But I will not pursue this issue.

3 By contrast, Hampton's (2001, 352) apparent naivety about Kant is well illustrated when she writes at one point: "Kant also has opponents who, while agreeing that our value is noninstrumental and objective, reject the idea that all humans are of equal value – for example, those who think human beings of a certain gender or race or caste are higher in value (and so deserving of better treatment) than those of a different gender, race, or caste." But of course *Kant himself* was a notorious sexist and racist, for whom women could only be "passive citizens," while blacks and Native Americans were "natural slaves." (See Eze 1995; Schröder 1997; Bernasconi 2001; 2002.) The concepts of the sexual and racial contracts enable us to understand how these seemingly contradictory commitments are reconcilable, not merely in Kant but in most other thinkers of the period, through the workings of white male moral psychologies and moral boundaries created by the exclusionary "particularistic universalism" of the domination contract.

4 Rawls's left-liberal, social democratic contract is, of course, good on class – that is its main strength, from a radical point of view – though even here some on the political left argue that it did not go far enough and was unrealistic or evasive about the implications for political power and people's social status of the economic inequalities it left intact. See, for example, Peffer (1990).

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38

Race, Sex, and Indifference

Carole Pateman

Voters in Alabama were asked in 2000 to vote on a constitutional amendment to eliminate a provision prohibiting interracial marriage. This had remained on the books although in 1967 the US Supreme Court, in Loving v. Virginia*, had finally declared such laws to be unconstitutional and a Federal District Court judge had told Alabama in 1970 that the provision could not be enforced. The amendment passed, with 40 percent of voters against it.*

In December 2003, Essie Mae Washington-Williams revealed at the age of 78 that she was the daughter of Strom Thurmond who had died in June, aged 100. Thurmond, a member of the United States Senate for 48 years, was for most of his life one of the most prominent supporters of racial segregation. Washington-Williams's mother, Carrie Butler, was the Thurmond family's black maidservant and only 16 when she gave birth. Thurmond never publicly acknowledged the existence of his daughter.

About 1,200 Danish couples were living in Malmo in Sweden in 2004 because they were partners in "mixed" marriages. In early 2006 about 60 couples were moving there each month. Changes to Danish immigration law in 2002 included requirements about housing, finance and family reunion that make it very difficult for interracial partners to remain in Denmark.

The sexual and racial contracts have been intimately connected since modern states (civil societies) began to be created in the seventeenth century and the three dimensions of the original contract – social, sexual, and racial – have cut across and reinforced each other. The state has upheld laws and policies that have consolidated structures of racial and sexual power, the sexual contract has been refracted through race, the racial contract has shaped sexual relations, and both contracts have structured citizenship. Modern civil societies developed as patriarchal "racial states" (Goldberg 2002). It not possible fully to understand or analyze either the major institutions of modern civil societies or the construction of the world system of modern states without reference to both race and sex. The idea of "race" and the conviction that women must be governed by men became interwoven social and political forces that were at the heart of structures of power and subordination and molded the beliefs and lives of individuals.

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My analysis in *The Sexual Contract* are tied more closely to early modern theories of an original contract than is Charles Mills's conception of the racial contract. I confined my argument to Britain, the United States, and Australia, societies that can plausibly be seen as contractual "civil societies" (the modern political order created to replace "the state of nature"). Mills ranges much more widely: "the Racial Contract is *global*." I agree, but part company with him when he writes of the application of "the social contract" to "non-Europe, where it becomes the Racial Contract" (Mills 1997: 20, 42). My argument is not that the "social contract" becomes the racial contract, or that the latter has separately to be applied. The racial contract is one dimension of the original contract and shapes Britain as well as British colonies, although in a different fashion. Most colonies were not seen as *terra nullius* and transformed wholesale in the manner of (what became) the United States, Canada, or Australia. Rather, British rulers made enough changes to allow power and control to be exercised and wealth extracted. Thus, I agree with Mills that economic exploitation is central to the racial contract, but I do not see it as "the *most* salient" aspect (Mills 1997: 32). Sexual difference is just as important for the racial contract.

My approach here is, for the most part, similar to my book. I use selected historical illustrations – this time from Britain and the United States – to show connections between the sexual and racial contracts and to provide a context to consider the relationship today. I refer to "illustrations" because an adequate discussion of the extraordinarily complex interrelationship between the sexual and racial contracts cannot possibly be undertaken in a single chapter. In section IV I broaden my discussion to include economic exploitation, move to the present and to a more diffuse sense of "contract", and draw on Norman Geras's (1998) argument about the contract of mutual indifference.

The concepts of race and racism are often conflated but my discussion here is not about racism. My interest is in the development of the idea of race as part of the structure of a modern state. "Race" is necessary for and breeds racism, which remains a major problem, anti-Arab racism being one of its most prominent recent manifestations; the UN World Conference Against Racism in 2001 was surrounded by clamor and controversy.

"Race" developed differently in the United States and Britain and this further complicates any discussion. In the United States, founded in slavery and the forcible seizure of the territory of Native peoples, racial segregation was enforced by law until the 1960s. British racial conceptions and practices were played out in the context of a vast, diverse empire (initially including the American colonies) in which, as Linda Colley (2002) has recently stressed, the British rulers were a small minority.[1] There was also a metropolitan black population; by the late eighteenth century there were at least 10,000 blacks in London, including a small middle class.[2]

I "Race" and Reproduction

From the early modern period onward, "race" became the vehicle through which certain groups of humans were deemed to be inferior, to be at the margins of humankind or even outside of humanity altogether. Accounts of differences between groups of people and between men and women have a long history but familiar, modern conceptions of "sex" and "race" began to be developed in the seventeenth and eighteenth centuries, together with theories about the stages of "civilization." Indeed, theorists of an original contract played an important part in the emergence of modern ideas about racial and sexual differences and hierarchies, albeit that their theories were couched in the subversive language of universal freedom and equality.

Kant's arguments are of particular interest. In *The Sexual Contract* I discussed his endorsement of the subordination of women, and Robert Bernasconi (2001, 2002) has argued that he was the first philosopher to develop a concept of race, in the sense of a clearly defined notion with scientific status (see also Eze 1997 [1995]).[3] Kant upheld both the sexual and racial contracts, but now that attention has been drawn to embarrassing aspects of his arguments, two common responses are to detach the offending parts from his major principles and arguments or to explain them away.[4] But these strategies ignore his characterization of women and Africans and that he lectured and published on the subject of race for several decades (see: Kant 1965 [1764], 1978 [1798], 2000 [1777], 2001 [1788]).

For Kant, the concept of race, like the Idea of marriage, is necessary; it is dictated by reason from "the viewpoint of natural history." This viewpoint deals with the "natural science of origins" and so is much more than a description of nature (Kant 2001 [1788]: 40; see also Kant 2000 [1777]: 13 n1). The crucial racial differences are permanent and they arise from reproduction and descent. Kant argued that there were "original seeds of the human line of descent" and, together with hereditary predispositions, these were implanted for the

purpose of peopling the earth (2001 [1788]: 42). The seeds and predispositions produced the different races of humans (in "Of the Different Human Races" he distinguishes four).[5] In principle, the assumption about innate seeds implies nothing about the worth of the human races to which they give rise; all seeds could produce races of equal value despite some fundamental variations among them. Kant, however, makes it clear that white men are the only individuals who possess the capacities required to grasp the universal principles fundamental to civil society and thus the capacities to govern others.[6]

The natural attributes of nonwhite races and women were widely seen in similar terms; in particular, both were seen to lack or have a lesser capacity for reason and self-government. By the late eighteenth century, questions about such issues as why Africans were black, whether or not humans all descended from one original couple as laid down in the Bible (monogenesis vs polygenesis), and how human beings were to be classified had become matters of extensive debate and controversy. "Races" began to be seen as distinct human groupings, recognizable by such markers as skin color, hair texture, skulls, facial features, and specific dispositions and attributes.

The early eighteenth century, and the development of slavery as a condition suffered only by Africans, marked a turning point. From the beginning of the seventeenth century significant numbers of Britons had been captured by corsairs from Barbary and sometimes enslaved, which made it hard to see slavery in racial terms. But in 1672, the Royal Africa Company was established in Britain with a government monopoly to supply African labor to the colonies, and "after the 1730s, slavery became rhetorically established as a polar opposite to Britishness" (Colley 2002: 64). Or, in other words, freedom became signified by a white skin.

The *blackness* of (sub-Saharan) Africans became perceived, in itself, as a mark of lesser humanity. Europeans came to believe that they were *white* and hence superior. "Black" Africans were decisively marked out from "white" Europeans and the civilization and freedom of whites. By the early eighteen century, lifetime servitude was established for black, but not white, indentured laborers in Virginia (see Section II). As Europeans seized more overseas territories and imposed colonial rule, the belief in white superiority fostered a consciousness among other "races" that they were "nonwhite." My historical illustrations are drawn from "white" and "black" since this antinomy – and Africa – lies at the heart of the construction of the political fiction of race. Other developments in the United States, such as the prohibition of Chinese immigration from 1882 until 1944, the expulsion of nearly half a million Mexican American citizens and Mexican nationals across the border between 1931 and 1935, and the internment of most Japanese American citizens in camps during the Second World War, were an outgrowth of the initial creation of a racial order of "whites" who ruled over "blacks."

In the late nineteenth and early twentieth century, fairs, ethnological exhibitions, and "human zoos" (Bancel et al. 2000) provided a graphic portrayal of white beliefs about "race." Various displays were prompted by the Crystal Palace exhibition in London in 1851. In the United States, 100 million people attended the world fairs held between 1876 and 1916 (D. King 2005: 39).[7] By the early twentieth century, "the world on view at the fairs had been anthropologized and racialized according to social Darwinian taxonomies provided by leading lights of the anthropology profession" (Rydell 2002: 224). Exhibitions of humans included reconstructions of colonial victories. In France the stocking of displays before the First World War followed overseas conquests: "Tuaregs were exhibited in Paris after the French conquest of Timbuktu in 1894, and the first Malagasies appeared a year after the occupation of Madagascar. The exhibition of Amazons from Abomey followed the defeat of King Behanzin in Dahomey" (Bancel et al. 2000: 9). Nor have echoes of such exhibitions entirely died away. In 2005 there was an outcry in Germany after Augsburg Zoo put on a show of African culture and featured a dance display next to a cage containing baboons (Pancevski 2005).

Human racial exhibitions were also sexual curiosities. The most (in)famous example is that of Saartjie Baartman, labeled the "Hottentot Venus," who was a member of the Khoisan people from the Cape of South Africa. She, and particularly her large buttocks and genitalia, was displayed in London and Paris from 1810; doctors and anthropologists examined her. Robert Wedderburn, a Jamaican abolitionist, was instrumental in a case being brought against her exhibition in London on the grounds that it was indecent and tantamount to slavery, but the court rejected the claim, ruling that she had freely entered a contract. Baartman died aged 25, and after her death she was dissected and her remains put on display until 1976 in the Musée de l'Homme in Paris. Nelson Mandela finally succeeded in obtaining her return to South Africa after he became President.

A good deal of effort and some remarkable contortions were required to fit people into a tidy racial

classification. Who counted as "white," and thus privileged, was the most difficult problem. Perhaps the best-known proclamation of whiteness is when Japanese in South Africa under apartheid were deemed honorary whites for economic reasons. The whiteness of immigrants to the United States from Ireland and Southern and Eastern Europe was in question for a long time.[8] In 1790, shortly after ratification of the United States constitution, Congress limited naturalization to "free white persons." From the 1870s a series of cases was brought to decide which applicants for naturalization counted as white.[9] Naturalization and citizenship involved both the racial and sexual contracts. On the one hand, if a woman was not "white" and so ineligible for naturalization she did not, despite coverture, take on the citizenship of an American husband. On the other hand, even if eligible she could not be naturalized if her husband was ineligible (see also Cott 2000: 165).

John Stuart Mill remarked in his *Subjection of Women* (1989 [1869]) that the elaborate social and political stratagems and intimidation required to keep women in their place demonstrated that there was nothing natural about subjection. In one sense, the belief that women's subordination springs directly from biology is more plausible than analogous claims about racial differences. A basic fact about humans is that women, not men, become pregnant and give birth. Human reproduction provides a biological thread running through sexual difference. But it is a very thin thread indeed and is far too slender to bear the weight placed upon it by patriarchal conceptions of sexual difference, views of proper relations between the sexes and women's place in the world. These are not entailed by biology but matters of culture, politics, and power. That is to say, as Mill saw (and as I argued in *The Sexual Contract*), "masculinity" and "femininity" are political constructs.

"Race" is also a political construct, and more completely so than alleged sexual difference. Like an original contract, it is a political fiction, a "rational absurdity" (Gilroy 2000: 14; see also Appiah 2000). Race has no natural or scientific basis. The "science" of race, which reached its peak in the racial classifications of the nineteenth century, was challenged as soon as it began to be developed – Herder, for example, took a different position from Kant – and has been largely discredited since the Second World War; UNESCO rejected a biological basis for race in 1948. A further blow has come from recent advances in genetics which show that variations between human populations are not much greater than genetic variation within those same populations (which is not to deny that some humans are, for example, more genetically susceptible to certain diseases than others). And people are, so to speak, voting with their feet in increasing numbers by forming interracial partnerships.[10]

Nonetheless, race is popularly seen in biological terms as a matter of "blood." Blood was used in law to classify individuals according to race in the United States. As recently as 1974 the Supreme Court of Louisiana upheld the view that anyone with 1/32 of African blood was black (Allen 1994: 27–8). Now, bloodlines are lines of descent – and here is the point at which human reproduction enters and sex and race come inextricably together. If the idea of race is to have social and political purchase, then populations perceived in racial terms have to maintain themselves over time. Women must have babies if a population is to continue; or, at least, the "right" women must do so and they must reproduce with the "right" men if the population (its bloodline) and its culture are to remain pure. Race is about reproduction and sexual relations, about purity, degeneration, and the right human stock.

II Race and Miscegenation

To create societies in which race was an ordering principle demanded a great deal of theoretical, social, political, and cultural work – and much violence. Individuals had to learn to see themselves as members of races and to believe that one race was superior to another. This change in consciousness demanded a particular form of life in politics, law, the economy, and in everyday behavior and sexual relations.

A racial order was established in the first stages of settlement in the colony of Virginia. The "white race" – that is, a social category based on skin color whose members exercised power over, and enjoyed superior standing to, all those with black skins – came into being in the early part of the eighteenth century (Allen 1997). The seeds for the creation of a racial power structure were sown in the seventeenth century. Theodore Allen remarks that initially there was little point in landowners setting up a dual system of service, limited term for whites and lifetime servitude for Africans, because "the death rate was so high for several decades that there would have been no practical advantage for employers in such a distinction" (1997: 178). From the 1620s it became common practice for tenants to be transferred from one landowner to another without their consent and, through a variety of means, the term of service of indentured laborers, both

African and white, was lengthened.[11] By the 1640s there were indications that lifetime servitude was to be reserved for Africans and that an aristocracy of skin color was to be created. Nevertheless, until late into the seventeenth century some Africans owned land, engaged in commercial transactions, and even made use of white laborers.

The establishment of a modern racial system meant that "race" had become widely understood. Moreover, once race became an ordering principle in social life everyone was caught up in it, irrespective of their individual beliefs. Indentured Africans were turned into property and measures were taken to deprive free Africans of rights and exclude them from various trades. Conversely, "white" men became legal "persons" merely because they were white. Married white women were not legal persons but, despite their subordination to their husbands under coverture, they shared in the power and privileges of the white-skinned. "Whites" from the highest to lowest social stratum, both men and women, conscious that they were not "black," took part, actively or passively, in the maintenance of the new power structure or were forced to struggle against it. On the other side, Africans had to bear all the manifold burdens that now accompanied the designation of "black," even if they were not slaves.

"Race" required purity of the bloodline and so fashioned the sexual contract. In a racial order only some women were deemed worthy of "protection" by white men. The women of the ruling race, who continued the racial bloodline and were held to have the attributes of true womanliness ("the fair sex"; see Schloesser 2002), were protected (governed) by the men who shared their skin color. The interrelationship between the sexual and racial contracts meant that the sexuality of whites and blacks was seen quite differently. African sexuality was viewed as untrammeled and degenerate. Black women could never be "pure" like white women and African-American men were greatly feared as a standing threat to white womanhood. Nonwhites were for white people, at one and the same time, objects of desire, revulsion, curiosity, and prurient speculation.

The "white race" was safeguarded through prohibitions, both formal and informal, against interracial sexual relations. Or, rather, the prohibitions were first and foremost directed against relations between white women and black men. This provided some assurance that the white bloodline would not be polluted.[12] For white men, the prohibition came into play against *marriage* with nonwhite women. Nonwhite women were not "protected" so, outside of marriage, white men demanded sexual access, coerced if necessary, to black women.

In *The Sexual Contract* marriage has a central place. I argued, first, that the marriage contract provided for legitimate, orderly access for each man to a woman of his own. But under the racial contract men's choice of a wife had to be limited if racial bloodlines and racial power were to be maintained. Maryland enacted the first criminal law in 1664, and this was aimed at "freeborn English women" who had made "shamefull Matches" with African slaves (Cott 2000: 44). Six of the original American colonies prohibited marriage between a white and black or mulatto and three of the thirteen banned interracial sex outside marriage. Nancy Cott states that "the English colonies stand out as the first secular authorities to nullify and criminalize intermarriage on the basis of race or color designations" (2000: 41).[13]

Second, I emphasized the interconnections between marriage, employment, and citizenship in *The Sexual Contract* but under the racial contract the connections were severed for African Americans in the aftermath of slavery. Slaves were prohibited from marrying, thus underlining their exclusion from civil law, but after emancipation the federal government took steps to ensure that as many of the freed slaves' unions as possible were regularized. The Freedmen's Bureau took care to enforce the sexual contract, and the labor contracts it promoted upheld coverture (see Cott 2000; also L. Edwards 1996 and Stanley 1996).[14] However, the power that free black husbands gained over their wives did not translate into political standing. The civil rights of black men and women alike were severely limited and, especially in the Southern States, their political rights denied. In the twentieth century, major social policies, such as Mothers' Pensions and Aid to Dependent Children, largely excluded African-American women, and the GI Bill after the Second World War did not benefit black servicemen in the same way as their white counterparts.[15]

White men were husbands, "persons," and citizens and, as I have stressed, their extramarital choice of women was unconstrained, especially if they were slave masters. Slaves were property; that is, they were mere factors of production to be used in the plantations and great houses. They were factors that could be replaced or increased by breeding but, unlike the breeding of livestock, the slave masters themselves could participate directly in their reproduction. Indeed, the paradox of slavery, which I highlighted in *The Sexual Contract*, is perhaps most evident in the case of female slaves. They were property, but it was their humanity that made their

reproduction possible and made them sexually attractive to white masters.

Initially, the slave master's part in breeding led to a problem. On the one hand, children of slave mothers were property at the disposal of the master/father who could sell them at will. On the other hand, descent was patrilineal under common law. Race trumped patriarchy to solve the difficulty. In Virginia in 1662 it was decreed that slave mothers would pass their lifetime bondage onto their children. The ruling also meant that, notwithstanding their paternity, all such children were to be treated as "black." In my book (Pateman 1988: 122) I noted Mary Chesnut's comment that, in *Uncle Tom's Cabin*, "Mrs. Stowe did not hit the sorest spot. She makes Legree a bachelor." Wives of slave-owners exercised power over slaves but they had to pretend not to see their husbands' other offspring.[16]

Law, social sanctions, and a great deal of violence were used to regulate interracial sexual relations and prevent African Americans from exercising their newly acquired rights. The most violent forms of intimidation were the lynching of black men and the rape of black women; Hazel Carby argues that the rapes were "political terror," "an institutionalized weapon of oppression" that was the equivalent of lynching (1987: 18, 39).[17] Few could escape from the taint of such a racial order.

One telling example is the exchange over lynching between Ida Wells and Frances Willard, two remarkable and very politically astute women. Willard, a white woman, was the leader of the Women's Christian Temperance Union, the biggest women's organization in the United States in the late nineteenth century, which not only campaigned against alcohol but was the organizational mainstay of the suffrage movement (this was true too in Australia and New Zealand, though not in Britain). Wells's parents were slaves; she obtained an education, but lost her job as a schoolteacher because she drew attention to the second-class treatment of black children. She then became a journalist and co-owner of the weekly *Memphis Free Speech*.

In 1892 Wells wrote an editorial after the lynching of three black shop-owners, her friends (the paper was then attacked and the business destroyed). Wells wrote that most of the recent lynchings had been prompted by "the same old racket – the new alarm about raping white women," and she warned that Southern white men might "overreach themselves and public sentiment will have a reaction" (Wells-Barnett 2002 [1892–1900]: 29; she married in 1895). Wells saw the murder of her three friends as an example of the use of lynching to prevent black men becoming economically successful and competing with white businesses, but she used the phrase "new alarm" because, following Frederick Douglass, she argued that three different claims had been made about lynching. The first, immediately after the end of the Civil War, was that lynching was necessary to prevent race riots and insurrections. From the early 1870s lynching was said to prevent Negro domination at the ballot box. By the 1890s, when lynchings were at their peak, it was claimed that the atrocities resulted from the propensity of sexually depraved black men to rape white women.[18]

Wells then embarked on an extraordinarily courageous campaign against lynching. One of her aims was to "[t]ell the world the facts" and to demand that accused black men should have a fair trial (Wells-Barnett 2002 [1892–1900]: 151). She emphasized one crucial fact: that only about a third of the victims were actually alleged to be rapists.

Before Ida Wells's campaign and the anti-lynching movement in Britain (the first Anti-Lynching Committee was formed in Britain in 1894), the WCTU had never condemned lynching and had no black members in the Southern states. Willard attacked Wells in an address to the WTCU in Cleveland after Wells pointed out that in many cases of lynching where rape was alleged it was known at the time and "indisputably proven after the victim's death" that the relationship was consensual, although clandestine. A charge of assault would have been thrown out in a courtroom. Wells asked the question

> what the white man means when he charges the black man with rape. Does he mean the crime which the statutes of the civilized states describe as such? Not by any means. With the Southern white man, any mesalliance existing between a white woman and a colored man is sufficient foundation for the charge of rape. The Southern white man says that it is impossible for a voluntary alliance to exist between a white woman and a colored man, and therefore, the fact of an alliance is a proof of force. (Wells-Barnett 2002 [1892–1900]: 61)

Willard refused to acknowledge that white women could, and sometimes did, enter voluntarily into sexual relations with black men. She leapt to the defense of white womanhood and insisted that Wells's arguments put an unjust and unfounded "imputation upon half the white race in this country" (2002 [1892–1900]: 130).

Wells replied in a letter, published while both women were campaigning in Britain.[19] She reproduced some earlier remarks of Willard's on the need for "safeguards" against illiterate aliens and Negroes voting and on the "problem" facing white Southerners. "The colored race," Willard had written, "multiplies like the locusts of Egypt. The grog-shop is its center of power" and the safety of women and children was threatened (quoted in Wells-Barnett 2002 [1892–1900]: 131–3). After the publication of an interview with Willard, conducted in Britain by one Lady Henry Somerset, Wells had to publish another letter in her own defense. Willard never entirely retracted her attack on Wells.

During Wells's first visit to Britain in 1893 she was involved in a very curious incident. She had been invited through the initiative of Isabella Mayo and her friend Catherine Impey.[20] Mayo took in nonwhite lodgers as part of her philanthropic activities, one of whom was George Ferdinands, a student from Ceylon. Shortly after the three women departed on Wells's tour, Impey wrote to Ferdinands proposing that they marry. Ferdinands forwarded the letter to Mayo who was scandalized and called Impey a nymphomaniac and a disgrace. Vron Ware writes that "[i]t is hard to believe that Catherine would have made the proposal without any encouragement, and the whole episode remains a mystery" (1992: 191).

Mayo showed the letter to Wells and demanded that Wells turn her back on Impey, but Wells refused. Mayo sent letters to America criticizing them both and continued her attack during Wells's second visit to Britain. She published an article in which she referred to the "diseased imaginations" of "women who will 'fancy' anything which will give them a sensation." In some states of the United States, she wrote, this imagination "would mean *the death of the man*," and "[i]f the women in the South were all 'pure in heart and sound in head,' we should hear of fewer lynchings" (quoted in Ware 1992: 195–6). Willard's reaction to Wells and this strange episode illuminate the complex ways in which the racial and sexual contracts played out, even in circles where one or the other, or both, were challenged.

III White Women, Black Women

Through the nineteenth century and into the first decades of the twentieth, women in both Britain and the United States were very politically active, both inside and outside conventional political arenas and in a wide range of women's organizations. They used arguments about rights and equality but stress was also laid on (white) women's particular affinity for morality and much "civilization work" was undertaken, both at home and abroad (Newman 1999). One observer wrote in 1900 of the Hull House settlement in Chicago that it was "a colony planted in a strange land by immigrants from a superior civilization" (quoted in Newman 1999: 23). The London Missionary Society had begun to recruit single women in 1875 and by 1899 women missionaries outnumbered men (Haggis 2003). The women's foreign mission movement was the largest women's movement in the United States by 1915 (Newman 1999: 53).

White women who attacked the sexual contract could still compare their position favorably to that of the women of lesser races. Female slaves, wives in polygamous marriages, inhabitants of harems, or victims of suttee were frequently invoked. For white women to see black women as political equals was very difficult in a context of "race" and colonialism. Their ambiguous attitude is nicely illustrated by the image adopted by British women anti-slavery activists in 1828. They modified a famous cameo, first produced by Josiah Wedgwood in 1787, to portray a female slave, with the words "Am I not a woman and a sister?" But, like her earlier male counterpart, the slave was on her knees, a supplicant before a standing white woman.

The sexual and racial contracts reached into the anti-slavery movement. Black campaigners rarely had an equal place, even though the genesis of the anti-slavery movement lay in the activities and writings of blacks in Britain in the 1760s. The Anti-Slavery Society was founded in 1823 but it was not until the 1850s that the first steps were taken to include women in national committees. In 1840, the British organizers of the World Anti-Slavery Convention in London refused to accept women delegates from the Garrisonian wing of the American abolitionist movement, and the question of women's rights was thus thrust in front of the British movement.[21] But British women did not take part in the debate at the Convention; they could attend only as visitors.

Yet (middle class) women were at the heart of the British anti-slavery movement. They had begun a campaign against the slave trade (abolished in 1807) in the 1780s, they organized a boycott of sugar from the West Indian plantations from 1791 and, after the British ended slavery in 1833, turned their attention to the United States. From 1825 women developed their own extensive network of independent anti-slavery organizations and engaged in a wide variety of extraparliamentary activities, some of which they pioneered. British

anti-slavery organizations initially supported gradual emancipation and it was a pamphlet by a woman, Elizabeth Heyrick's *Immediate, not Gradual Emancipation* (1824), and the women's associations that changed this. Heyrick's arguments were grounded in the principle that freedom was a "sacred unalienable right." She saw gradualism as "puerile cant" and slave insurrections as self-defense again appalling oppression.[22]

But Heyrick was unusual among women anti-slavery activists, who more resembled missionaries than revolutionaries. They commonly came to the movement out of Christian duty, and focused on the plight of women slaves, the tearing apart of slave families and education. Their Christianity meant that the humanity and spiritual equality of the slave was emphasized, a radical position. But this was counteracted by a general sense of cultural superiority. Most women in the movement, however benevolent and opposed to slavery they might be, failed to see blacks as other than in tutelage, waiting to be assisted by their white mother. It was not until Sarah Remond, an African American, arrived in 1859–61 that a (very short-lived) anti-slavery organization had black committee members. The case of Mary Prince, a slave brought to London from Antigua by her owners, Mr and Mrs Wood, who refused to emancipate her, is instructive. In 1831 she published her autobiography, *The History of Mary Prince: a West Indian Slave*, widely used by the Anti-Slavery Society in its publicity.[23] Clare Midgley summarizes Prince's position. She was treated "not as a fellow-activist but rather as a victim of slavery, as a possibly unreliable individual whose account needed authentication, and a working-class servant. Given this, it is hardly surprising that they did not think to recruit her as a member of one of their ladies' anti-slavery associations" (1992: 91).

The racial order permeated the women's movement in the United States. The enormous suffrage movement, for instance, was largely segregated. A difficult political dilemma arose with the Fifteenth Amendment; should suffragists support the enfranchisement of the freed male slaves despite the fact that black women continued to be excluded from the ballot box? The two most prominent white leaders, Elizabeth Cady Stanton and Susan Anthony, opposed the Amendment and the controversy split the movement for a generation. By the 1890s, white suffragists, who had already campaigned for decades and were desperate for any political opening, began to attack votes for ignorant, unwashed men, whether African American or immigrant, and entered into extremely unsavory alliances with racist Southern politicians.

Another example: one of Frances Willard's campaigning slogans was "a white life for two." By this she meant that the sexual double standard should be abolished and that sexual equality would be lived out in a teetotal and monogamous life, with chastity for both partners before marriage. But how should the metaphor of a "white life" be interpreted? Did it mean a pure life for all or was it a life suited to a racially superior population? Again, should Charlotte Perkins Gilman's many references to "the race" – in her day she was the most famous feminist writer in the United States – be read as referring to the human race or to the white race? Such uncertainties were well suited to a society that by the 1890s was in the grip of Social Darwinism (derived from Herbert Spencer) and in which popular acceptance of eugenics was growing.[24]

Gilman provides a fascinating illustration of how feminism (rejection of the sexual contract) and race (acceptance of the racial contract) were interwoven. In modern societies, she argued in 1898, there was too great a differentiation between the sexes; it was "carried to such a degree as to be disadvantageous to our progress as individuals and as a race" (1966 [1898]: 33). Women traded on their sexual attractiveness, not their talents, and one result was "pathological maternity" (1966 [1898]: 169).[25] Women, she insisted, had a "racial duty of right selection" of a father for their children (1966 [1898]: 201). Prospective mothers, not fathers, should be responsible for selecting suitable mates to ensure sturdy offspring. But if women were to exercise this responsibility they had to be educated, independent, and men's equals. The human race would thus become fitter, but it is clear that Gilman had whites in mind as the model for progress.

In 1908 she published an essay, "A Suggestion on the Negro Problem." She notes that, as a result of contact with "our more advanced stage of evolution," many Negroes had rapidly become "self-supporting and well behaved" but most had not (1908: 80). To improve and civilize them Gilman suggested that they should be formed into a labor army. This would have its own uniforms, music, and insignia and include all ages, with schools for children. The army would provide its own food and clothing and there would be training in domestic service, but its major task would be in agriculture and in developing the South. Gilman declared that this plan was "not enslavement, but enlistment"; once individuals were deemed capable of working on their own initiative they would graduate "with honor." The army would be "compulsory at the bottom, perfectly free at the top" (1908: 81, 82).

"[C]oncern with eugenics was characteristic of nearly all feminists of the late nineteenth century" (Gordon 1990: 110). The sociologist Edward Ross was one influence on Gilman, and he coined the term "race suicide," popularized by President Theodore Roosevelt. This could mean either that the least fit were breeding too fast and thus endangering the human race, or that the falling birthrate among whites and rapid growth in the nonwhite population was leading to the end of white civilization.[26] Either way, *some* women (not even all white women) were required to have more babies. The eugenic argument was that only the better specimens of their kind should be allowed to reproduce.

By the early twentieth century, prevailing opinion across the political spectrum was that a modern society should take scientific steps to ensure that its population was of the requisite quantity and quality.[27] Leaders of the birth control movement, such as Margaret Sanger in the United States and Marie Stopes in Britain, joined in the efforts to limit the reproduction of the least fit human beings.[28] In principle, examples of poor quality could occur anywhere in the population but, in practice, the "undesirables" were found in certain groups. The criteria hinged on such features as social inadequacy, fecklessness, feeblemindedness, and sexual indicators, all of which overlapped with the characteristics typically attributed to the poor in general, poor women in particular, and nonwhites.

By 1904 Galton was arguing that eugenics "must be introduced into the national conscience, like a new religion" (2000 [1909]: 83). In the United States and Europe it became very big business, funded by major foundations and supported by many of the most prominent and progressive figures on both sides of the Atlantic.[29] By the end of the 1930s the Birth Control Federation was singling out African Americans, arguing that their numbers were increasing from births among the least fit. Between 1919 and 1964 at least 30 states had eugenics legislation to allow involuntary sterilizations. Huge numbers of women were sterilized, whether voluntarily or not. One estimate is that in 1972 alone the federal government had funded over 100,000 sterilizations, many on black women; in North Carolina the majority of sterilizations were carried out on black women from 1933 onward. Sometimes the operation was performed on girls as young as 12. In Puerto Rico, after legislation in the late 1930s, over 35 percent of women of childbearing age had been sterilized by the 1970s (Davis 2003). Nonwhite women, mostly poor Puerto Ricans and Chicanas, were also used, respectively, to test the birth control pill and the IUD (Gordon 1990: 421–4).

One of the charges made against the women's movement by nonwhite women in the United States soon after its revival in the late 1960s was that, while the right to abortion was vigorously advocated, little was said about involuntary sterilization.[30] This was an example, they argued, of their exclusion from the movement and the failure to see that their interests frequently differed from those of white women. There were differences, too, over feminist critiques of the family and the oppression of women (see, e.g., Joseph and Lewis 1981) and over paid employment. The majority of African-American women had always had no choice but to be in paid work. When welfare measures were introduced in the 1930s, black women with children, unlike white women, were seen as "employable mothers" (Kerber 1998: ch. 2).

Many nonwhite women today still see feminism as relevant only to middle-class white women, a perception no doubt reinforced when women's organizations remained silent about the welfare reform legislation in 1996 that abolished Aid to Families with Dependent Children. The beneficiaries of the program were mostly mothers from minority groups, particularly African Americans, caring for children on their own. To be sure, by 1996 most mothers, from choice or necessity, were in the paid labor force and only "welfare mothers" received assistance to be at home with their children. Yet many Americans saw black mothers as moral failures, as lazy and unwilling to help themselves (Gilens 1999). This was why the figure of the undeserving, African-American "welfare queen" was able to haunt the popular political imagination.

The complexities of the position of black women, and the corrosive effects of the sexual and racial contracts, were highlighted when Anita Hill, a former employee of Clarence Thomas at the Equal Employment Opportunity Commission, accused him of sexual harassment during his nomination for the Supreme Court.[31] The hearings of the Senate Judiciary Committee became a major public spectacle after Hill's accusation. The Chair of the Committee ruled that the burden of proof lay with Hill, and the Senators apparently found it difficult to believe that sexual harassment was commonplace in workplaces. The hearings and media coverage turned not on Thomas's conduct but on Hill's truthfulness, another episode in the very long history of distrust in women's ability to tell the truth in court combined with an even greater disbelief in black women's veracity.[32] Many African Americans saw the charge of sexual harassment as part of a white feminist agenda that operated to the detriment of black men and so as casting doubt on

Hill (Burnham 1992: 311–13). They also saw Hill as violating a code in her own community. She had criticized a fellow African American in public and raised the question of the treatment of black women by black men. The breach, Hill said, "damned me in the eyes of many Blacks whose profound experiences of racism have led them to ignore within our own community what we find intolerable when committed by others against us" (A. Hill 1995: 284).

IV Home and Abroad

It might be objected that my historical illustrations are drawn from a completely different context than my two examples from the 1990s. After all, I argued in *The Sexual Contract* that the heyday of modern patriarchy in Britain was between 1840 and the late 1970s; by then its props had begun to crumble and conventional understandings of "masculinity" and "femininity" were under challenge. In addition, the legal underpinnings of racial power in the United States had been dismantled, and almost all colonies had become self-governing.[33] Further changes have taken place since the late 1970s; for instance, multiculturalism is now public policy. But although the context has changed, the social and economic legacy of old forms of women's subordination and racial superiority linger on, and newer forms have emerged.[34]

Some insight into the persistence of these patterns of power can be gained by bringing economic exploitation, emphasized by Charles Mills, to the fore and by bringing the racial and sexual contracts – or what, in the wider focus of this section, might be called the global sexual-racial contract – together with Norman Geras's contract of mutual indifference (1998). The latter (and the global sexual-racial contract) are "contracts" in a broader sense than my usage in *The Sexual Contract*, more akin to Mills's conception of the racial contract.

Geras distinguishes the contract of mutual indifference from theories of an original contract. It is not, he argues, about origins or justifying government; nor does it involve a state of nature. Rather, the contract of mutual indifference is "imputed," it "can be read from the realities of our time" (1998: 28). But early modern theories, with their pictures of the state of nature and justification of a particular form of government, also owed a good deal to the realities, as each theorist interpreted them, of their present. The crucial question is precisely how we are to read these realities. Not everyone sees Geras's contract, or the sexual or racial contracts, in our past or present circumstances.

The contract of mutual indifference reflects a world in which, in general, people remain unmoved by large-scale atrocities, mass deprivation, and distress. Geras does not deny that there are people and groups who are motivated by humanitarianism and make efforts, sometimes very heroic efforts, to assist others in torment or distress, but most people, most of the time, do not do so. The contract reflects *general* not *universal* relations of mutual indifference. The contract of mutual indifference, Geras argues, is a model of our world that is "exaggerated – or, better perhaps, reduced – by omission of such mutually assisting behaviour in dire misfortune as there is" (1998: 29). That is to say, the contract takes the form of a pact that I do not come to your aid in an emergency and I do not expect you to come to mine. Geras's central argument is that we lack a social morality of mutual aid and so feel under no obligation to come to the assistance of others, even in the most extreme circumstances. We are governed by mutual indifference.

Humanitarianism – a concern for the well-being of people unknown to, and often far distant from, ourselves – was created, Thomas Haskell has argued, in an early stage of capitalism in the late eighteenth century. A major change in moral sensibility occurred when individuals began interacting in a capitalist market; ideas of moral responsibility broadened and individuals became "men of principle" (1985: 560).[35] Haskell, however, remarked that the later stages of capitalism might provide much less support for humanitarianism. This is the import, too, of Geras's comment that in societies such as Britain and the United States the norm of "collective existence" is for the wealth of some to be accumulated from the poverty of others. Poverty and its deprivations, though often deplored, are accepted as part of the social order and so "to all intents and purposes" the sufferings of the poor "are of little consequence" (1998: 59). That is, we remain indifferent to them.

During the past quarter-century, capitalism, and so Geras's norm of collective existence, has extended across the world and into most areas of social life. Even Marx might be surprised by its scope. The expansion has been accompanied by a marked increase in economic inequality and insecurity, both within the United States and Britain and between rich (mostly white) and poor (mostly nonwhite) countries. The "Overview" in the 2005 *Human Development Report* (UNDP 2005) provides a summary of the extent of global inequality. Some countries and regions have prospered, but many have

not – some African countries have gone backwards – and there are large disparities between urban and rural populations. At present it looks unlikely that the UN Millennium Development Goals will be met by 2015. Income inequalities have increased in countries inhabited by over 80 percent of the world's population; 2.5 billion people live on less than $2 a day and have 5 percent of global income (more than 1 billion live on less than $1), while the richest 10 percent enjoy 54 percent of global income.

Africa was at the heart of the construction of the modern concept of "race" and now the image of the starving, about-to-die African infant symbolizes the suffering of the global poor. Predatory, brutal, and corrupt leaders and elites share responsibility for destitution in Africa, as do companies engaged in the latest round of plunder of the continent's riches, but as Thomas Pogge (2002) has recently argued, the structure and policies of global economic institutions have contributed too.[36] These institutions are part of the changes now called globalization (for data, see Held et al. 1999). In one sense, globalization is hardly new. It was part and parcel of early modern European expansion and formed the context in which political theorists formulated theories of original contracts. But the present phase is wider, is moving with greater speed (see T. Brennan 2003), and has been driven by neoliberal doctrines of structural adjustment, deregulation, and privatization, touted with the same fervor as the old colonial mission.

The extraction of resources from poor countries is now, for the most part, less dependent on the gun and the lash than it was during the colonial period; bodies such as the International Monetary Fund and the World Trade Organization, and agreements such as the North American Free Trade Agreement have taken center stage.[37] But, in the last analysis, just as military force upheld colonialism, neoliberal policies and the power and reach of Western corporations are underwritten by the overwhelming military strength of the United States (demonstrated most vividly by the orders for the complete privatization of occupied Iraq drawn up by the Provisional Coalition Authority under Paul Bremer, which received remarkably little publicity). Few poor countries have escaped the imposition of structural adjustment, the creation of labor markets, the entry of Western corporations and the consequent transformation of their economic life and cultures. Their borders must be opened to corporate capital and their social services and resources, including water, handed over to private buyers; their agriculture must be focused on crops for export (though they face tariffs) and compete with imports from the rich countries (subsidized at the level of $2 billion per week); farmers must cease to save seeds and buy them from corporations each season.[38] The poor even sell their vital organs, particularly kidneys, to the rich through thriving illicit global markets.

This is the context in which the contract of mutual indifference reinforces, and is reinforced by, the global sexual-racial contract.

If "poverty" were defined as living on 60 percent of median income, 23.8 percent of the population in the United States would have been living in poverty in 2000.[39] The richest two-fifths have almost three-quarters of the national income (B. Barry 2005: 175). In Britain inequalities have increased to the point where the poorest 20 percent of the population have an income that is comparable to that of their counterparts in a much poorer country, the Czech Republic (UNDP 2005: 56). In 2002, the poorest 10 percent received 3 percent of the national income and the richest 10 percent received over a quarter (B. Barry 2005: 175). Income inequality is also correlated with other important social indicators such as education, health, and longevity.[40]

These inequalities are fueled by the sexual and racial contracts. In both countries women and nonwhites are overrepresented among the poor.[41] Statistics about wealth are particularly telling; disparities are much greater than for income. In the United States, 80 percent of the population received only 9 percent of gain in marketable wealth between 1983 and 1998; in Britain, the poorer half of the population received only 7 percent of the increase in marketable wealth between 1982 and 1996 (B. Barry 2005: 188). Of households in the United States with less than $5,000 net worth in 2000, 45 percent were headed by nonwhites (although nonwhite households were only 24 percent of all households). The median net worth of (non-Latino) white households in their highest quintile was $208,023 compared with $65,141 in the highest quintile of black households. In the lowest quintiles, the median net worth of white households was $24,000 – and in black households it was $57 (L. Williams 2004: 684).

These figures go a long way to explain why it was predominantly African Americans who had no means to leave New Orleans – one of the poorest cities in the United States – during Hurricane Katrina in 2005 and were herded into an unsanitary, ill-equipped stadium. In an interesting insight into the workings of the contract of mutual indifference at home, the then head of the Federal Emergency Management Agency is reported to

have remarked that "we are seeing people we didn't know exist."

The consequences of the global sexual-racial contract are even starker; the poor and destitute of the world are overwhelmingly nonwhite and the worst-off are likely to be female. Women's plight is summed up in the well-known statement that women do two-thirds of the world's work, earn 10 percent of the income, and own less than 1 percent of the property. Most of the world's refugees and displaced persons are women and their children. Girls and women are likely to be less literate, less well nourished, and to receive less medical care than men and boys; they are also less likely to survive. Amartya Sen (1990) calculated that over 100 million women are "missing" in South Asia and China, cultures where girls have little value.

Increasing inequality has weighed very heavily upon women (and their children) everywhere, but especially in poor countries. The survival of families depends on the work of women, and the reduction, privatization, or elimination of public services means that they now carry extra burdens. An illustration of the global sexual-racial contract is the emigration of many women, who send home remittances to support their children and other family members, to work as maids and nannies. There is now "a global transfer of the services associated with a wife's traditional role … from poor countries to rich ones" (Ehrenreich and Hochschild 2002: 4). Domestic servants largely disappeared after the Second World War in the United States and Britain but demand is now rising. One reason is that although the majority of women are in the paid workforce they are, typically, still responsible for domestic caring work; men refuse to do their fair share. Thus employing a maid avoids marital conflict – and allows men to continue to free-ride – and maids are increasingly likely to be imported. Maids move from Southeast Asia to the Middle and Far East, from the former Soviet bloc and Africa to Western Europe, and from south to north in the Americas (see the maps in Ehrenreich and Hochschild 2002: 276–9, and in Seager 2003: 72–3).

The sex industry and sexual violence are two other graphic illustrations of the global sexual-racial contract. The growth of the sex trade – the demand by men for the sale of women's bodies as a commodity in the market – has expanded apace since I wrote my book. Women emigrate to work in the industry and are also tricked and forced into it; numerous well-organized criminal organizations have women and girls as one of their products. The trade is fueled by women's impoverishment (including in Russia and the former Soviet bloc countries) and by the wars and population displacement of the last two decades.[42] Women and young girls in refugee camps and conflict zones may have to provide sex to their "protectors" in the form of UN peacekeepers and aid workers for the means of survival.[43] The global flows of women into the sex industry are well defined enough to be mapped and reflect men's racial preferences (Seager 2003: 56–7, map 20).

In addition to the violence involved in the sex trade, other forms of violence against women continue unabated. In November 2005, the World Health Organization issued a report on domestic violence showing that it is a global problem, occurring in rich and poor countries alike, something that feminist scholars and activists have been aware of for some time. Men kill women every day.[44] Rape is endemic worldwide (contributing to the spread of HIV), committed by men with virtual impunity. Women have always been seen as one of the spoils of war and rape is also used on a mass scale as a weapon of war. Many recent wars have involved (what is now called) ethnic cleansing. Here again the sexual and racial contracts are interwoven. Rape has been used not only to humiliate enemy men by violating, shaming, and degrading "their" women and girls, but as a way of "diluting" the bloodline of the enemy community through forced impregnation.[45]

At this point it might be objected that, while my examples show that there is still work to be done, the task of eliminating global inequality and the sexual-racial contract is well underway. And, far from being indifferent, people respond very generously to major appeals for help and numerous organizations provide assistance. I do not want to deny that much is being done or to dismiss the generosity; indifference, as Geras argues, is general not universal. However, the problem is not only that problems persist but that not all cases of distress receive the same response.

For example, generosity is generally greater for natural disasters than in the case of man-made catastrophes or deeply entrenched problems. It is, of course, very much easier, at least in the first stages of a natural disaster, to see how a difference could be made than to see what can be done in the face of endemic, grinding poverty or wars which destroy not just numerous communities but whole countries.[46] Seeing what might be done has become harder, too, because citizens in the United States and Britain have little exposure now to criticism of prevailing economic dogmas. We are encouraged to believe that there is only one "natural" way to organize

economic production across the globe and to believe that everything must be on sale in markets.

Besides such obstacles, response and lack of response to distress is refracted through the contract of mutual indifference and the global sexual-racial contract. Many problems have been acknowledged only very recently; violations of women's rights began to receive attention as breaches of *human* rights only during the 1990s and it has taken until the twenty-first century for rape to be prosecuted as a war crime. Rape during war began to receive major publicity only when it happened in the early 1990s in Europe. Little was heard about the quarter to half a million women, almost all Tutsi, raped in 1994 during the genocide in Rwanda. There is still indifference to the enormous number of victims in the conflicts in the Congo. A great deal of attention was paid to killings in the Balkans, unlike the genocide in Rwanda or the indifference for a quarter of a century to the death toll and atrocities in East Timor after it was invaded and annexed by Indonesia.[47] Indifference continues to the Russian blitzkrieg and violations in Chechnya. There has been little concern about the fate of the 4 million souls who have perished in war and its consequences in the Congo. Indifference persists to the Israeli occupation of Palestine, the destruction of infrastructure, agriculture, and homes, and the killing and maiming of Palestinians (or the construction of roads for the use of Jews only; even South Africa did not go that far).

In 2006, it is relatively easy to find out about these examples and about many other tragic cases. Occasionally they are in the news, and the United Nations, the World Bank, and a plethora of nongovernmental organizations issue reports, major international conferences have been held on women's rights, and war crimes tribunals are hearing cases from a number of conflicts. Information is available on the internet. The question is why people prefer not to know about, make no effort to find out about, ignore, remain unmoved by, or turn away from deprivation and distress, even extreme torment. This is a very difficult question to answer (and my remarks do not address the politics of governmental and international inaction; why, for example, the World Food Agency announced at the end of April 2006 that it was halving rations being distributed to the traumatized, displaced people of Darfur because donors had supplied only a third of funds needed). But consideration of the past history and present realities of the sexual and racial contracts can make a small contribution to understanding the widespread phenomenon of indifference, of turning a blind eye to suffering.

That, at the beginning of *States of Denial*, Stanley Cohen can list 27 expressions related to "hearing what we want to hear," "not believing that this is happening," and so on, shows how adept we are at avoidance (2001: 1–2). As Geras points out, it is not easy to learn about and think about past or present horrors; indeed, it can be unbearable to dwell on them. It is much less disturbing and a great deal easier to remain as indifferent bystanders, or to adopt the position where "we know and don't know at the same time" (Cohen 2001: 5; see ch. 6 for bystanders). Yet it is easier for some rather than others to maintain "willful ignorance" (Frye 1983). Part of being in power or being privileged is that a choice is available about what is seen or listened to. The powerful can ignore or be shielded from anything that might threaten their position and their comforts. Frequently they lie about what is going on. On the other hand, their underlings, too, can prefer "to know and not to know" if speaking out would undermine their security or bring down sanctions on their heads. Cohen (2001) discusses such mechanisms in detail.[48]

Knowing but not knowing occurs in the context of the global sexual-racial contract. It is easier to be indifferent to the misery of others if those involved are seen as having brought their distress upon themselves, or are perceived as very different, as alien, as worth less, as inferior, as barely human, or as another "race." Their sufferings can then be seen as of little or no account. Charles Mills argues that the racial contract requires that the distress of whites count for a great deal more than that of nonwhites. The sexual contract plays just as large a role in fostering indifference. Prevailing conceptions of masculinity and femininity cultivate and sustain indifference. The lesson that little girls and women are worth less than little boys and men (that women exist *for* them) is conveyed in a multitude of ways, beginning in the home. No emergency or "war on terror" has ever been declared because of the scale of violence against women. Everyday violence by "our" men against "our" women continues remorselessly but we turn away our eyes. We do not want to know about the violence inflicted on "their" women.

Geras's argument is about our response to dire emergencies and extreme suffering, but lack of mutual aid, indifference, and knowing but not knowing are found in less dire circumstances. They are part of everyday life. Indeed, indifference at home helps explain at least something about indifference to the fate of those far away. Perhaps the most common objection to arguments for universal mutual aid is that our natural inclination, and our first obligation, is to care for those closest to us. The

most common response to this objection is that, even if this is the case, there is no reason why it should preclude assistance to others abroad. What is usually overlooked is that it is not true that all those closest to us receive assistance. There is a hierarchy of worth at home and abroad. The interrelationship between the sexual and racial contracts encourages turning a blind eye, corroding everyday life at home and fostering indifference to destitution and suffering abroad.

V Concluding Observations

Part of present economic orthodoxy is that there must be unfettered movement of capital, goods, and services – but no free movement of poor, nonwhite people. The European Union (EU) has expanded east, where skins are mostly not so dark, but at the same time it has become "fortress Europe" against the nonwhite poor outside. Far-right, racist parties are gaining ground and in Britain resistance to the entry of refugees has been growing amid hysteria about "asylum seekers." Immigrant communities – labeled "immigrant" even if large numbers are citizens by birth – tend to be on the margins of society, concentrated in poor areas, their members working in low-level jobs or unemployed. A large part of immigration into Europe has been, as it were, the return of the repressed colonial past.[49] But the connection between the population flows of the past 50 years and the European expansion that began in the early modern period has largely been erased from the popular political imagination. This is why the history of the sexual and racial contracts is so crucial; it is not possible to understand present-day patterns of global inequality, sexual and racial subordination, and indifference to distress without some understanding of their historical development.

For example, shades of old debates about civilization and lesser races, and of previous claims about the poor treatment of women in colonial possessions compared to the position of women at home, hang over controversies about immigration. Much popular attention is now directed to the oppression of women in immigrant communities. In several European countries the *hijab* and other female Islamic dress has become a battleground for the defense of "European culture." Albeit that all this is a backhanded compliment to the influence of the women's movement, much of the concern appears to have less to do with women than to be a way of presenting the communities concerned as alien. It is reminiscent of the cynical use made by the United States government of the extreme subordination of women in Afghanistan under the Taliban. During the years that the Taliban were forming and after they seized power in Afghanistan little or nothing was said at official levels about the position of women, but when bombing was imminent it was claimed that war on Afghanistan would liberate women, a claim accepted by some prominent feminist spokeswomen.

Two final comments: toward the end of *The Racial Contract* Charles Mills notes that it is not only whites who are implicated in a racial contract and he mentions Japan and World War II (1997: 127–8). There are many current examples of states governed by a particular racial or ethnic group that exploit, ill-treat, or wage war against members of their own population, often in the name of maintaining the unity and borders of the state. It is not only Europeans who see people unlike themselves as backward and unfit to be self-governing. Nor is imperialism a uniquely European phenomenon. The expansions of the Han Chinese into Tibet or the Javanese across the Indonesian archipelago are examples. The strategic and economic importance of numerous countries to the United States and other Western countries means that the global racial contract is now enmeshed in a range of lesser racial contracts. Local rulers and elites support the interests of Western governments and corporations, and are supported by them, assisting the transfer of resources from the global South to the North.

Conceptions of racial and sexual difference are political constructs and both can, and do, change. The possibility is open that "race" could be eliminated and that what it means to be a "man" or a "woman" could alter radically. The racial and sexual contracts could, therefore, become mere historical curiosities. But, as this chapter is designed to show, both are deeply embedded in social and political institutions, national and international, and in individuals' sense of themselves. A great deal has to change, including the neglect of the history I have illustrated, before the global sexual-racial contract withers away.

Paul Gilroy has recently argued that there is a "crisis" in which the idea of race "has lost much of its commonsense credibility, because the elaborate cultural and ideological work that goes into producing and reproducing it is more visible than ever before, because it has been stripped of its moral and intellectual integrity, and because there is a chance to prevent its rehabilitation" (2000: 28–9). That Charles Mills and I have written this

book is, in a sense, a testament to that very crisis. But there can be no certainty whether, or about the manner in which, it might be resolved. In our current global circumstances and the "war on terror" it would be foolhardy to make a prediction about the future of mutual indifference and the sexual and racial contracts.

Notes

1 Colley argues that in "all sorts of ways" the British Empire "remains an unknown quantity" and that anyone interested in the Empire needs to understand "Britain itself, the ways in which it was once powerful, but also the ways in which its power overseas was always constrained and sometimes faltered" (2002: 374, 375). It is also worth noting that the first act of the new Australian federal parliament in 1901 was to create immigration restrictions to maintain "white Australia."

2 One of its best-known members was Olaudah Equiano; another was Ignatius Sancho, born a slave and brought to Britain as a child, who argued against slavery, became a writer, a shopkeeper, correspondent of Laurence Sterne and was painted by Gainsborough (see King et al. 1997).

3 Bernasconi (2001: 15) notes that this argument was first put forward in the 1920s. The relation between Kant's arguments about race and the *Critique of Judgment* has been acknowledged by some scholars, including one of his contemporaries; Bernasconi provides some references (2001: 27 n84). He also states that "a great deal more work needs to be done, both to establish the context of Kant's discussion of race with reference to his sources and to clarify the various aspects of Kant's theory of race that have been treated largely in isolation from each other" (2001 [1788]: 15).

4 See, e.g., Hill and Boxill (2001) for an example of the first response, and Ladd (1999) for an example of the second.

5 The role of climate in the development of races was much discussed, and one claim was that different environments were the cause of racial differences. Kant argues for the differential development of the seeds over long periods through lines of descent in hot, cold, etc., climates.

6 Kant is not entirely consistent. He criticized the doctrine of *terra nullius* but left doors open for the justification of colonization, and his view of slavery was ambiguous.

7 At the Columbian Exposition in Chicago in 1893 black Americans were included in the exhibits. Six African-American women spoke at the World's Congress of Representative Women, part of the Exposition but, Hazel Carby argues, this was not from "concern to provide a black political presence but part of a discourse of exoticism that pervaded the fair" (1987: 5).

8 Charles Kingsley, a Briton, put the Irish on a lower level in a different fashion. He wrote to his wife of a visit to Ireland, "I am haunted by the human chimpanzees I saw … to see white chimpanzees is dreadful; if they were black, one would not feel it so much" (quoted in McClintock 1995: 216).

9 Haney López (1996) discusses the numerous cases; see especially *Ozawa v. United States* 260 US 178 (1922) and *United States v. Thind* 261 US 204 (1923).

10 In the United States a movement has begun for the recognition of a "mixed race" category for official purposes (Hollinger 2005). About 12 percent of young people fall into this category, and by 2050 perhaps 10 percent of whites and blacks and over half of Latinos, Asians, and American Indians will marry outside their "race" (Hochschild 2005: 76). Census Bureau projections indicate that whether or not whites remain a numerical majority depends on whether Latinos who identify as "white" on the Census are so counted. If they are not, by 2050 whites are likely to be a numerical minority (Haney López 2005: 43; on Census categories see also Prewitt 2005). One British survey found that, of respondents who had a partner, half of the British Caribbean men and a fifth of British Indian men had a white partner and so did a third of the British Caribbean women (Modood 1998: 387).

11 This broke with the Statute of Artificers (1563) under which specified wages had to be paid and laborers bound by the year were allowed to terminate their employment with due notice. It was forbidden to punish an apprentice by extending the term of his service.

12 Elizabethan drama suggests that opposition to interracial sexual relations between white women and nonwhite men was itself produced along with modern conceptions of race. Sexual liaisons between white women and black men were portrayed as the "ultimate romantic-transgressive model of erotic love" (Boose 1994: 41). But once "race" began its course any connection between white women and nonwhite men became the most feared and the most viciously punished relationship.

13 "[T]here seems to be no historical precedent for the sexualization of race in the United States, that is, no earlier cultural example of the assignment of a debased form of sexuality to an hereditary caste, over generations" (Zack 1997: 148). During the 1860s more states passed antimiscegenation legislation and some Southern states introduced new bans after the Civil War (the *Oxford English Dictionary* records the first use of "miscegenation" in the United States in 1864); "[i]n Mississippi the penalty was life imprisonment" (Cott 2000: 41). The Civil Rights Act (1866) excluded these laws on the grounds that they applied equally to black and white, and all challenges brought after the 14th Amendment (1868) were rejected by the Supreme Court. The California Supreme Court led the way in 1948 in striking down antimiscegenation laws;

the federal Court (as noted at the start of the chapter) finally acted in 1967.

14 The major function of the Bureau – its official title was the Bureau of Refugees, Freedmen, and Abandoned Lands – was to turn "ex-slaves into wage workers" (Cott 2000: 85).

15 Southern politicians were determined to maintain very low wages for their workforce and they opposed the 1935 Social Security legislation. Agricultural, domestic, educational, and hospital workers were not covered, thus excluding most nonwhite and women workers. Vagrancy laws were used to compel black individuals into employment (see Kerber 1998: ch. 2).

16 See also the comment about a member of Congress who had fathered six children by one of his slaves in Harriet Jacobs's memoir of her life as a slave (1969 [1861]: 215). Jacobs's book was edited by a white women, L. Maria Child, and Jacobs used the name Linda Brent, necessary protection given that she wrote about her sexual history. She refused Harriet Beecher Stowe's offer to incorporate her memoir into *The Key to Uncle Tom's Cabin*.

17 The victims of lynching were predominantly male and black. Lynching began in the 1830s (the term was first used then) and before the Civil War most lynchings took place in California. It has a long history; there were lynchings still in the 1940s. In the 1890s, crowds numbering in the thousands, including whole families, often witnessed the dreadful killings of black men and mementoes were collected and disseminated to friends and relatives.

18 Wells also noted that during the Civil War the slave master had safely left his wife and children with his slaves when away fighting. And at the end of the Civil War many white women came from the North as teachers to the freed slaves and for more than a quarter of a century they had worked without any fear. As Pauline Hopkins wrote, "[t]he men who created the mulatto race" continued to fill its ranks "year after year by the very means which they invoked lynch law to suppress, bewailing the sorrows of violated womanhood" (quoted in Carby 1987: 141).

19 Wells was one of a number of black women and men activists from the United States who visited Britain in the nineteenth century.

20 Impey ran a monthly paper, *Anti-Caste*, which in its final issues stated as its aim that "the dark races of Mankind [should have] equal right to protection, personal liberty, equality of opportunity and human fellowship" (quoted in Ware 1992: 190) She was acquainted with a number of leading black American activists and was especially concerned with racial justice. She was involved in other radical causes, supporting "the abolition of the alcohol traffic, an end to militarism, a respect for the environment and the humane treatment of animals – she was also a strict vegetarian" (Ware 1992: 187).

21 In the United States "women's discontent with their position was as much cause as effect of their involvement in the antislavery movement. What American women learned from abolitionism was less that they were oppressed than what to do with that perception, how to turn it into a political movement" (DuBois 1978: 32).

22 Heyrick believed that everyone was implicated in slavery and called on the population to act themselves through mass abstention from slave-produced goods (Midgley 1992: 104–8; see also M. Ferguson 1992: 253–8). In 1804 Maria Edgeworth wrote in her tale "The Grateful Negro" of the benevolent slave-master Mr Edwards: "He wished that there was no such thing as slavery in the world; but he was convinced, by the arguments of those who have the best means of obtaining information, that the sudden emancipation of the negroes would rather encrease than diminish their miseries. His benevolence therefore confined itself within the bounds of reason" (2003 [1804]: 49).

23 The book was dictated to and edited by a white woman and included a lengthy supplement and appendices to authenticate it. "[T]here are times when Prince's voice seems more discernable than at others" (Salih 2000: xiii). The editor, Susanna Strickland, excised Prince's sexual history but this was revealed in Wood's libel action against Thomas Pringle, the Secretary of the Anti-Slavery Society (see Prince 2000 [1831]: app. 3).

24 Francis Galton invented the term "eugenics" in 1883, but his interest in the subject had begun in the 1860s. He devoted a chapter of *Hereditary Genius* in 1869 to "The Comparative Worth of Different Races" and was explicit that the white race contained the most advanced humans (Galton 1978 [1869]).

25 Wives were nothing more than house servants and one saw all around "innumerable weak and little women, with the aspirations of an affectionate guinea pig" (Gilman 1966 [1898]: 168). She advocated radical reform of marriage and the home, which she saw as a relic from an earlier era.

26 "Race suicide" was a major issue in Australia as well as the United States. Ironically, in the United States between 1870 and 1910 the black birthrate seems to have been declining at a faster rate than that of whites (Gordon 1990: 150–1, and note, 151).

27 Reference was made to "Bolshevik eugenics." J. B. S. Haldane wrote in 1938 in Britain that questions about eugenics spanned the conventional political divisions: "For example, the English National Council of Labour Women had recently passed a resolution in favour of the sterilization of defectives, and this operation is legal in Denmark and other countries considerably to the 'left' of Britain in their politics" (quoted in Paul 1984: 570–1).

28 The movement in the United States had begun as agitation for "voluntary motherhood," part of the campaign for women's rights and reform of marriage law, but in the twentieth century became a professionalized part of population control (Gordon 1990).

29 Eugenics, of course, took its most extreme form in Nazi Germany, where American developments had been eagerly

followed. In Sweden and other Nordic countries it was an integral part of the welfare state. A National Commission in Sweden in 1997 drew attention to the scale of eugenic activities there. A National Institute for Race Biology had been established in 1922, and by the time the legislation was eliminated in 1975 over 60,000 sterilizations had taken place, 90 percent of them on women.

30 This remains a pressing issue. In 2002, for example, a report from investigators appointed by the Health Ministry in Peru stated that over 330,000 women, mostly poor Amerindian women, had been sterilized between 1995 and 2001. The report stressed that "they were blackmailed, threatened, or bribed with food; none was properly informed" (Barthélémy 2004: 8). Pharmaceutical corporations also carry out clinical trials in Africa without the ethical safeguards required in the West, a matter dramatized in the movie *The Constant Gardener*.

31 Thomas was nominated by President George H. Bush in 1991, despite the fact that the American Bar Association had found him only marginally qualified and his performance as Chair of the Equal Employment Opportunity Commission had been poor. He seemed unwilling to enforce antidiscrimination law (see Burnham 1992; Swain 1992). Resnick (1995) gives an account of the judicial background to the hearings and discusses the procedure. Thomas's nomination was narrowly confirmed.

32 Thomas even famously claimed that he was the victim of a "high-tech lynching." In contrast, Hill was seen as having "betrayed the man who had done me a favor by hiring me" (A. Hill 1995: 275). Moreover, she was a single woman and this gave rise to insinuations that she was attacking Thomas because she had been spurned by a black man married to a white woman.

33 I cannot discuss here the contribution made by women to the liberation movements and how they were then typically relegated to lesser citizenship in the new states. There is now a growing literature on nationalism and gender; for two early examples see Yuval-Davis (1997) and McClintock (1995: ch. 10).

34 In Western countries race "persistently correlates with statistically overwhelming significance in wage levels, unemployment levels, poverty levels, and the likelihood of incarceration" (Alcoff 2002: 15). In the United States, African-American men are arrested and imprisoned in extraordinarily large numbers. Brian Barry writes of the "black gulag" in the United States and he notes that a similar trend is occurring in Britain with young black men (2005: ch. 7).

35 Haskell's main example of humanitarianism is the anti-slavery movement but he overlooks both the prominence of women in the movement and that, by the late eighteenth century, capitalism was being constructed as an arena for men. Middle-class women were supposed to confine themselves to the home. How, then, did they become women of principle?

36 Policy for Africa in both the United States and Britain is geared towards privatization and big corporations through the Corporate Council on Africa in the US and the Investment Climate Facility in Britain (Monbiot 2005).

37 Thankfully, King Leopold's Congo is a thing of the past; but, for example, few questions were asked for a long time about "blood diamonds" and oil companies have been accused of complicity in major human rights violations in more than one country.

38 Thousands of farmers in Andhra Pradesh in India have committed suicide since the early 1990s when their livelihood began to fail as market reforms were introduced. In 2003 the Department of Justice was investigating 120 slavery cases, many involving migrant farm workers in the fields of the United States (Bowe 2003: 38).

39 The Luxembourg Income Study, at www.lisproject.org/keyfigures/povertytable.htm. A level of 50% or 60% of median income is a common measure of poverty in Europe and in cross-national studies. In the United States poverty is measured by the income required to buy a bundle of basic goods, a measure virtually unchanged since the 1960s. This gives a threshold of around 40% of median income.

40 In Washington, DC, the infant mortality rate among African Americans is higher than in Kerala in India (UNDP 2005: 58).

41 See, for example, for figures for Britain, DWP 2004: ch. 3, and for the United States the website of the US Census Bureau, at http://pubdb3.census.gov/macro/032005/pov/new01_100_01.htm.

42 The "shock" introduction of capitalism and privatization in Russia has impoverished much of the population while creating the new class of ostentatious millionaires. The poorest 20% receive 6% of the national income, 27% of the population (officially) is below the poverty level (unofficially it is around 40%), and pensions are around 20% of subsistence level; welfare expenditure has remained stagnant since 2000 and public health expenditure is 0.2% of GDP (Clément 2003: 10). In 2004, seven members of Putin's entourage controlled 40% of the GNP (Clément and Paillard 2005: 6).

43 When troops and a variety of civilians arrived in Kosovo in 1999 the sex trade increased enormously; "the international presence … initially made up some 80 per cent of the clients." Women are now trafficked from all over the Balkans and Eastern Europe to Kosovo to be sold onward (Vulliamy 2005: 14–15; see also the Amnesty International report of May 2004). In 2005 there was another such scandal about the Congo. But such predations are not new; over a decade ago, for instance, UN forces sent to Mozambique were reported to be utilizing child prostitutes.

44 In the town of Ciudad Juarez, over the border from El Paso, Texas, for example, over 300 women have been murdered since 1993. In Guatemala more than 1,600 women have been killed since 2001 (Asturias and del Aguila 2005).

45 Raped women, and any consequent children, may be shunned by their communities. For a discussion of rape as a central weapon in genocide see MacKinnon (2005).

46 It is especially difficult when we are told that wars arise from primordial ties or are fought by peoples much more prone to violence than ourselves. This neatly diverts attention both from the desire for power and control of resources by elites and from sales of small arms – some 640 million in existence worldwide – and torture equipment from Western and other companies (leaving aside the matériel available on the black market).

47 Documents declassified in late 2001 confirmed that President Ford and Henry Kissinger, Secretary of State, had assured Suharto that the United States would not object to action against East Timor. Aceh has been in the news and a peace settlement has now been reached only because of the total devastation caused by the tsunami in 2004 and the influx of foreign news media and personnel from the UN and nongovernment organizations. West Papua is still ignored.

48 For a novel in which a whole country "knows and not knows" (and which raises some questions touched on here about a different problem) see Ishiguru (2005).

49 This has now been replaced in Britain by large inflows from the East European countries newly part of the EU; estimates in the latter part of 2006 were that around half a million had immigrated, mostly from Poland. A high rate of immigration into the United States continues, but nonwhite illegal immigration, especially from Mexico and Central America, is now a controversial political matter and since 9/11 the southern border continues to be fortified. Hypocrisy is the order of the day. In California the economy, especially the service and agricultural sectors, depends on cheap immigrant labor but in 2005 and 2006 growers were complaining that because of crackdowns on entry they did not have enough workers to harvest their crops.

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39

Respecting Beliefs and Rebuking Rushdie

Peter Jones

The furore that followed the publication of Salman Rushdie's *The Satanic Verses* has provided a graphic illustration of the conflicts that may still arise in societies characterized by diverse religious beliefs. This article examines how far the rules governing a plural society should require its members to defer to beliefs that they themselves do not share. In particular, it examines whether a principle of 'respect for beliefs' can provide adequate reason for limiting freedom of expression. A strong version of the principle, which would limit substantive criticism of beliefs, is found untenable. A weaker version of the principle, which would concern itself not with the matter but with the manner in which others' beliefs are treated, has greater plausibility and moral appeal. That also, however, proves too hazardous and indeterminate a basis for setting legal limits to freedom of expression.

Freedom of expression and freedom of religion are two freedoms which seem securely embedded in the culture of modern Western societies. Their conjunction in the right of people to express themselves freely on religious matters has seemed a particularly secure and widely-held conviction. So true has this been that, for decades and with few exceptions, that particular freedom has passed virtually unchallenged both in the politics of Western societies and in Western political thought. The Rushdie affair has put an end to that easy consensus.

The publication of Salman Rushdie's *The Satanic Verses* led to world-wide protests that it constituted a gross insult to Muhammad and to other important figures in the Islamic faith as well as to Muslims themselves.[1] That in turn led to calls for the book to be withdrawn from circulation by the publishers and for all existing copies to be pulped. There were also calls for governments to ban the book. Indeed, the book was banned in India and in Pakistan, Indonesia and very many other Muslim countries, but also in some non-Muslim countries, such as South Africa and Venezuela. Nor have the complaints been confined to Muslims. Prominent leaders from other religions – including the Archbishops of Canterbury and York, spokesmen for the Vatican, the American evangelist, Billy Graham, and leading rabbis in Britain and Israel – expressed their sympathy with the protests of Muslims and suggested a variety of measures to prevent a recurrence of this sort of episode. In Britain, although some members of the Government expressed sympathy for the hurt caused to Muslims, the Government officially refused to contemplate a ban and protested that, anyway, it had no power to impose one. However, some Muslim groups claimed that

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Rushdie could have been, and should have been, prosecuted under the Public Order and Race Relations Acts. Others sought to mobilize the English common law of blasphemy against Rushdie but these efforts came to nought, since the existing law protects only Christianity. That, in turn, has led to vigorous calls for a reform of the law of blasphemy so that its protection would be extended to other religions and so that books such as *The Satanic Verses* would, in future, be subject to the full rigours of the law.

The whole issue was further intensified and complicated by Ayatollah Khomeini's notorious *fatwa* sentencing Rushdie to death and calling upon 'all zealous Muslims' to ensure that the sentence was carried out, adding that whoever was killed in the attempt would be regarded as a martyr. Various financial rewards were offered to those who successfully assumed the role of executioners. Rushdie himself was forced into hiding. His subsequent qualified apology for the distress he had caused Muslims was judged by his would-be executors to be insufficient to rectify his wrong and it seems that Rushdie's life will remain under threat for the foreseeable future and very possibly for the rest of his days.

In this article, I want to consider the general issues raised by the Rushdie affair for a plural society. By a 'plural society', I mean one characterized by a diversity of fundamental beliefs and, more especially, one characterized by a diversity of religious beliefs. I shall assume that all parties to the argument accept the legitimacy of a plural society. The issue, therefore, as I shall examine it, is not one of which, if any, of a number of competing religions should be adopted by a society as the 'correct' one to the exclusion of all other (false) beliefs. It is not about whether a society should be committed to Christianity or to Islam or, indeed, to atheism. Rather all parties to the argument are assumed to accept that members of the society should be able to hold and to live according to their own beliefs; so the issue amongst them is simply about the way in which the society should accommodate the diversity of beliefs that they hold. In examining this issue I shall make use of the arguments and claims thrown up by the Rushdie affair, but my ultimate concern will not be to deliver a verdict on the rights and wrongs of the affair in its every detail. Instead, my interest will be in the general question of what should be required of the members of a plural society by way of deference to beliefs that they themselves do not share. In particular, I shall consider the plausibility and the implications of the claim that we should show 'respect' for the beliefs of others.

In examining the principle of 'respect for beliefs' I shall argue that, although it has some affinity with the idea of not offending people's sensibilities, it is actually a distinct idea with a different moral foundation and some different practical implications. I shall examine the principle both in its strong form, in which it would limit substantive criticism of people's beliefs, and in its weaker form, in which it would constrain only the 'manner' in which others' beliefs are treated. Finally, I shall consider whether the difficulties that we confront when we invoke the offence principle or the principle of respect for beliefs can be by-passed by focusing instead upon the requirements of public order.

Coping with Conflict

Now it should not be taken for granted that there *must be* some set of rules that is acceptable to all members of a plural society in spite of their different beliefs. Different groups of believers may all accept the legitimacy of a plural society but may disagree about the rules that should govern that society. For example, if Christians, Muslims, Buddhists and humanists each draw upon their own bodies of belief in deciding what the common rules should be, there is no guarantee that they will come up with identical sets of proposals. If no such 'overlapping consensus'[2] is forthcoming, we may be stuck with a virtual 'state of war' between different bodies of believers. There are certainly elements of the Rushdie affair which fit that description. Ayatollah Khomeini was not interested in providing for a plural society and he did not command the allegiance of all Muslims. But many Muslims in Britain and in other Western societies accepted Khomeini's *fatwa* sentencing Rushdie to death and affirmed their willingness either to carry out that sentence or to collude in its being carried out by others. In addition bookshops have been bombed and a campaign of civil disobedience has been threatened. Other Muslims have rejected Khomeini's *fatwa* and are unwilling to resort to illegal tactics to achieve their aims but, even amongst those, there seems to be a general conviction that they can never give up their protests and simply accept that others have a right to subject their religion to the sort of treatment it has received at the hands of Rushdie.[3]

How might we get beyond this state of conflict? One possibility is peace based upon mere compromise. For example, Muslims might come to endure attacks upon Muhammad and the Koran, not because they believe

that they are obliged to do so by some principle that supersedes their religion (what principle could that possibly be?), but only because, in practice, that is all that they can do short of leaving the society. Alternatively, the non-Muslim section of the population might agree to the prohibition of severe attacks upon Muslim beliefs, not because it believes that there is really anything wrong with those attacks, but only to assuage those who would be outraged by them and who might react violently. I describe each of these as 'mere compromise' because neither is an arrangement that both sides regard as truly right or fair. Each is no more than a *modus vivendi*, a truce, in which force of circumstances has induced one side to concede something that, it believes, it should not have to concede. That may be preferable to open conflict but it is still an unhappy state of affairs, for it does not represent a genuine consensus on what the rules of the society should be. Is there no more principled basis upon which people might defer to one another's beliefs?

What has become the standard liberal position may be regarded as a minimum starting point. All would at least agree that each should be free to hold and live according to his own beliefs, subject to the usual qualification that that does not involve his harming or infringing the rights of others. People can, of course, believe that this sort of liberal position is wrong in principle and that they are duty-bound to attempt to make everyone conform to their own uniquely right beliefs. However, I am contemplating a population whose members accept the legitimacy of a plural society and it is hard to see how, if they accept that, they cannot also accept, as a minimum, that each should be allowed to hold and to pursue his own beliefs.

The question is whether more than that minimum can be required. My right to hold and to pursue my own beliefs does not, of itself, impose any limit upon what others may say about, or do with, the beliefs that I hold. Rushdie's *Satanic Verses* cannot be said to interfere with Muslims' right to conduct their lives as Muslims, nor can Scorsese's *The Last Temptation of Christ* be said to impede the freedom of Christians to live as Christians. Yet there is a widely shared sentiment that some limit should be placed upon the treatment that may be meted out to other people's most cherished beliefs, particularly if they are religious beliefs. What can justify that sentiment? What reason can there be for a society's throwing a protective cordon around people's beliefs? If I am a Christian, I have reason to object to the vilification of Christ because, as far as I am concerned, he is the Son of God. But what reason can I give a non-Christian, which will count as a reason for a non-Christian, for refraining from what I regard as a sin? And why should I myself refrain from vilifying Muhammad, since, as far as I am concerned, he is a figure who has no divine status and who was indeed a false prophet? Clearly, whatever reason there might be for limiting freedom of expression out of concern for people's beliefs, it cannot be a reason that presupposes the truth of those beliefs, for that would disqualify it as a reason for all except those who already hold those beliefs.

Offending Sensibilities

That goes some way towards explaining why 'offensiveness' has become such a prominent concern both in relation to the general question of whether people's religious beliefs should receive legal protection and in relation to the specific controversy over Rushdie's book. People can acknowledge the offence caused by attacks upon others' beliefs even though they themselves do not share those beliefs. The non-believer, because he is a non-believer, cannot share the Christian's or the Muslim's conception of the essential wrongness of blasphemy. However, he can recognize that blasphemies cause distress and offence to the devout, that the distress and offence is undesirable and that that provides a (*prima facie*) case for prohibiting blasphemies. He must still regard these offended reactions as, in a sense, 'mistaken', for they depend upon beliefs which are (for him) false; but he may regard that as a matter of no consequence since the reality of offended sensibilities is unaffected by the truth or falsity of the beliefs upon which they depend. Nor is this reasoning relevant only for atheists. In so far as different religions do not have overlapping beliefs, they will have different conceptions of what is blasphemous. As far as the Christian is concerned, an attack upon Muhammad cannot be truly blasphemous; in relation to Islam, he too is a non-believer. Thus he too must find reason for not attacking the Muslim's beliefs in something which does not imply his own acceptance of the beliefs at issue – such as the avoidance of offence.[4]

As for believers themselves, the offence caused by blasphemy is not likely to be their major preoccupation. For the Christian, impugning the character of Christ and, for the Muslim, impugning the character of Muhammad is wrong as such. Each may be offended by the blasphemy but that offence is merely a by-product of the wrongful act; it is not the offensiveness of the act which explains its wrongness but the wrongness of the

act that explains it offensiveness. If the Christian or the Muslim characterizes the blasphemy as a wrong *to* anyone, he will regard it as principally a wrong to Christ (and to God) or to Muhammad (and to Allah) rather than to himself. It would be a derogation from his faith to do otherwise.[5] Even so, he has to recognize that he is in a society many of whose members do not share these beliefs and for whom these cannot provide reason for refraining from blasphemy. But he can present the distress and the offence caused to him by blasphemy as a concern that others ought to recognize whatever their own beliefs and, in so far as blasphemy is wrong because it is offensive, he can present himself as the person who is wronged by it.

Although being offended is a disagreeable experience, it is often a fairly slight one which does not bear comparison with harms such as physical injury. Consequently, when it is weighed against values such as freedom of expression, it is often found wanting. However, the potential for offence related to religious belief is very great. The conception of certain figures and symbols as 'sacred' in Christianity and in Islam makes them special objects of reverence, and acts which treat those figures and symbols irreverently are therefore especially offensive. That is why, of all belief-related offence, that occasioned by religious belief seems the most intense.

The current English law of blasphemy has developed in a way which is very much related to the prevention of offence. At one time the purpose of the common law of blasphemy was to uphold the truth of Christianity, for it was upon that truth that the social and political institutions of England were said to be founded. Blasphemy, either against Christianity in general or against the Church of England in particular, was viewed as a form of sedition. However, during the nineteenth century, the character of the law was gradually modified so that its prime purpose became that of protecting Christians from offensive treatment of their beliefs rather than that of asserting and upholding the truth of Christianity itself. Provided they observed the 'decencies of controversy', people could attack the very foundations of Christian belief without being guilty of the legal offence of blasphemy.[6]

Given that the modern law does not presuppose the truth of Christianity, its protection could be extended to other religions without anomaly for, as we have seen, preventing belief-dependent offence does not presuppose the truth of the beliefs at issue. Indeed, it now seems anomalous that its protection should be confined to Christians. If its purpose is to protect people from what they find offensive, why should that protection be extended to some citizens but not to others? That seems plainly inequitable. Thus the very character of the existing English law of blasphemy might be said to intimate its own reform. That reform would bring certain complications in its train, such as what exactly is to count as a religion for purposes of law, and these difficulties have evidently played some part in persuading the current British Government not to extend the scope of the law (even though they have also decided not to abolish it).[7] But, although 'no change' might seem an attractive political option in present circumstances, there is little to recommend it in either logic or equity.

I have examined how far a case can be made for the prohibition of blasphemy on grounds of offence on a previous occasion;[8] I shall not repeat that examination here. My earlier study was prompted by the *Gay News* case, which was pursued in the English courts from 1977 to 1979. My conclusion then was that, while the offence caused by blasphemy deserved to be taken seriously, it was insufficient, when weighed against rival concerns, to justify blasphemy's remaining a crime. The Rushdie affair has not induced me to revise my earlier argument or its conclusion. Moreover, even if the law of blasphemy in its present form were extended to include Islam, it should not be taken for granted that a court would judge *The Satanic Verses* to have contravened it.

Respecting Beliefs

However, offensiveness is not the only ground upon which different religious groups in a multi-faith society may call for legal protection for their beliefs. The Rushdie case has served to highlight a distinct, if related, form of argument. That argument appeals to, what I shall call, the principle of 'respect for beliefs'. This principle holds that people should behave in a way which is consistent with their respecting the beliefs of others. As with the offence principle, 'respect for beliefs' is a principle that is especially relevant to a plural society in which different groups of people hold fundamentally different beliefs. It holds that, in such a society, not only should people be allowed to conduct their lives in accordance with their most deeply held beliefs, they should also not have to endure attacks upon those beliefs. An attack upon the beliefs of others is a violation of one of the understandings that should underpin a society in which people are expected to live together in spite of their fundamentally different beliefs.

Like the argument from offence, the appeal to respect for beliefs does not presuppose the truth of the beliefs at issue. For example, it would require people to refrain from vilifying Christ or Muhammad not because it presumes that Christ really was the Son of God or that Muhammad really was God's Prophet, but out of respect for those who hold Christian or Muslim beliefs. As with the offence principle, therefore, the ultimate objects of concern in the principle of respect for beliefs are not beliefs as such but the people who hold them.

The demand that we respect the beliefs of others is, as I shall argue in a moment, fraught with difficulties, particularly for liberal political philosophy. Even so, it is a principle that liberals should at least find intelligible. The idea of individuals as objects of respect has figured prominently in recent liberal thinking. The arrangements required for a liberal society have been worked out as those appropriate to persons capable of forming and acting upon their own views of the ends to which they should devote their lives.[9] A liberal society is one whose members are allowed to form and to pursue their own beliefs. It stands opposed to a society in which people are compelled to live in accordance with beliefs that they themselves do not share or which, in other ways, pays no heed to the conscientious convictions of those who make up its citizens. The principle of respect for beliefs, as I have described it, can be seen as an extension of this way of thinking. It holds that the mutual respect which is required of citizens who form a plural society should be taken to include their not acting in ways which affront one anothers' beliefs. That, it asserts, is one of the minimum guarantees that people should be able to demand as a condition of their accepting the obligations of citizenship.[10]

Before seeing how well this principle stands up to scrutiny, let me say a little about how it differs from an injunction not to offend people's sensibilities. These two will often be closely allied for it is likely that people will be offended when they find their beliefs being treated disrespectfully.[11] We should not therefore expect to find the distinction between these two sorts of complaint being closely observed when people register their protests. Yet, despite their close association, neither is reducible to the other. My person or my beliefs may be treated disrespectfully even though I experience little or no offence and, equally, my offended reaction does not, of itself, establish that either I or my beliefs are being treated without due respect.

The ethical substructures from which each of these notions derives its appeal are also quite different. The notion of 'being offended' encompasses a variety of mental states which share little in common except that they are unpleasant, perhaps sometimes painful, mental responses.[12] It is the disagreeable character of the experience that makes offence a ground for complaint and that, in turn, indicates that underlying objections, which appeal to offence, are considerations of an essentially utilitarian character. By contrast the principle of 'respect for beliefs' is an altogether more rights-based notion.[13] Its appeal derives not from the disutility that people suffer when their beliefs are attacked, but from the premise that people are 'self-originating sources of claims',[14] who are entitled to a certain minimum of respect from their fellows. To subject beliefs to attack, ridicule or contempt is simultaneously to subject the people who hold those beliefs to attack, ridicule or contempt, and that is to accord them less than the respect to which they are entitled.

As I have already indicated, the language of offence and the language of respect will not always indicate clearly which form of concern someone is intending to avow. Each thought might find expression in the language of the other. Thus, someone who asserts that we should treat the beliefs of others 'with respect', may turn out to believe, not that that respect is of intrinsic value, but only that it is of instrumental importance. He may believe, for example, that disrespect will cause offence or social conflict and that that is the main or the only reason why it should be avoided. Similarly, people may be offended by something, and may declare that they are offended, without intending to suggest that their offence is their reason for objecting to what they find offensive. People are offended and upset by the existence of genocidal concentration camps, but it would be a very odd person who cited their upset and offence as their reason for objecting to genocidal concentration camps. Analogously, people may find attacks upon their religious beliefs offensive but may hold that those attacks are wrong, not because they cause offence, but because they are intrinsically 'sinful' or because they do not accord to others the respect to which they are entitled. However, despite these 'semiotic confusions', the distinction between these two ways of condemning attacks upon beliefs remains and, in what follows, I shall give the terms 'offence' and 'respect' the specific interpretations that I have described.

Once this notion of respect for beliefs is brought to bear upon the Rushdie controversy, certain of its features become more intelligible. One reply frequently given to protesting Muslims has been that, if they believe

that they will find *The Satanic Verses* offensive, they need not read it. Indeed, that is a reply that has been given by Rushdie himself.[15] Yet Muslims seem to have been singularly unimpressed by this riposte. What is more, their own protests and demonstrations would seem to have been oddly counter-productive if their primary concern was with the offensiveness of Rushdie's writings, for by these actions they have greatly increased the number of people who have become aware of the alleged blasphemies and who have therefore been offended by them. Mosques have displayed samples of Rushdie's blasphemies and organizers are reported to have handed out photocopies of the offending passages during demonstrations. This would indeed be strange behaviour if the ground of their complaint was the offence, the 'mental pain', caused to the Muslim population. If, however, the essence of their complaint is not the offensive character of Rushdie's words but the disrespect that they manifest for the beliefs of Muslims, their conduct is altogether more intelligible and condonable. Spreading the word about Rushdie does not then amount to compounding the evil.

Another reason that Muslims have given for their being unimpressed by the invitation not to read the book, is that they do not need to read Rushdie's actual words in order to be aware of what he said and to be offended by it.[16] Mere knowledge of Rushdie's themes is enough to cause them anguish. Yet this too creates a puzzle. If Muslims are offended by their mere awareness of what Rushdie said, what would be the point of banning *The Satanic Verses*? By now virtually all Muslims in Britain must know about it and banning the book would not erase Rushdie's remarks from their consciousness. It is difficult therefore to see how a case can be made, merely on grounds of preventing offence, for banning the book. (It is, of course, easy to see how a case might be made for banning *future* books of this sort on grounds of offence.) However, more sense can be made of the call for the book to be suppressed if we introduce the idea of respect for beliefs. The suppression of the book might be demanded by Muslims as a gesture of respect for them and their faith and an acknowledgement of the respect that should be shown to their beliefs by members of the majority society who do not share them.

There is one further way in which respecting beliefs might be held to score over preventing offence. Offence can be a highly idiosyncratic reaction. What offends some people does not offend others and some people seem generally more easily offended than others. Should the freedom enjoyed by members of a society be at the mercy of such a subjective and erratic phenomenon?[17] Might not the fault sometimes lie with those who take offence rather than with those who purportedly give it? The dangers of idiosyncratic or unreasonable reactions may seem to disappear when we are concerned with large groups of people, as in the case of offence felt by the adherents of a religious faith, yet groups may also be very uneven in their propensity to feel offence. Imagine a society characterized by two religions. One of these has roots deep in the society's past but, with the development of secularity, its adherents have had to become accustomed to attacks upon their fundamental beliefs and have, in consequence, developed a degree of 'mental resistance' to them. The other religion is relatively new to the society. Its adherents are not similarly used to secular assaults upon their beliefs and consequently react with much greater hurt and indignation when their beliefs are questioned or attacked. Should the law give greater protection to the new than to the old religion? If our only concern is to prevent offence, it should. Yet it seems unjust that the adherents of the old religion should have to put up with a greater amount of ridicule and contumely merely because they have become more resigned to it. If people's most cherished beliefs are to receive legal protection, should not that protection be extended to all believers equally – as would be required by the principle of respect for beliefs – rather than be dependent upon the contingencies of their mental states?

One final point should be made about the different implications of preventing offence and respecting beliefs: if our purpose is to prevent offence, that provides some justification for singling out religious beliefs as of special concern. As I explained earlier, the sacral element in religious beliefs makes people particularly susceptible to offence in relation to them. That is why there seems something disingenuous about the atheist's riposte that he is just as liable to be offended as the theist and therefore should receive the same protection. However, if our guiding concern is securing respect for beliefs rather than preventing offence *per se*, it is not at all clear that religious beliefs can claim a unique status. If the rules are to remain neutral between the different contents of people's beliefs, should non-religious or irreligious beliefs receive any less respect than religious beliefs? Might not identical claims to respect be made for moral or political beliefs?

Clearly, we do not think that all of a person's beliefs are equal candidates for respect. We would not ordinarily suppose that my beliefs about whether it will rain

tomorrow, or about the likelihood of a team's winning a football match, impose strong obligations of respect upon others. It is not easy to specify what it is that makes some of a person's beliefs more demanding of respect than others, beyond the general observation that it has something to do with the centrality of a belief to a person's life and being. But, however one makes the distinction, it is quite implausible to suppose that the principle of respecting beliefs should issue in an injunction to respect only religious beliefs. Thus I shall continue to focus on religious beliefs for the remainder of this article, not because I suppose that they have a unique claim to respect, but only because they are central to the Rushdie affair and because conflicts of religious belief have proved particularly difficult for plural societies to handle.

How strong a case is there, then, for embracing the principle of respect for beliefs? One thing I have not done so far is to specify the precise scope of the principle and that might seem to be an essential preliminary to subjecting it to examination. Just how demanding is it? What precisely does it forbid? Rather than simply stipulate an answer to these questions in a more or less arbitrary fashion, I would prefer to let one emerge from an examination of the general idea of the principle. However, I shall begin by assuming that the principle takes a fairly strong form – strong enough to forbid challenges and criticisms designed to undermine the beliefs of others. Is that a principle we should accept?

Little progress can be made in answering this question by invoking distributive values such as justice or equality, even though it is those values that have dominated recent liberal political philosophy. Justice and equality are concerned with how freedom and protection should be distributed amongst people rather than with what freedoms and protections there should be and, *prima facie*, a system of laws which extends the kind of protection at issue here to *everyone's* beliefs seems neither more nor less just than one which gives that protection to *no one's* beliefs. Where then are we to look for an answer?

Firstly, there is the entire phalanx of arguments that may be invoked in defence of freedom of expression. I cannot review all of those here, so I will confine myself to a few brief comments.[18] Much has been made of the rights of Rushdie as an author in a way which implies that creators of literature, because they are creators of literature, have some special claim to freedom. That is not perhaps the most persuasive of defences since it has the appearance of a mere prejudice which elevates the interests of a small group of *literati* above those of many millions of Muslims. Much has also been made of the requirements of a democratic society. Now the phrase 'democratic society' can be variously interpreted but, if it refers to the prerequisites of a democratic political process, it is not immediately obvious that restrictions upon blasphemy will seriously impede the operation of that process. However, I concede that it is difficult and perhaps impossible to state, *a priori*, which opinions will be relevant to a political process and which will not, so that some headway may be made in defending Rushdie by reference to democracy.

For my money, the most persuasive defence of freedom of expression in religious matters is the kind of argument developed by Mill in the second chapter of *On Liberty*.[19] If we are serious about wanting to possess true beliefs, and presumably anyone who professes a 'belief' must be concerned that it is a true belief, we must be willing to live in the kind of society that allows the truth of beliefs to be examined. That is a society in which all beliefs are open to question and none is immune from scrutiny. It is unnecessary for me to restate the arguments for freedom of expression and discussion so ably marshalled by Mill. His is the kind of non-distributive concern for liberty that has been unduly neglected in recent liberal thinking and which is of first importance for the Rushdie affair. It serves to show how we each have an interest, not only in our own freedom of expression, but also in one another's freedom of expression. Of course the concern here is not quite the same as Mill's. He feared the imposition of a uniformity of belief either by governments or by the pressure of social opinion; we are contemplating a society of diverse beliefs in which each body of belief is insulated from criticism and challenge by the rivals that exist alongside it. But the ideal of a society in which 'mutual respect' requires rival bodies of belief not to speak to one another is as vulnerable to Mill's criticisms as a society in which only one body of belief is respected.

I concede that Mill's argument about the need to test beliefs may not persuade someone whose beliefs depend entirely upon claims of revelation.[20] Such a person may hold both that the truth of his beliefs is utterly beyond question and that ordinary standards of argument and evidence are entirely irrelevant in matters of religious belief. However, the fact that some people take that view does not entail that they *rightly* take that view. Actually, belief in revealed truths is rarely based upon what has been directly revealed to the believer himself. Nor should we overlook the central places occupied by

argument and scholarship in both the Islamic and the Christian traditions. Some of those who have spoken up on behalf of Muslims in the Rushdie affair have done so by suggesting that truth is not really at issue in religious beliefs and that it is misplaced to allow our response to the diversity of religious beliefs to be guided by a concern for the pursuit of truth. But that sort of argument is unlikely to be welcomed by Muslims themselves, who would regard their own beliefs (rightly) as beliefs about what is supremely true. Rather than rushing to sever any connection between religious belief and truth, Muslims are more likely to regard the sceptical relativism implicit in that proposal as itself part of the unfortunate fall-out of secular liberalism.

However, a strong version of the principle of respect for beliefs is open to a second objection that is even more decisive than the strictures set out by Mill. In its strong form the principle would seem to require us to treat an individual's beliefs as a well-defined territory over which he has a sovereign right. Just as he may be said to possess an inviolable right over his person and over his property, so too he may be said to possess an inviolable right over his beliefs. Indeed, on this view, his beliefs are virtually a part of his 'property' and that is why it is incumbent upon a society to ensure that they are protected.

There are two reasons why this way of viewing and valuing people's beliefs must collapse into incoherence. The first is that the contents of people's beliefs overlap and conflict. That observation is as important as it is pedestrian and it is especially important in relation to religious beliefs. The very existence of different religious faiths, and of differences within religious faiths, must mean the existence of conflicting bodies of belief. Christianity impugns the truth of Islam and Islam impugns the truth of Christianity. Likewise Protestantism and Catholicism stand in contradiction to one another (although not of course in every detail). How are we to decide whose beliefs are to be privileged and therefore protected? Who should we regard as the victim and who as the assailant in this conflict of beliefs? Clearly those questions are incapable of receiving neutral answers. The only way of honouring the principle that no one's beliefs should be subjected to attack, either explicitly or implicitly, would be to require, absurdly, that no one should ever give voice to a belief.

This strong version of respect for beliefs is also at odds with itself in a second way. It may have some intuitive appeal as long as a person's beliefs are purely self-directed, that is, as long as they are beliefs only about the believer himself and how he ought to live. But as soon as those beliefs become beliefs about others as well, it becomes nonsensical for him to insist that the content of those beliefs is properly of concern to no one but himself. Yet it would be a very odd set of fundamental beliefs that had relevance to no one but the believer. Typically, fundamental beliefs are about what is true of the world or humanity at large and about the right or the good way for people generally to conduct their lives. Christianity and Islam, for example, are comprehensive bodies of belief about the nature of existence, about man's place in it and about the proper conduct of human life. It would, therefore, be singularly perverse for those who hold Christian or Muslim beliefs to insist that what their beliefs are beliefs *in* is a matter which is somehow private to Christians or Muslims and properly of concern to no one but them. On the contrary, they must, and do, insist that the content of their beliefs is of importance to everyone.

The distinction that is in danger of being overlooked in respect for beliefs is that between (i) a belief's being mine in the trivial sense that it is what *I believe* and (ii) a belief's being mine such that *what I believe in* comes to belong exclusively to me. My beliefs are obviously 'mine' in the first sense, but that does not make them 'mine' in the second sense. Propositions, ideas, theories, theologies and the like cannot be appropriated and removed from the public domain simply by some individuals coming to believe that they are true. 'The market-place of ideas' is a happy metaphor but it should not mislead us into supposing that adopting ideas, like buying goods, amounts to acquiring a right of private ownership over their content.

Finally, although what constitutes treating another's beliefs 'with respect' is a contestable matter, it is not infinitely malleable. On almost any view of what constitutes respecting a person, it is hard to take seriously the complaint that conducting a sober examination of the truth of another's beliefs amounts to not treating him, or his beliefs, with respect. Arguably, it is more insulting to have one's beliefs treated as though their truth or falsity were of no consequence; for that is to have one's beliefs not taken seriously as *beliefs*. That is a trap into which some varieties of multi-culturalism seem to fall. There are many reasons for both tolerating and promoting cultural diversity and there is nothing illogical about supporting and encouraging diverse forms of music, dance, literature and life-style, each of which has its roots in a particular culture. Now cultures are often caught up with beliefs, particularly with religious beliefs. Again there are many reasons for tolerating all of

those beliefs. However, it would be odd to find amongst them the claim that a world characterized by different religious beliefs is the best of all possible worlds and that nothing should be allowed to diminish that diversity. Different religious beliefs are rival religious beliefs. They represent rival claims to the truth. 'Beliefs aim at truth', as Bernard Williams puts it.[21] For that very reason, to treat the truth of someone's beliefs as a matter of no consequence is already to have ceased to take them seriously as beliefs. But to seek to immure people's beliefs so that they will never be threatened or changed is effectively to do just that. It is to treat the continuance of those beliefs as of greater moment than their truth. It is to hold that it matters less that people should live lives grounded in falsehoods than that their existing beliefs, and the ways of life grounded in them, should remain undisturbed. At least those who challenge beliefs signal in so doing that they take them seriously as claims to truth. By contrast, those who seek to 'protect' beliefs so that they become, in effect, exhibits frozen in a social museum run the risk of reducing them to mere objects of curiosity which make no demands for serious consideration upon those who do not already hold them. No doubt those who wish to extend this protection to others' beliefs are generously motivated but their efforts may ultimately be more patronizing than the attempts of others to refute them in the ordinary rough and tumble of argument.

Earlier I connected respect for beliefs with the liberal idea of respect for persons. If a strong version of respect for beliefs is untenable, and if indeed some of the reasons for rejecting it are reasons traditionally associated with liberalism, what is amiss in making that connection? After all, liberalism's propensity to treat beliefs, particularly religious beliefs, as essentially 'private' matters may itself have encouraged people to embrace the principle of respect for beliefs. The logic that I previously suggested ran from (1) respecting persons to (2) the right of individuals to form and to pursue their own beliefs and then to (3) their having the right not to have those beliefs attacked. The step from the first to the second notion – that is, from respect for persons to the right to form and pursue one's own beliefs – is not without complications, but I shall not examine those here.[22] More to the point is the step from the second to the third – from the right to form and pursue one's own beliefs to the right not to have those beliefs criticized. Of course, in strict logic one does not entail the other – my being free to form and pursue my own beliefs does not require that others abstain from questioning and criticizing those beliefs. Even so, there might still seem to be some affinity between these two notions. If my beliefs are reckoned to be of sufficient moment to be the subjects of guaranteed freedom, does that not imply that they constitute a territory which others should 'keep off'? Lord Scarman, for example, has argued, in the context of the law of blasphemy, that article 9 of the European Convention on Human Rights, which provides for freedom of religion, also 'by necessary implication … imposes a duty on all of us to refrain from insulting or outraging the religious feelings of others.'[23]

However, the apparent affinity between these two notions is, I believe, misleading. Why should people be free to form and pursue their own beliefs? That question can be answered in many ways, but the answer which seems fundamental to the deontological liberalism at issue here is that individuals' lives are their *own*; they should therefore be free to conduct *their* lives as they see fit. Thus the reason why I should be free to live in accordance with my beliefs is not that those beliefs come to acquire a peculiar sanctity merely because I adopt them. Rather I should be entitled to shape my life according to my beliefs because it is *my life*. In other words, in so far as there is something like a notion of ownership at work here, it is ownership over my life rather than ownership over certain propositions that I have come to believe in. That is why my right to live according to my beliefs entails that others are duty-bound not to prevent my so living but does not entail that they are duty-bound not to challenge the beliefs to which I devote my life.[24]

Respect, Decency and Manner

Are we then to conclude that the principle of respect for beliefs is entirely without merit? Are people to be free to speak, write and behave without having any regard for the beliefs of others? My previous arguments have shown that a strong version of the principle of respect for beliefs is untenable. Can the principle receive a less demanding, and therefore more plausible, interpretation? Both sides in the Rushdie affair are to be heard espousing the value of freedom of expression, and both are also to be heard exhorting us to treat the beliefs of others with respect, albeit with varying degrees of enthusiasm.[25] That implies an interpretation of 'respect' which is not seriously at odds with, or which is at least in some way reconcilable with, freedom of expression. What might that interpretation be?

Some of Rushdie's defenders may mean by 'respecting another's beliefs' no more than the liberal idea of allowing people to live according to their own beliefs. If that is all that respect for beliefs requires, it provides no reason for limiting free expression. Indeed, it is sometimes suggested that exceeding that minimal liberal position would entail 'imposing' others' beliefs upon people.[26] However, others who have spoken in defence of Rushdie clearly do intend their injunction to respect others' beliefs to imply something more than the minimal liberal position, even though that 'something more' would leave substantial room for freedom of expression. Likewise, many of Rushdie's critics declare their acceptance of the right of freedom of expression and complain only that Rushdie has abused, or exceeded the limits of, that right.[27]

How then might we set a limit to the demands of respect for beliefs so that these fall short of prohibiting all serious challenges to people's beliefs? There are a number of possibilities.

Some of the antagonists in the Rushdie affair seem to want to place some subjects 'off-limits' altogether. Some matters, which religious believers regard with special reverence, should simply not be open to challenge. There are two difficulties with that view.

Even though it is only some aspects of a person's beliefs, rather than all of a person's beliefs, that are placed beyond the pale of criticism, that would still run into the objections that I have already outlined. Should any matter be placed beyond challenge and inquiry? If some aspects of a person's beliefs are of especial importance to him, is it not also especially important that the truth of those aspects be open to scrutiny? And can it really be an act of disrespect merely to question what another asserts, however tenaciously that belief is held?

Secondly, how are we to decide which matters are off-limits and which are not? It is not easy to see how there could be a single criterion that could be applied across all religions, and it would clearly be unacceptable to let each religion, or each sect of each religion, determine for itself the schedule of subjects which should be excluded from public discussion. Moreover, even the faithful may regard this approach as unnecessarily severe. Their own understanding of the demands of 'respect' is often less one of what should, and what should not, be open to challenge and criticism and more one of *how* that challenge and criticism should be conducted.

That takes us on to a second possibility. Every subject, it might be said, should be open to challenge and critical scrutiny, provided that that challenge and criticism respects the 'decencies of controversy'. It is not criticism or questioning that is objectionable; it is the conduct of criticism and challenge in a way which exceeds the bounds of 'decent' or 'civilized' or 'respectful' discussion.[28] A standard of that sort has long been a part of the English law of blasphemy.[29]

Once again, however, that proposal presents us with two difficulties: one technical, the other political. The technical problem is that of drafting a law that will indicate to people, with reasonable precision, what they may say and what they may not. Phrases like 'decent' or 'civilized' leave everything to interpretation. A law stated in those terms would make it almost impossible for people to know in advance whether their statements were permitted or prohibited; they could be sure only after the court had decided. Nor would it be easy to infer from its past decisions what the future decisions of a court would be.

The political problem is how we are ever to achieve a reasonable degree of consensus on what it is acceptable and what it is unacceptable for people to say, remembering that we are legislating for a society of people with different sets of beliefs. The problem here is not merely that different individuals may have different views on what decency requires. It is also that different faiths, and different varieties of the same faith, may have different conceptions of the limits imposed by 'decency'. In other words, rather than 'decency' providing a criterion that people can recognize and embrace independently of whatever beliefs they hold on religious matters, it may itself be a belief-dependent notion and so vary according to belief. Fundamentalists, for example, be they Muslim or Christian, are likely to possess a more severe view of what decency requires than those who are, in religious terms, 'liberals' or 'modernists'.

All of this may seem to make the attempt to exclude certain matters of substance from criticism seem hopeless as well as undesirable. However, there is a third possibility which might seem more promising. That option turns upon a distinction between the matter and the manner of what is said. Broadly, it holds that people should not be prevented from saying things merely because others dislike the 'matter' of what they say, but that they may be prevented from saying things in an objectionable 'manner'. Thus, your taking exception to the substance of my opinions is not an acceptable reason for my being silenced; but I may be prevented from expressing those opinions in an unnecessarily disrespectful way.

This is another distinction that has been frequently invoked in relation to the English law of blasphemy. Stephen, for example, characterized the law as follows:

> Every publication is said to be blasphemous which contains any contemptuous, reviling, scurrilous or ludicrous matter relating to God, Jesus Christ, or the Bible, or the formularies of the Church of England as by law established. It is not blasphemous to speak or publish opinions hostile to the Christian religion, or to deny the existence of God, if the publication is couched in decent and temperate language. The test to be applied is as to the manner in which the doctrines are advocated and not as to the substance of the doctrines themselves.[30]

There is much that is attractive about dealing with this issue in terms of the distinction between matter and manner. For one thing, it seems to offer a more workable distinction than appeals to 'decent' or 'civilized' discussion. Secondly, it would appear to offer us the best of both worlds. Freedom of expression would be limited but in a quite unobjectionable way. No opinion would have to remain unstated, no subject would be excluded from open discussion and none would be exempt from critical scrutiny. All that would be proscribed would be attacks upon beliefs that were formulated in an unnecessarily abusive manner, and there would seem little reason to champion unnecessary abuse. Thirdly, the very phenomenon of treating other people's beliefs 'disrespectfully' often seems to be a question of manner rather than matter. As I argued above, subjecting another's beliefs to sober and serious examination can hardly be represented as treating those beliefs, or their holders, disrespectfully. It is when matters of special reverence are subjected to ridicule, contempt, vilification, and the like, that people are most likely to object. If the demands of respect concern the manner rather than the matter of one's treatment of another's beliefs, the principle of respect for beliefs will provide a secure normative underpinning for that distinction.

Does, then, this distinction between matter and manner provide an acceptable and workable standard for setting the boundary between freedom of expression and respect for beliefs? The distinction clearly has some merit. A sceptical academic treatise and an abusive vulgar lampoon may both deny the existence of God, but, although they agree in their matter, there would be a clear difference in their manner and a difference that is likely to be significant for those whose beliefs are under attack. The problem is that applying the distinction between matter and manner is rarely as straightforward as that. More often form and substance are so interrelated that it is not possible to treat one as a dispensable feature of the other. Manner and meaning are not wholly separable. Nor need a forceful and contemptuous manner be without justification. If strong and colourful prose enables an argument to hit its target more effectively, and if we believe that a religion or cult deserves to be targeted, then we are likely to feel that this more effective medium is justified. Religions are many and various and have been responsible for many of the worst, as well as some of the best, episodes in human history. Moreover, the exponents of religion have themselves not always been notable for the temperateness of their language. Those who possess a religious faith may be amongst the most reluctant to forsake the full armoury of language in opposing doctrines that they believe to be bogus and harmful or in condemning conduct that they regard as evil.[31]

Nor is it clear that this distinction has actually been followed in English law or that it would be acceptable to those who want some legal restriction placed upon blasphemy. It is quite obvious that it was the matter, and not merely the manner, of James Kirkup's poem that led to the successful prosecution of *Gay News* and its editor in 1977. The same is true of many earlier cases of blasphemous libel, even though judges who presided over those cases claimed to be applying the distinction between matter and manner.[32] It is also difficult to apply the distinction to Rushdie's work. For one thing, it is hard to know quite what should count as matter, and what as manner, in a novel. For another, it is quite clear that it is *what* Rushdie was understood to have suggested about Muhammad, the Koran and other important aspects of Islam, and not merely *how* he stated those thoughts, that was found objectionable.

Public Order

Finally a word is needed about public order. The maintenance of public order is typically considered an uncontroversial obligation of governments; it is also widely regarded as an acceptable reason for curtailing freedom of expression. Even Mill was prepared to concede that the urgent need to prevent a riot should take precedence over freedom of expression. A government might claim

that it is obliged to proscribe what members of its population find offensive or disrespectful simply to prevent disorder, violence and social conflict. That seems to have been part of the motivation for banning *The Satanic Verses* in India and Pakistan, where people have already died in demonstrations against the book. In Britain there have been suggestions that the sort of issue raised by the Rushdie affair might be most satisfactorily handled in terms of the maintenance of public order and the avoidance of social conflict. Thus, for example, in his response to the Rushdie affair, the Chief Rabbi of Britain has proposed that the law should prohibit 'the publication of anything likely to inflame, through obscene defamation, the feelings or beliefs of any section of society, or liable to provoke public disorder and violence.'[33]

Yet there is reason to be deeply unhappy with this sort of proposal. If the prospect of violent and disorderly reactions is sufficient reason to curtail a freedom, that freedom is placed at the mercy of others' willingness to react in violent and disorderly ways. The readier they are to respond violently, the more they can curtail the freedoms they find objectionable. The more aggressive and intemperate a group, the more protection it will receive; the more stoical and pacific a group, the less protection it will receive. That cannot be right.

If we are to distinguish between justified indignation and mere bully-boy tactics, we have to have some way of distinguishing between justifiable and unjustifiable (or excusable and inexcusable) disorder. If disorder occurs, or is likely to occur, we need some way of determining whether the responsibility for that lies with the speaker or writer (was he being unreasonably provocative?) or whether it lies with those who have resorted to disorder and violence (were they responding in an unreasonable way?).[34] That, in turn, requires us to return to questions of what, all things considered, constitutes unjustified offence or what, all things considered, constitutes intolerable disrespect for people's beliefs. We cannot therefore satisfactorily evade the issues that I have raised in this article by making public order our concern.

It may be, of course, that a violent reaction is likely to occur, even though it would be unjustified, and that a government may feel unable to prevent or contain it except by disallowing what the reactors find objectionable. That government may then judge that it is duty-bound to maintain the public peace even though that entails preventing people saying what they ought to be free to say. However, it is still important to distinguish between (i) cases in which the fault lies with the speaker and in which a government merely prevents him from saying what he has no right to say, from (ii) cases in which the fault lies with the reactors and in which a government feels compelled to override people's rights of free expression only as the lesser of two evils. Clearly, more is required to justify government action in the second case than in the first.

Conclusion

What, then, are we to conclude? In spite of the difficulties that the notion of respect for beliefs encounters, it is not a principle that is wholly without appeal. I have shown that, in any very strong form, the principle is unsustainable. If we interpret the principle less demandingly, so that it is concerned with the manner rather than the matter of statements, it is still not without its problems and difficulties. However, the objections that it encounters in this weaker form are, perhaps, less imposing and less conclusive. If the principle is concerned more with the way something is said than with the substance of what is said, it does not run into the simple contradictions that characterize its stronger version, nor does it collide so readily with the concerns that underlie freedom of expression. Moreover, there is reason to object to remarks which are intentionally or gratuitously disrespectful, whether they concern religion or any other subject, and, of course, a whole range of terms and phrases exist in our language whose very purpose is to insult, humiliate, belittle or wound.

There can then be cases in which someone's disrespectful treatment of another's beliefs is properly condemned. Whether we should translate that moral condemnation into legal condemnation is another question. Suppose that we do encounter a case in which people's complaints of disrespect are well founded and in which the author of the disrespectful remarks can claim no countervailing justification for them. Are these 'wrongs' really of sufficient moment to warrant bringing in the engine of law? If we draw only upon the idea of respect for beliefs, and do not allow that to be supplemented by claims about the *religious* wrongness of the author's words, is he guilty of very much more than bad manners or gross discourtesy? And, given the problems of definition that a law on this matter would face, and given the risk of serious and justified criticism being suppressed along with scurrilous and gratuitous insult, do we really want to have these matters decided upon by judges and courts? The conflicting interpretations that have been offered of Rushdie's *Satanic Verses* serve

notice that these are likely to be 'hard cases' and ones which judges and lawyers will be poorly equipped to handle. My worries about translating the more modest version of the principle of respect for beliefs into law are of this more practical kind. They indicate that the safest course, as far as law is concerned, is to err on the side of freedom of expression.

However, if we do abjure resort to law, we can still insist that those who avail themselves of the right of free expression are under a moral obligation to exercise it responsibly. That does not mean that it must never be exercised in a way which people will judge disrespectful. Clearly, if people are wrong, it is usually desirable, as well as justifiable, for others to tell them so, even if they themselves find that exceptionable. Even if people are not wrong, it may be no bad thing, as Mill argued, that from time to time, they should have to confront challenges to their most cherished beliefs. But to recognize that is not to endorse indiscriminate abuse. Strong, derisive, colourful, hurtful language may, on occasion, all things considered, be justified. But it may also, on occasion, all things considered, be unjustified.

The position that I am arguing for here then is that, legally, people should be entitled to do what, morally, they may be unjustified in doing. People ought not gratuitously to vilify the most cherished beliefs of others even though, legally, they should be unprevented from treating beliefs in that way – just as people should not call for the banning of books whose content they dislike, even though, legally, that is a call that they should be free to make. I would therefore be loath to see law, in the wake of the Rushdie affair, used to limit freedom of expression in the name of respect for beliefs. I would also want public bodies to withstand the use of other sorts of coercive tactics such as attempts to prevent books being held by public libraries. However, if we can demand a certain minimum of robustness from readers, we can also demand it of authors. That does not mean, of course, that they should have to endure threats of assassination or other forms of physical assault! But they cannot expect to be spared the vigorous protests of those who strongly object to their works; for example, provided it does not form the prelude to something more sinister, I can see nothing wrong with people burning their own privately purchased copies of books to manifest their disgust at their content. Whatever the moral and practical limitations of the principle of respect for beliefs, it is a notion that should not be wholly dispensed with and those who wield the pen should not feel themselves wholly free to disregard it.

Notes

1 Salman Rushdie, *The Satanic Verses* (London: Viking, 1988). For a useful collection of documents on the Rushdie affair, see Lisa Appignanesi and Sara Maitland, eds., *The Rushdie File* (London: Fourth Estate, 1989). Timothy Brennan, *Salman Rushdie and the Third World* (London: Macmillan, 1989), examines *The Satanic Verses* in the context of Rushdie's other writings. Two general accounts of the Rushdie affair and its background, one written from a Muslim and the other from a non-Muslim stance, are Shabbir Akhtar, *Be Careful with Muhammad! The Salman Rushdie Affair* (London: Bellew, 1989), and Malise Ruthven, *A Satanic Affair: Salman Rushdie and the Rage of Islam* (London: Chatto and Windus, 1990). To date Rushdie has given two main defences of his position: 'In good faith', published in *The Independent on Sunday*, 4 February 1990, pp. 18–20, and 'Is nothing sacred?', The Herbert Read Memorial Lecture, 6 February 1990 (London: Granta, 1990).

2 On 'overlapping consensus', see John Rawls, 'The Idea of an Overlapping Consensus', *Oxford Journal of Legal Studies*, 7 (1987), 1–25.

3 Cf. 'Many writers often condescendingly imply that Muslims should become as tolerant as modern Christians. After all, the Christian faith has not been undermined. But the truth is, of course, too obviously the other way. The continual blasphemies against the Christian faith have totally undermined it. Any faith which compromises its internal temper of militant wrath is destined for the dustbin of history, for it can no longer preserve its faithful heritage in the face of the corrosive influences.

The fact that post-Enlightenment Christians tolerate blasphemy is a matter for shame, not for pride…

Those Muslims who find it intolerable to live in a United Kingdom contaminated with the Rushdie virus need to seriously consider the Islamic alternatives of emigration (*hijrah*) to the House of Islam or a declaration of holy war (*jehad*) on the House of Rejection. The latter may well seem a kind of hasty militancy that is out of the question, though, with God on one's side, one is never in the minority. And England, like all else, belongs to God.' Shabbir Akhtar, *The Guardian*, 27 February 1989 (Appignanesi and Maitland, eds., *The Rushdie File*, pp. 240–1).

4 Whether the truth or falsity of beliefs is really of no consequence here is a nice question. It is arguable that, if my offence is misplaced because it stems from false beliefs, it cannot provide adequate reason for limiting your freedom. However, even if we take that view in principle, we may still

regard it as of little consequence in practice, since, in religious matters, there is such radical and unresolvable disagreement about which beliefs are true.

5 Cf. 'The Rushdie affair is, in the last analysis, admittedly about fanaticism on behalf of God.' 'It is true of course that God is above human insult in one sense; but there is another equally valid sense in which the believer is morally obliged to vindicate the reputation of God and his spokesman against the militant calumnies of evil. Only then can he or she truly confess the faith. For faith is as faith does.' Akhtar, *Be Careful with Muhammad!*, pp. 61, 103. In taking action against *Gay News* for blasphemous libel in 1977, Mrs Mary Whitehouse explained, 'I simply had to protect Our Lord'; *New Statesman*, 15 July 1977, p. 74.

6 For the history of the English law of blasphemy, see G. D. Nokes, *A History of the Crime of Blasphemy* (London: Sweet and Maxwell, 1928).

7 The British Government's considered position on the issues raised by the Rushdie affair was set out in a letter sent by John Patten, Minister of State at the Home Office, to a number of leading British Muslims, 4 July 1989. The full text of the letter was published in *The Times*, 5 July 1989, p. 13, and is reprinted in Bhikhu Parekh, ed., *Law, Blasphemy and the Multi-Faith Society* (London: Commission for Racial Equality, 1990), pp. 84–7.

8 'Blasphemy, Offensiveness and Law', *British Journal of Political Science*, 10 (1980), 129–48. A few years ago, the Law Commission recommended that the common law offences of blasphemy and blasphemous libel should be abolished: see Law Commission, *Working Paper No. 79: Offences against Religion and Public Worship* (London: HMSO, 1981), and the Commission's subsequent Report to Parliament, *Criminal Law: Offences against Religion and Public Worship* (Law Com., *No. 145*) (London: HMSO, 1985). For other recent discussions of the English law of blasphemy, see Richard Buxton, 'The Case of Blasphemous Libel', *Criminal Law Review*, November 1978, 673–82; J. R. Spencer, 'Blasphemy: the Law Commission's Working Paper', *Criminal Law Review*, December 1981, 810–20; St John A. Robilliard, *Religion and the Law* (Manchester: Manchester University Press, 1984), pp. 25–45; David Edwards, 'Toleration and the English Blasphemy Law', in John Horton and Susan Mendus, eds., *Aspects of Toleration* (London: Methuen, 1985), pp. 75–98; Parekh, ed., *Law, Blasphemy and the Multi-Faith Society*.

9 E.g., John Rawls, *A Theory of Justice* (Oxford: Oxford University Press, 1972); 'Kantian Constructivism in Moral Theory', *Journal of Philosophy*, 77 (1980), 515–72; Ronald Dworkin, *Taking Rights Seriously* (London: Duckworth, 1978); and *A Matter of Principle* (Oxford: Clarendon Press, 1986), Part 3; Bruce A. Ackerman, *Social Justice in the Liberal State* (New Haven, Conn.: Yale University Press, 1980).

10 The following statements, prompted by the Rushdie affair, provide examples of opinions which imply a commitment to something like the principle of respect for beliefs.

'In our view, it [*The Satanic Verses*] is a mere collection of insults, sacrilege, blasphemy and obscenity against Islam. No individual with the slightest grain of self-respect can accept being insulted and it is a more serious matter when a whole world community is subject to outrageous abuse of its inviolable sanctities.' (Dr. Mughram Ali Al-Ghamdi, chairman of the UK Action Committee on Islamic Affairs; quoted in Appignanesi and Maitland, eds., *The Rushdie File*, p. 113.)

'The right to freedom of thought, opinion and expression should not be practised at the expense of the rights of others. Islam should not be degraded under the banner of freedom of thought. Cursing any divine religion (Islam, Christianity and Judaism) could not be excused on the basis of freedom of thought, expression and opinion; it is a low act which deserves to be condemned by the whole world.' (Declaration of the Islamic Conference Organization, *The Times*, 18 March 1989.)

'The Labour Party is a secular political party in a secular state. Britain, however, is a multi-racial, multi-faith society. There must be respect and understanding for everybody from everybody. This must impose constraints and restraints on freedom of speech.' (Max Madden, *Tribune*, 7 April 1989, p. 1.)

'When a prophet is treated in a supercilious, dismissive or crude manner, what is at stake is not his honour – for he is dead and too big a person to be affected by insults. What is really at stake is the sense of self-respect and integrity of those living men and women who define their identity in terms of their allegiance to the prophet. Their pride, good opinion of themselves, dignity and self-esteem deserve to be protected and nurtured, especially when these are subjected to daily assaults by a hostile society.' (Bhikhu Parekh, *New Statesman and Society*, 24 March 1989, p. 33.)

'The laws of this country [Britain] were made before the Muslim peoples arrived … Now they must adapt to us. Others must respect our faith.' (Pir Mahroof Hussain, quoted in *New Statesman and Society*, 2 June 1989, p. 14).

'Faith is something to be respected and revered: not to be used as an opportunity to humiliate.' (Keith Vaz, *The Independent*, 29 July 1989, p. 11.)

'One would think that, in a plural democracy, we should all generate respect rather than hatred for opposed yet conscientiously held convictions … It can never be right to defend, in the name of liberalism, works that demean and humiliate human nature and tradition in any of their established forms.' (Akhtar, *Be Careful with Muhammad!*, p. 7.)

11 However, note that my offended reaction may be caused not by the fact that what you say amounts to disrespect for my beliefs, but simply by my taking exception to the substance of your remarks; for example, if you make abusive remarks about Christ, I may be offended, not because that constitutes disrespect for *me* as a Christian, but simply because you are abusing the Son of God.

12 For a catalogue of offended conditions, see Joel Feinberg, *The Moral Limits of the Criminal Law; Vol. 2: Offense to Others* (New York: Oxford University Press, 1985), pp. 10–13.

13 On 'rights-based' moralities, see Dworkin, *Taking Rights Seriously*, pp. 169–73; J. L. Mackie, 'Can There be a Rights-based Moral Theory?', in Jeremy Waldron, ed., *Theories of Rights* (Oxford: Oxford University Press, 1984), pp. 168–81.

14 Rawls, 'Kantian Constructivism in Moral Theory', p. 543.

15 Appignanesi and Maitland, eds., *The Rushdie File*, p. 28.

16 For example, 'You are aggrieved that some of us have condemned you without a hearing and asked for the ban without reading the book. Yes, I have not read it, nor do I intend to. I do not have to wade through a filthy drain to know what filth is. My first inadvertent step would tell me what I have stepped into.' (Syed Shahabuddin, in Appignanesi and Maitland, eds., *The Rushdie File*, p. 47.)

17 In some measure this difficulty might be handled by subjecting offence to a test of reasonableness; see Jones, 'Blasphemy, Offensiveness and Law', p. 147, and *Report of the Committee on Obscenity and Film Censorship* (the 'Williams Report'), Cmnd 7772 (London: HMSO, 1979), pp. 122–5. However, not everyone would accept that 'reasonableness' is an appropriate test to apply to offence; see, for example, Feinberg, *Offense to Others*, pp. 35–7.

18 The grounds for freedom of expression are examined in relation to the Rushdie affair in Jeremy Waldron, 'Too important for tact', *Times Literary Supplement*, 10–16 March 1989, pp. 248, 260; and Albert Weale, 'Freedom of Speech vs Freedom of Religion?', in Bhikhu Parekh, ed., *Free Speech* (London: Commission for Racial Equality, 1990), pp. 49–58.

19 For a contrary view, see Susan Mendus, 'The Tigers of Wrath and the Horses of Instruction', in Parekh, ed., *Free Speech*, pp. 3–17.

20 For an examination of the significance of revelation for the Rushdie affair, see Preston King, 'Rushdie and Revelation', in Parekh, ed., *Free Speech*, pp. 28–48.

21 Bernard Williams, *Problems of the Self* (Cambridge: Cambridge University Press, 1973), p. 136.

22 I have examined some aspects of this relation in 'Liberalism, Belief and Doubt', in Richard Bellamy, ed., *Liberalism and Recent Legal and Social Philosophy* (ARSP, Beiheft 36) (Stuttgart: Steiner, 1989), pp. 51–69.

23 *R. v. Lemon* [1979] 2 WLR 281 at 315. See also Weale, 'Freedom of Speech vs Freedom of Religion?', pp. 55–8. For criticism of Lord Scarman's view, see the Law Commission, *Working Paper No. 79: Offences against Religion and Public Worship*, pp. 78–80.

24 This may also explain why liberalism tends to concern itself much more with some sorts of beliefs than with others, an unevenness of concern which would seem odd if what mattered were beliefs as such. Why all the *Angst* about moral and religious beliefs? Why not an equal concern with people's beliefs about the natural world or about art? Part of the answer would seem to be that moral and religious beliefs are 'life-shaping' and are therefore more directly relevant to the kind of rights that the deontological liberal wants to assert.

25 For example, 'For Unesco, as a world-wide forum for dialogue and understanding, freedom of creation, of opinion and of expression, with respect for convictions, beliefs and religions, is essential … It is every person's duty to respect other people's religions; it is also every person's duty to respect other people's freedom of expression.' (Frederico Mayor, Director-General of UNESCO, in Appignanesi and Maitland, eds., *The Rushdie File*, p. 125). 'Western emphasis on freedom of speech and tolerance is essential to civilisation. But reverence towards the traditions and ideals which other peoples hold dear is also an essential part of a healthy and happy society.' (H. B. Dehqani-Tafti, Bishop of Iran, Letter, *The Times*, 1 March 1989.)

26 For example, 'censorship is wrong and any calls for censorship by any fundamentalist religious leaders should be resisted. Not because of any lack of respect for anyone's sincerely held personal faith. But because it cannot be right to have one set of views imposed on everyone else by force, punishment and the censor.' (Diane Abbott, Letter, *The Guardian*, 16 February 1989, in Appignanesi and Maitland, eds., *The Rushdie File*, p. 111.) 'It is important that their [British Muslims'] spiritual values should be respected … They, in turn, however, must not seek to impose their values either on their fellow Britons of other faiths or on the majority who acknowledge no faith at all.' (Editorial, *The Independent*, 16 January 1989.)

27 For example, 'It is not civilised to insult the religious sanctities of any people. We do not object to anyone writing critically about Islam – there are hundreds of such books in our libraries – but as you see these *Satanic Verses* belong to an entirely different genre.' (Spokesman for the Islamic Council, in Appignanesi and Maitland, eds., *The Rushdie File*, p. 78.) 'That Rushdie has insulted us is evident … Of course, the rights of the individual, notably to free expression, are inalienable. Those of the community, notably the respect of its beliefs, are no less so.' (Moncef Marzouki, in Appignanesi and Maitland, eds., *The Rushdie File*, p. 182.) 'Islam and Muslims are not against freedom of expression but they are against freedom to insult and injure the religious beliefs and sentiments of any community.' (Drs. S. M. Khalil, I. Mojahid, and M. S. Khan, Letter, *The Independent*, 3 March 1989.) 'The Muslims did not object to anybody disagreeing with Islam but only to somebody insulting it. Whether this right to insult exists, is the issue.' (Shoaib Qureshi and Javed Khan, *The Politics of Satanic Verses* (Leicester: Muslim Community Studies Institute, 1989), p. 27.)

28 'No freedom can be absolute and, in a democratic society, the individual, whether a writer, an artist or an ordinary man in the street, must voluntarily restrain his freedom to

stay within the universally accepted bounds of civilised conduct. If he does not, then he is asking for restriction to be imposed upon him. Some argue that writers and artists are a special category and must enjoy unrestricted freedom of expression. This notion must be challenged. No one who has read the book can deny that Mr Rushdie has transgressed all boundaries of decency and propriety in *The Satanic Verses* and for that he must be condemned.' (M. Akbar Ali, Letter, *Daily Telegraph*, 9 March 1989, in Appignanesi and Maitland, eds., *The Rushdie File*, p. 217.) 'This book is not a threat to Muslims. It is a threat to decency. One cannot and should not malign or publish libellous statements against leaders of any faith. Islam can withstand any controversy and criticism. No religion should tolerate blasphemy.' (Shaikh Mohommad, Letter, *The Independent*, 20 January 1989.) 'Freedom to criticise one religion from the basis of another is not under threat … Muslims accept criticism but they will not tolerate vilification of the Prophet Mohamed. They in turn may criticise the beliefs of Christians but would never insult Jesus … Criticism will be met, as it has been in the past, by "the ink of the scholars". But why should vilification be allowed? Surely it is not beyond the capability of intelligent people to distinguish between useful religious debate and deliberate distortion and insult.' (M. Hossain, Letter, *The Independent*, 1 June 1989.)

29 In *R. v. Ramsay and Foote* [1883], Lord Coleridge declared, 'I now lay it down as law, that, if the decencies of controversy are observed, even the fundamentals of religion may be attacked without the writer being guilty of blasphemy' (15 Cox C. C. 231, at 238). However, he was not the first to interpret the law in that way.

30 *Stephen's Digest of the Criminal Law*, 9th edn. (1950), article 214. This formulation of the law was endorsed by Lord Scarman in *R. v. Lemon* [1979], 2 WLR 281, at 315.

31 Cf. 'Religion is a luxuriant growth. Alongside major historical traditions is a tangled mass of lesser and newer ones, not always easily identifiable, fiercely competitive, some of them much given to litigation, and with beliefs that range from the profoundly impressive to the suspiciously barmy. Where does one draw the line? Is Ron Hubbard, for instance, a candidate for posthumous inviolability? And if not, why not? And what might be the consequences of protecting the reputation of religious founders who, in any sane and tolerant society, would deserve to be ridiculed?' (The Archbishop of York (commenting on a proposal to extend the law of libel to the founders of religious faiths), Letter, *The Times*, 1 March 1989.)

32 See further, Jones, 'Blasphemy, Offensiveness and Law', pp. 141–4.

33 Letter, *The Times*, 9 March 1989 (in Appignanesi and Maitland, eds., *The Rushdie File*, pp. 215–16). Similarly, though rather more opaquely, the Archbishop of York has suggested dealing with the issues raised by the Rushdie affair by developing 'that aspect of the present law of blasphemy which focuses on the shaking of the fabric of society when widespread sensibilities are offended. Implicit in this is the belief that stable societies contain a sacral element, and that it is unwise to allow this sense of sacredness to be undermined by scurrilous attack.' (Letter, *The Times*, 1 March 1989.)

34 Note that, even if we judge that the speaker was speaking improperly, that need not be sufficient to condone a violent or disorderly reaction.

40

The Structure of Proletarian Unfreedom

G. A. Cohen

I

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 denned the proletarian as the producer who has (literally or in effect) nothing to sell but his own labor power.[1] He inferred that the worker is *forced* to sell his labor power (on pain of starvation).

In this article 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 labor power?

This question is debated in the real world, by nonacademic 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 article I argue against leftists who do not see the answer's power and against rightists who do not see the answer's limitations.

II

Some would deny that workers are forced to sell their labor 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 labor 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 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,

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and the claim that the worker is forced to sell his labor 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.

III

Robert Nozick might grant that many workers have no acceptable alternative to selling their labor 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 is he nevertheless not forced to sell his labor 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.[2]

IV

There is, however, an objection to the claim that workers are forced to sell their labor power which does not depend upon a moralized view of what being forced involves. But before we come to it, in Section V, I must explain how I intend the predicate "is forced to sell his labor power." The claim in which it figures here comes from Karl Marx. Now I noted that Marx characterized classes by reference to social relations of production, and the claim 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 labor power in the relevant Marxist sense, then this must be because of his objective situation, and not 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 labor 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 XV 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 *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[3] that this insistence is wrong, but I shall accede to it in the present article, 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 labor 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 labor capacities of its producers and the means of production they use.[4] We can distinguish between standard and deviant uses of the stated powers. Let me then propose that a worker is forced to sell his labor 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 labor 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 yet 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 nonstandard 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 labor 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 deliberate human action, notably on the part of the state. And if, as I often think, the state functions on behalf of the capitalist class, then any structural constraint by virtue of which the worker must sell his labor power has enough human will behind it to satisfy the stipulation that where there is force, there are forcing human beings.

The stipulation might 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. Then, too, one might be justified in speaking of human forcing.

V

Under the stated interpretation of "is forced to sell his labor 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 labor 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 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[5] British proletarians are in a position to obtain these. Therefore most British proletarians are not forced to sell their labor power.

VI

I now refute two predictable objections to the above argument.

The first says that the recently mentioned persons were, *while they were proletarians*, forced to sell their labor power. Their cases do not show that proletarians are not forced to sell their labor power. They show something different: that proletarians are not forced to remain proletarians.

This objection embodies a misunderstanding of what Marxists intend when they say that workers are forced to sell their labor 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 labor power, they do not mean: "X is a proletarian at time t only if X is at t forced to sell his labor 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 labor power on Tuesday, but if he is not forced on Tuesday to sell his labor 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 labor 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 labor 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 counterexamples traveled, reaching their destination in, as I would argue, an amount of time less than n,[6] they were, though proletarians, not forced to sell their labor power in the required Marxist sense.

Proletarians who have the option of class ascent are not forced to sell their labor power, just because they do have that option. Most proletarians have it as much as our counterexamples did. Therefore most proletarians are not forced to sell their labor power.

VII

But now I face a second objection. It is that necessarily not more than few proletarians can exercise the option of upward movement. For capitalism requires a substantial hired labor force, which would not exist if more than just a few workers rose.[7] Put differently, there are necessarily only enough petty bourgeois and other nonproletarian positions for a small number of the proletariat to leave their estate.

I agree with the premise, 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 labor power? I think not.

An analogy will indicate why. Ten people are placed in a room the only exit from which is a huge and heavy 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 jailer 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.[8] 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 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[9] proletarians there exists a means of escape. So even though necessarily most proletarians will remain proletarians, and will sell their labor 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 the workers are objectively forced to sell their labor 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 labor power. Hence they are not objectively forced to sell their labor power.

VIII

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 labor 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 that 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.

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 defense of this 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 the annals of human motivation show that 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.[10]

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 the others would have contempt for him, but not try to stop him). Each remains free to leave. Yet we can envisage members of the group communicating to their jailer 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.

Marx often maintained that the worker is forced to sell his labor power not to any particular capitalist, but just to some capitalist or other, and he emphasized the ideological value of this distinction.[11] The present point is that, although, in a collective sense, workers are forced to sell their labor 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 coercion,"[12] it does not require the unfreedom of specified individuals. There is an ideologically valuable anonymity on *both* sides of the relationship of exploitation.

IX

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 what Marx called the "dull compulsion of economic relations."[13] Long occupancy, for example from birth, of a subordinate class position nurtures the illusion, 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 transpetty 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.[14]

Those lines envisage a better liberation: not just from the working class, but from class society.

X

In the rest of this article I consider objections to the arguments of Sections VII and VIII, which I shall henceforth call argument 7 and argument 8, after the numbers of the Sections in which they were presented. Shorn of explanatory detail, the arguments are as follows:

7. There are more exits from the British proletariat then 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 labor 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 VI) 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.

A one-premise argument may be challenged in respect of its premise, its inference, and, independently of the way it is drawn, its conclusion. Section XI considers the inference of argument 8; Sections XII and XIII examine whether its conclusion is true, or, if true, interesting; and Section XIV investigates its premise. In Sections XV and XVI the inference of argument 7 is challenged, and in Section XVII its premise is subjected to scrutiny.

XI

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 jailer'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 this 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 admitted 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 IV, 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.

XII

The objector of Section XI doubted that the situation of the proletariat could be described as one of collective freedom, but he did not challenge the very concept of a collective unfreedom distinct from individual unfreedom. I now deal with a differently inspired skepticism. Set aside the question of what causes the restriction on the number of nonproletarian 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.[15] 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, 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 (*sensu composito*) to perform A, and
2. no matter which m members performed A, the remaining $n - m$ would then be unfree (*sensu diviso*) to perform A.[16]

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,[17] 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*.[18] Note that the relevant relation is neither symmetrical nor transitive. If I am free to do A with you, it does not 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 VIII, 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 interesting 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?[19] 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 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 to regret an unfreedom to do what I have no desire to do,[20] I am not less unfree for lacking that desire.[21] 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 nonaccidentally 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.[22] 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 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 labor 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 labor 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.

XIII

In an argument which does not challenge the concept of collective unfreedom, Hillel Steiner and Jan Narveson[23] 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 labor 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 labor power to some capitalist … shows equally that the capitalist is compelled to obtain labor power from the worker."[24]

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.

For the worker is more closely connected with his labor power than the capitalist is with his capital. When I sell my labor power, I put *myself* at the disposal of another, and that is not true when I invest my capital. I come with my labor power, I am part of the deal.[25] That is why some people call wage labor 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."[26] I am sure that many will think it is an irresponsible exaggeration to call wage labor 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 labor 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 labor power instead.[27] 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 labor power; or, if he is, then that is because of how bad selling one's labor power is, in comparison with investing one's capital.[28]

It might be said that the capitalist is, *qua* capitalist, forced to invest his capital: insofar as he acts in that capacity, he has no 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,"[29] 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 labor 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 labor power. So they have an alternative to selling their labor 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."[30] 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 labor 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 Section XII). Then note that even if the objection is 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 society 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.[31] 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.

XIV

The final challenge from the Right to be considered here concerns the premise of the argument of Section VIII: 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 article: proletarians can form workers' cooperatives. 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.[32]

Note that this objection is not intended to support the conclusion 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 cooperatives. But the opportunities have to be very extensive indeed for the premise 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 cooperatives (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 cooperatives. 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' cooperatives) 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 coordination affecting the initial formation of cooperatives. There might be many workers each of whom would be willing and able to prosper cooperatively 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 cooperatives 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 cooperatives would require substantial external finance, but financiers are reluctant to back even commercially viable cooperative 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."[33] 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 cooperative 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 cooperators into sellers of labor power, in effect if not in form.[34]

There is a general reply to the position of the bourgeois ideologist expounded on before. 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' cooperatives on the extensive scale required to secure 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 cooperative market society. When the Labour government of 1974–9 denied support to workers' cooperatives of a kind routinely given to private industry,[35] 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 cooperation. 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 enthusiastic proponents of the cooperative market economy rely on the state to promote a transition to that form of society.[36]

XV

One left-wing objection to the argument of Section VII does not question its premise, 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, and so on.[37]

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 favorable, 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).[38]

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. Others, such as Harry Frankfurt, would defend a weaker *analysans*: for Frankfurt, natural obstacles restrict freedom. I think he is right, but I resolved (see Section IV) 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 jailer 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 labor power. Is he, in addition, forced to sell his labor 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 V). Positive answers to these questions would upset the argument of Section VII. 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.

XVI

Argument 7 says that (most) British workers are not forced to sell their labor 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 XV 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.[39] 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 fledgling 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 objection does not challenge the premise 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[40] of attempting the petty bourgeois alternative is normally too low to justify the statement that most workers are not forced to sell their labor power.

Attention to expected utility also illuminates the case of the immigrant petty bourgeois (Section V), 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 who are consequently less prone to superexploitation. 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 argument, let us state it as it would apply to one whom we shall think of as a typical worker, and 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 labor power. Therefore,
5. The conclusion of argument 7 does not follow from its premise.

The first premise is a (more or less) factual claim, and the second is conceptual. In assessing the truth of the factual premise, 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 XV. Even if we could carry out the needed discounting, it would remain extremely difficult to tell whether the factual premise 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 exworkers 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 premise is true, in order to focus on the conceptual claim embodied in premise 2.

If a person is forced to do *A* if he has no acceptable alternative, then what makes for acceptability in the required sense? Suppose 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, then 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.

So it appears that expected utility must figure in the calculus of constraint. But I think it figures in a more complex way than premise 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. Illustration: "You're not forced to go to Brighton, since you can go to Margate, though you're less likely to have a good time there."

Premise 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 not an acceptable alternative to A iff
EITHER *A* is particularly bad and *B* is worse than *A*
OR *A* is not particularly bad but *B* is,

which simplifies to:

B is not an acceptable alternative to A iff
B is worse than *A* and *B* is particularly bad.

Expected utility is the standard for judging courses good and bad here, and in order to apply the analysis one has to make not only relative 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 "particularly bad." If we were allowed only relative 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. 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 are so bad. You could be forced to go to the superb 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.

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 have the defect 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."

XVII

Tannenbaum accepted the premise 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 premise of the argument. I adduced in support of it 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 skepticism is justified. But not in all cases. Often enough the nonproletarian position occupied by an immigrant demands, initially, longer hours and stronger commitment than native British tend to find worthwhile, so that it would have gone unfilled had some nonnative 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 nonproletarian, 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 premise 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 labor 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.[41] When considering such theses as that workers are individually free to escape the proletariat, we should beware of arguments which would at best show them to be barely true.

Notes

1 For elaboration of this definition, and a defense of its attribution to Marx, see my *Karl Marx's Theory of History* (Oxford: Oxford University Press and Princeton: Princeton University Press, 1978), pp. 63–77, 222–3, 333–6. This book is henceforth referred to as *KMTH*.

2 For Nozick's view, see his *Anarchy, State and Utopia* (New York: Basic Books, 1974), pp. 262–4, which I criticize at p. 151 of "Robert Nozick and Wilt Chamberlain," in *Justice and Economic Distribution*, ed. John Arthur and William Shaw (Englewood Cliffs, NJ: Prentice-Hall, 1978). For more discussion of false-because-moralized definitions of freedom, see my "Capitalism, Freedom and Proletariat," *The Idea of Freedom*, pp. 12–14; "Illusions about Private Property and Freedom," in *Issues in Marxist Philosophy*, ed. John Mepham and David Ruben (Hassocks, 1981), 4:228–9; "Freedom, Justice and Capitalism," *New Left Review*, no. 126 (March/April 1981): 10–11. A partly similar critique of moralized accounts of force and freedom is given by David Zimmerman at pp. 121–31 of his "Coercive Wage Offers," *Philosophy & Public Affairs* 10, no. 2 (Spring 1981).

3 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," in *Essays of Freedom of Action*, ed. Ted Honderich (London: Routledge & Kegan Paul, 1973), pp. 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.

4 See *KMTH*, pp. 31–5, 63–5, 217–25.

5 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 note 6.

6 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 labor 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 labor power, but they cannot dispose of the counterexamples 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 0, he is not forced to sell his labor power.

7 "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," *Capital*, trans. Ben Fowkes [Harmondsworth: Penguin Books, 1976], 1:1079). For commentary on similar texts see *KMTH*, p. 243.

8 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.

9 See notes 5 and 6.

10 In a stimulating commentary on the argument of Sections VII and VIII, 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," p. 63). Elster shows that such structures pervade social life.

11 See *KMTH*, p. 223, for exposition and references.

12 The phrase comes from Marx, *Capital* (London, 1962), 1:899. See *KMTH*, pp. 82–4, for a discussion of different modes of exploitation.
13 Marx, *Capital*, 1:899.
14 From his "Song of the United Front."
15 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 Section XI and here set aside.
16 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 labor power. Unlike the definition I described and rejected at p. 25 of "Capitalism, Freedom and the Proletariat," this one would have the virtue of keeping Sir Keith Joseph out of the working class.
17 See *KMTH*, pp. 243–5 for remarks on that issue.
18 Robert Ware brought the important concept of relational freedom to my attention.
19 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.
20 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. And subtler reasons for valuing the freedom to do what I do not want to do are presented by Jon Elster in "Sour Grapes," in *Utilitarianism and Beyond*, ed. A. Sen and B. Williams (Cambridge: Cambridge University Press, 1982).
21 See Isaiah Berlin, *Four Essays on Liberty* (Oxford: Oxford University Press, 1969), pp. xxxviiiff., 139–40 and also Hillel Steiner, "Individual Liberty," *Proceedings of the Aristotelian Society*, 1974–5, p. 34. The point was originally made by Richard Wollheim in a review of Berlin's "Two Concepts of Liberty." But see Elster, "Sour Grapes," *Utilitarianism and Beyond*, for a good challenge to the claim defended by these authors.
22 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 $n > m > 0$. See Section VI on the need to refer twice to time in fully explicit specifications of freedom.
23 In separate personal correspondence.
24 From p. 448 of his valuable article on "Justice and Capitalist Production," *Canadian Journal of Philosophy* 8, no. 3 (1978).
25 "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." See "Labour Management and the Market Economy," *Irish Journal of Business and Administrative Research*, April 1979, p. 30.
26 *Principles of Political Economy* (Toronto: University of Toronto Press, 1965), p. 766.
27 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.
28 And not only in comparison with investing capital, but also absolutely, if the account of acceptability in alternatives in Section XVI is right.
29 Marx, *Capital*, 1:92.
30 Marx, Preface to *A Contribution to the Critique of Political Economy*.
31 "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" (R. C. Jeffrey, "Statistical Explanation vs. Statistical Inference," in N. Rescher *et alia, Essays in Honor of Carl G. Hempel* [Dordrecht: Reidel, 1970], p. 105).
32 See Nozick, *Anarchy, State and Utopia*, pp. 255–6.
33 Branko Horvat, "Plan de socialisation progressive du capital," in *Solutions Socialistes*, ed. S.-C. Kolm (Paris: Editions Ramsay, 1978), p. 183.
34 See Jaroslav Vanek, *The General Theory of Labor-Managed Market Economies* (Ithaca: Cornell University Press, 1970), pp. 291ff., and pp. 317–18 (on "the dilemma of the collateral"); and also O'Mahoney, "Labour Management," pp. 33ff.
35 The first Minister of Industry in that government, Tony Benn, favored cooperatives, which is one reason why he was replaced in the summer of 1975 by Eric Varley, who interpreted Labour's semisocialist election manifesto commitments in an unsocialist way. See *The New Worker Co-operatives*, ed. Ken Coates (Nottingham: Spokesman Books, 1976), pp. 6, 95, 218; and Ken Coates, *Work-ins, Sit-ins and Industrial Democracy* (Nottingham: Spokesman Books, 1981), pp. 140ff. For a lucid presentation of the record of business and government hostility to cooperatives in my native Quebec, see Pauline Vaillancourt and Jean-Guy Vaillancourt, "Government Aid to Worker Production Cooperatives," *Synthesis*, Spring 1978.
36 Vanek (*General Theory*, p. 317) says that there is not "much real possibility … in a liberal capitalist environment" for developing a cooperative market economy, and Horvat (*Solutions Socialistes*, pp. 165ff.) proposes what amounts to expropriation without compensation as a means of instituting it.
37 See the requirements listed by Marx in the passage quoted in note 7.
38 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 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* (Oxford: Basil Blackwell, 1975), p. 136.

39 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.

40 The expected utility of a course of action is the sum of the products of the utility and probability of each of its possible outcomes.

41 To get an uncontroversial illustration of the sort of truth value 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, and 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.

41

What's Wrong with Colonialism

Lea Ypi

I

There is no question mark at the end of my title. I ask you to grant that *something* is wrong with colonialism. That in itself is no meagre concession; the history of liberalism is replete with apologies for colonialism as well as condemnations of it. If you think that colonialism is justified, you are unlikely to find my arguments attractive. But if you agree that something must be wrong with colonialism, you might want to know more about what exactly the nature of the wrong is.

It is tempting to answer the question by following one of two prominent strategies for showing the wrong of colonialism: an argument from nationalism and an argument from territorial rights. This article defends an alternative account. It argues that the wrong of colonialism consists in the creation and upholding of a political association that denies its members equal and reciprocal terms of cooperation. To see the nature of that wrong, no commitment to either nationalism or territorial rights is needed.

Let me nevertheless begin with a few words on each. Nationalism is familiar to most people. The idea that cultural groups have a prima facie claim to self-determination and that the wrong of colonialism is explained by the violation of such claims has a long-standing tradition both in political theory and in political discourse. "The power," Gandhi declared in his famous "Quit India" speech of 1942, "will belong to the people of India, and it will be for them to decide to whom it placed in the entrusted."[1] "Whether we like it or not, this growth of national consciousness is a political fact" and "we must all accept it as a fact," British Prime Minister Harold Macmillan emphasized in his equally famous "Wind of Change" address to the South African parliament.[2] Although few normative theorists would take Macmillan's words at face value, the aim of this article is not to discuss potential objections to the view. Many readers will continue to find nationalism attractive. But even more may be interested in a critique of colonialism that does not require commitment to some version of it, whether declared or disguised, whether of an ethnic or of a civic kind.

The argument from territorial rights has received a great deal of attention in the recent literature.[3] The claims of indigenous groups are often considered related to territory in some normatively important way, as claims to particular land, particular resources, and the use of geographical space belonging to a particular group of people.[4] To take one example, the United Nations'

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"Declaration on the Granting of Independence to Colonial Countries and Peoples" of 1960 states that "all peoples have an inalienable right to complete freedom, the exercise of their sovereignty and the integrity of their national territory."[5] To take another example, the principle of "permanent sovereignty over natural resources" asserted in the United Nations General Assembly Resolution 1803 (XVII) of 1962 emerged partly in response to the question of whether decolonized states could be considered free to reject contracts and concessions signed by their colonial masters and to ignore the torts of a predecessor state.[6] Finally, the defense of territorial rights might also appear crucial for our understanding of restitution claims. Indigenous peoples' arguments concerning the use of land and resources seem to gain their strength from an appeal to the territorial entitlements of their ancestors. Even in cases where we might be prepared to concede that changes in circumstances imply the supersession of past colonial wrongs, the claims of descendants of colonized groups to the territory belonging to their ancestors are rarely challenged.[7]

The article proceeds as follows. Section II introduces some definitions and clarifications. Sections III and IV disentangle the critique of colonialism from the defense of territorial rights. Sections V, VI, and VII develop a different analysis of colonialism, one that sees it not as a violation of territorial claims but as the embodiment of an objectionable form of political relation. Sections VIII and IX examine a number of objections. Section X lays out some implications of the argument. Section XI concludes.

II Preliminary Remarks

In its first, Latin use, the verb "to colonize" derived from "colon," which meant "farmer, tiller, or planter." It referred to the Roman practice of settling in a hostile or newly conquered country by citizens who retained their rights of original citizenship, while working on land bestowed to them by the occupying authorities.[8] This understanding of colonialism, linked to the settlement claims of particular groups and their use of specific geographical areas, remained central in sixteenth- and seventeenth-century accounts of the occupation of the New World. Here the term "colonies" was deployed to refer to the territory used by settlers who created new communities for themselves and their descendants while remaining dependent on the mother country in political and economic matters.[9]

But settler colonialism is only one historical manifestation of colonial relations. In some cases, indigenous populations were exterminated rather than subjugated to a common political authority: the European conquests of Tasmania, of some of the Caribbean islands, and of vast areas in America, Australia, and Canada are all relevant cases. In other cases, very little settlement took place. Colonized territories served mainly as a provider of vital natural resources: the kinds of commercial colonialism practiced by the Dutch, English, and Portuguese in places like China, Japan, and the East Indies are the most familiar examples of this kind. During the late nineteenth century and early twentieth century, the purpose of colonial rule was declared to be the "civilizing mission" of the West to educate barbarian peoples: French policies in Algeria, French West Africa, and Indochina and Portuguese rule in Angola, Guinea, Mozambique, and Timor were designed to reflect precisely this principle. My critique of territorial rights and the analysis of the wrong of colonialism as a practice grounded in the denial of equal and reciprocal terms of political association applies to all these phenomena (settler colonialism, commercial colonialism, and civilizing colonialism).

Before proceeding with the argument, a few clarifications are in order. This article examines what is wrong with colonialism. It is not about whether some colonial masters are better than others. It is not about what we should make of cases where domestically oppressed groups could have ended their oppression through benign colonial rule. And it is not about the legitimacy of humanitarian intervention. All these are important questions. But here I am not interested in the degree of wrongdoing that colonialism exhibits compared to other oppressive relations, domestic or otherwise. Nor am I interested in the question of how to end such oppressive relations. I am interested in what makes colonialism, even benign colonialism, wrong as such. And I am interested in defeating one powerful argument that claims to identify that wrong: the argument from territorial rights.

Colonialism is wrong for many reasons. As one early observer remarked, "No account, no matter how lengthy, how long it took to write, nor how conscientiously it was compiled, could do justice to the full horror of the atrocities committed at one time or another."[10] Burning native settlements, torturing innocents, slaughtering children, enslaving entire populations, exploiting the soil and natural resources available to them, and discriminating on grounds of ethnicity and race are only some of the most familiar horrors associated with it. The suggestion that

the wrong of colonialism consists in its embodiment of an objectionable form of political relation is far from implying that this can now be forgotten. This article tries to clarify what is wrong with colonialism, over and above these familiar outrages. Although an account focusing on the brutality of this practice would capture most of the wrong of colonialism (especially when examined in historical perspective), it would leave unchallenged more subtle forms of it.

To clarify the wrong of colonialism, let us turn to its definition. Colonialism is typically understood as a practice that involves both the subjugation of one people to another and the political and economic control of a dependent territory (or parts of it).[11] The first of these elements suggests that colonialism is a practice that involves collective political agents, not individuals, family members, interest groups, or civil society associations. This article assumes that we know what makes the collective a political collective, and that indigenous societies or tribal groups do count as political collectives.[12] The second element suggests that colonialism has an important territorial component. But, although territoriality is descriptively crucial for distinguishing colonialism from other wrongs in the same family, it should not matter normatively. Or so I hope to show.

Colonialism, then, is a distinctive wrong. But it is a distinctive wrong within a larger family of wrongs, the wrong exhibited by associations that deny their members equality and reciprocity in decision making. Oppressed minorities, seriously unequal alliances, and apartheid societies are some of its close relatives. They are all nonterritorial manifestations of the same generic wrong: morally objectionable political relations. What sets colonialism apart is the manner in which that same generic wrong applies to territorially distinct political agents. But the territorially distinctive nature of such agents, although descriptively important, requires no prior normative defense. What we need instead is an account of the morally acceptable way of establishing and maintaining new political associations when territorially distinct political agents are at stake.

III Acquisition and Settlement

To see why territory is only descriptively and not normatively important for illustrating the wrong of colonialism, it is crucial to reflect on the limitations of views that equate the wrong of colonialism with violations of territorial rights. The following pages try to show how the most plausible defenses of territorial rights are unable to account for the wrong of colonialism, and have in fact been endorsed throughout history (and the history of political thought) to legitimize colonial enterprises.

Consider one prominent example: acquisition theories of territorial rights. In both individualist and collectivist versions, territorial rights are established as a result of agents' freedom to stake a claim on previously unowned resources (including land) and on the way in which the use of these resources promotes the ends of these agents.[13] For some, territorial rights result from agents making efficient use of the land. For others, they result from deserving the fruits of the efforts invested to improve it. For others still, they are established as a result of the incorporation of needed external resources into legitimate purposes and activities.

Yet, a similar account of the relation between land occupation and settlement was present in many early modern attempts to justify colonial practices. As Grotius had it, "If within a territory of a people there is any deserted and unproductive soil … it is a right of foreigners to take possession of such ground for the reason that uncultivated land ought not to be considered occupied."[14] Locke, for whom the living conditions of indigenous groups in the Americas offered a clear image of how the state of nature would have historically looked,[15] made a similar point but replaced the criterion of use with a much stronger constraint: labor. According to him, external objects had to be appropriated before they could be of any use, and the only means by which land could be appropriated was to cultivate it.

Of course, it is possible to object to these earlier accounts that their justification of territorial rights places too much emphasis on labor, efficient use of resources, and productive cultivation, therefore neglecting culturally specific ways of interacting with land on the side of indigenous populations. But the reason early modern authors denied territorial rights to indigenous people is only to some extent explained by their ignorance of alternative ways of life or by a cultural bias in their application of acquisition theories. The First Set of Fundamental Constitutions for Carolina that Locke helped to draft emphasizes that "the Indians' idolatry, ignorance or mistakes gives us no right to expel or use them ill."[16] And, Locke certainly agreed that the labor theory of acquisition applied to native populations of the Americas: "The Law of reason," he claimed, "makes the Deer, that Indian's who hath killed it."[17] The issue was not that the productive activity of American Indians did not generate claims to acquisition. It was rather that

indigenous productive activity did not extend to resources (like land), which, according to the authors we are examining, were evidently not used on a territorially continuous basis.[18]

To see the point of their claims, consider the case of indigenous hunter-gatherer populations. If these groups were placed one day here, another day there, a third day somewhere else, it meant that they did not actually *need* to use a *continuous* area of geographical space; land simply did not relate to their culturally specific ends in a way that was relevant to ground property claims. Many defenders of colonialism were aware of this point. Emer de Vattel, for example, granted that the occupants of fertile land might once have been justified in hunting and keeping flocks instead of engaging in agriculture. But now populations with a similar style of life used more land than they needed. They therefore had "no reason to complain if other nations, more industrious and closely confined, come to take possession of part of those lands."[19] The establishment of colonies in North America was, he argued, "extremely lawful": "The people of those extensive tracts rather ranged through than inhabited them."[20] This argument remains plausible even if one accepts that indigenous people are entitled to parts of the land they currently occupy in virtue of its promoting some sufficiently important end of theirs, and even if it is conceded that they relate to it in ways that are culturally different from ours.

These arguments are compatible with another reading of acquisition theories of territorial rights, one emphasizing the relevance of the proviso principle to leave "enough and as good" for other needy newcomers. The proviso, as is well known, places original appropriators under an obligation to "downsize" their holdings should changes in circumstances create new needs for outsiders to access land and resources previously available to native inhabitants.[21] Of course, as a matter of historical fact, settlement was far from being strictly guided by the proviso principle: colonialists appropriated much more good than they left for others. Yet, the principle, although abused, played an important role in the endorsement of colonial conquest. Vattel, as we have seen, did not dispute the fact that occupiers of territories in the New World might have initially been entitled to use the land they inhabited. The point was that their claim to occupy these lands should not be coupled with a right to permanently exclude others in need. Many of Vattel's predecessors (including Vitoria and Pufendorf) also conceded that indigenous people might be attached to the lands they inhabited. Yet they denied that this implied a permanent right to exclude needy settlers. Since the earth had initially been available for use by everyone, indigenous people had a duty to receive colonialists, to treat them hospitably, to give away part of their holdings, and to enter into commercial and political relations with them.[22] The Spaniards, Vitoria argued, "may import the commodities which they lack, and export the gold, silver and other things which they have in abundance."[23] Local princes, he continued, "are obliged by natural law to love the Spaniards, and therefore cannot prohibit them without due cause from furthering their own interests."[24]

One could of course resist these claims by arguing that the way tribal populations engaged with land implied a particular connection to their territory, one that was essential to these populations' sense of identity and that required exclusive and permanent access to its resources. But such an argument would take us closer to the idea of self-determination of cultural groups, and would not be available to a critic of colonialism who was at the same time trying to avoid a commitment to nationalism. If we put nationalism to one side, few plausible reasons are left to insist that the proviso principle should not apply to indigenous populations, even if we assume they were initially entitled to vast tracts of territory. From an acquisition perspective, no identity-based conception of territory can limit the rights of others to a fair share of the earth's natural resources.[25] As one author puts it, "Native American beliefs that they should not yield to newcomers exclusive control over portions of their territories would be viewed as a kind of nonculpable moral ignorance, an ignorance that perhaps excuses their acts of resistance to settlement of their territories, but that in no way limits the rights of fair access (and self-defense) of newcomers."[26]

If the wrong of colonialism is reduced to a violation of territorial rights, settlement practices appear very difficult to criticize. This is not to say that we cannot condemn such practices for what they have historically produced: mass murder, ethnic cleansing, racial discrimination, the exploitation of labor and resources, and the enslavement of huge parts of the earth's population. We might also emphasize that it is wrong to invoke fair access and self-defense on the side of colonists when these rights were systematically denied to native populations. But this critique would take us closer to the idea that the wrong of colonialism consists in its embodying an objectionable form of political relation, not in the occupation of others' land. Colonialism is therefore not condemned on the basis of territorial entitlement. It is criticized, rather, because it grants certain prerogatives

to colonists but denies them to natives, therefore departing from an ideal of equal and reciprocal terms of political association. The emphasis in this case is not on entitlement to land but on the kind of institution required to adjudicate between conflicting claims. The question then becomes who should place constraints on acquisition and who should decide about their extent, limits, and enforcement: it turns into a question about legitimate institutions. This point helps introduce a different justification for rights to territory and a different critique of the wrong of colonialism, to which I shall now turn.

IV Legitimate States, Civilizing Missions, and Commercial Colonialism

In shifting emphasis from acquisition-based claims to land to the political institutions necessary to settle disputes concerning such claims, we arrive at a functional justification of territorial rights. On this account, an agent is entitled to particular territorial rights insofar as that agent is capable of performing certain crucial political functions within a defined geographical area, such as securing justice.[27] On the legitimate-state theory, the claim to territorial rights is conditional upon the satisfaction of a number of internal and external conditions: the ability to guarantee the rule of law, to protect basic human rights, and to provide sufficient opportunities for citizens' democratic participation, to mention but some.[28] The puzzle for the critic of colonialism is that if this is how territorial rights are justified, one particular kind of colonialism, colonialism with a civilizing mission, could not always be ruled out.

Historically, the emancipation of allegedly backward groups with the support of more progressive ones has been one of the main arguments offered in support of colonial practices. Barbarians, Vitoria claimed when reporting a popular argument concerning American Indians, "though not totally mad," could be considered "so close to being mad, that they are unsuited to setting up or administering a commonwealth both legitimate and ordered in human and civil terms." Therefore, "the princes of Spain might take over their administration, and set up new officers and governors on their behalf, or even give them new masters, so long as this could be proved to be in their interest."[29]

Vitoria presented these arguments in 1538, a mere forty-six years after Columbus had first set sail to America. But neither the passing of time nor increased awareness of the consequences of European colonial rule made much difference to the argument. If anything, Vitoria's claims appear more qualified than those of the otherwise progressive John Stuart Mill more than three centuries later. While Vitoria was willing to admit the thesis of the "mental incapacity of the barbarians" merely "for the sake of argument," Mill had no doubt that "barbarians" could not be relied upon to observe any rules. "Their minds," he wrote, "are not capable of so great an effort nor is their will sufficiently under the influence of distant motives."[30] Therefore, Mill concluded, "nations which are still barbarous have not got beyond the period during which it is likely to be for their benefit that they should be conquered and held in subjection by foreigners."[31]

If territorial rights are contingent upon a particular way of delivering justice (that of the legitimate state), and if the wrong of colonialism is reduced to violations of territorial claims, agents who fail in that task could arguably be colonized. Contemporary proponents of legitimacy-based accounts are of course aware of these challenges. This is why their defense of the requisite capacities an agent must display to legitimately exercise territorial authority is coupled with a "nonusurpation" condition stating that if an agent is to be granted territorial rights, that agent must have not come to existence through the violent or otherwise unlawful overthrow of another legitimate entity.[32] But this condition is rather puzzling. Usurpation does not count as usurpation unless an independent criterion has been offered to explain why those who currently occupy a territory are also entitled to do so. Either this independent criterion is grounded itself in the requirements of a legitimate state or it is not. If it is, we are back to the defense of colonialism with a civilizing mission. If it is not, we can only support the nonusurpation condition with arguments external to the legitimacy-based account.[33]

One might want to endorse the nonusurpation condition in a way that admits the incorporation of prepolitical criteria but avoids committing to nationalist claims. The most plausible strategy is based on occupancy rights, the claims of those who inhabit a particular geographical area through no fault of their own to continue doing so.[34] Permanent occupation of a particular place, so the argument goes, is central to individuals' structuring of their expectations and to the reliable pursuit of their life projects. To remove them from such places would be to disrupt their ability to continue investing in the activities that matter to them, and to prevent their continuous functioning as autonomous moral agents.[35]

The occupancy criterion seeks to clarify what it means for legitimate states to respect the nonusurpation condition. But notice that such a justification of claims to occupancy is use-oriented and self-referential. It refers to the freedom of those who live in a particular place to continue doing so, for as long as the place continues to be important for their life projects, and if no other reasons speak against that claim. This proves too much in one respect and too little in another. One set of arguments grounds rights to occupancy, and another set of arguments grounds rights to jurisdiction. But it is possible to recognize rights to occupancy without acknowledging rights to jurisdiction; and vice versa, it is possible to acknowledge rights to jurisdiction without acknowledging rights to occupancy. The legitimate-state argument explains the right to jurisdiction with reference to how a political association should deliver justice for its members. It explains the right to occupancy with reference to how residence in a particular place structures individuals' life projects. What remains unclear is why the agent that collectively exercises occupancy rights and the one that delivers justice in a political association should be considered the same. Why shouldn't we allocate occupancy rights to one agent and jurisdictional rights to another? And why shouldn't the same territory be subject to two or more jurisdictions?

The distinction between occupancy and jurisdiction has been historically crucial to the endorsement of colonial enterprises. Grotius, one of the earliest defenders of occupancy rights, insisted that since such rights are only weak claims, typically associated with the *use* of particular resources, they should be understood as "*permissions*" and not as "commands that were to be *perpetually* enforced."[36] Indeed, no one could possibly agree to the exclusive appropriation of territorial resources by rights of occupancy if accessing them undermined their availability to other people. Given these conditions, perpetual enforcement of occupancy rights could not be unilaterally imposed. The claims to permanent occupation, Grotius argued, do not have "the force of a general compact binding upon different independent nations." Instead, they could be considered "as one branch of the civil law of many nations, which any state has a right to continue, or repeal according to its own pleasure or discretion."[37]

This distinction between occupancy and jurisdiction implied that it was plausible to concede that tribal populations had rights to jurisdiction (regardless of how they treated their members), and that such rights to jurisdiction should be respected.[38] However, when it came to occupancy titles, their recognition depended on their use, and their use was determined by needs. And visitors, it was claimed, needed territory as much as original inhabitants.[39] Moreover, some territorial resources (conspicuous among them water) were by definition impossible to exclusively and permanently occupy without harming the rest of humanity. A river, Grotius argued, is as such "the property of that people, or of the sovereign of that people, through whose territories it flows. He may form quays, and buttresses upon that river, and to him all the produce of it belongs. But the same river, as a running water, still remains common to all to draw or drink it."[40] It followed from this that "a free passage through countries, rivers, or over any part of the sea, which belongs to some particular people, ought to be allowed to those, who require it for the necessary occasions of life." It followed also that "a free passage should be guaranteed not only to persons but also to merchandise." And it followed further that "those going with merchandise or only passing through a country, ought to be allowed to reside there for a time, if the recovery of health, or any other just cause should render such residence necessary." And even "permanent residence" ought not to be refused to "foreigners, who, driven from their own country, seek a place to refuge."[41]

Historically, these claims played a crucial role in the justification of commercial colonialism in the early stages of European expansion to the New World. The establishment of chartered commercial companies could not have occurred without the advocacy of the right to passage and trade, both of which were defended on the basis of a universal claim to use resources (like water and air) considered to be commonly available. To take one influential example, the British East India Company, through which the British Crown exercised indirect control over India until the mid-nineteenth century, was at first only an association of just over one hundred British merchants, created after petitioning for permission to sail the Indian Ocean, allegedly open to all.[42] Far from threatening to remove local jurisdictional powers, it operated for over two hundred years in concert with Indian authorities, taking advantage of their agreement to the establishment of trading posts, commercial privileges, and trade monopolies in order to undermine their Dutch and Spanish competitors. The same argument applies to the Dutch East India Company, in support of which Grotius's claims are often said to have been made.[43] Regardless of some important differences in the way these companies operated and enjoyed political support from home authorities, whether the territorial

claims of native populations were justified or not, and whether they were justified on grounds of property or mere occupation, seems to have made very little difference to the defense of colonial expansion.

This, as I have suggested, is not a problem that can be easily resolved by formulating a more careful defense of territorial claims, at least not if the defense continues to invoke self-referential criteria (of attachment to the territory, productive interaction with it, or mere occupation) to justify the right to permanently exclude outsiders and to limit their access to natural resources. To understand the wrong of colonialism we can be neutral on the status of territorial rights, whether they can be justified, and how, if at all. Where we need to focus our attention instead is on the kind of political relation colonial practices exemplify. That is the issue to which I now turn.

V A Cosmopolitan Critique

We can begin our reflections on the wrong of colonialism as an objectionable form of political relation by revisiting Kant's critique of the commercial practices of European states and the occupancy accounts legitimizing them. Like most of his predecessors, including Grotius, Kant endorsed the idea that everyone on the face of the earth might be entitled to use natural resources commonly available. He also endorsed the suggestion, familiar since the writings of Vitoria, that this included a right to visit other areas of the world and to establish political relations with the population of these areas. It is well known that Kant defined this right to visit and communicate with others as a "cosmopolitan" right, insisting that when such attempts at communication were made, it was reasonable to expect those on the receiving end to behave hospitably toward their visitors and to refrain from treating them with hostility. There were, in other words, certain norms of equal treatment and reciprocity that ought to have governed any attempt to seek political association with others. In the light of such norms, Kant criticized the instances of piracy and enslavement of stranded visitors that were typical of the inhabitants of the Barbary Coast, and condemned the attacks on nomadic tribes practiced by inhabitants of the deserts, for example, the Bedouins. But even more interesting is that when he compared these forms of inhospitable behavior with "the *inhospitable* behavior of civilized, especially commercial, states in our part of the world," he observed that "the injustice they show in *visiting* foreign lands and peoples (which with them is tantamount to *conquering* them) goes to horrifying lengths."[44] When the so-called civilized states visited remote areas of the earth, when America, Africa, and Asia were discovered, the merchant companies through which they operated treated the inhabitants of these areas "as nothing." In the East Indies, Kant observed, "they brought in foreign soldiers under the pretext of merely proposing to set up trading posts," but ended up with "oppression of the inhabitants, incitement of the various Indian states to widespread wars, famine, rebellions, treachery, and the whole litany of troubles that oppress the human race."[45] In the Sugar Islands, those trading companies served only the purpose of training sailors for warships and deploying them for selfish, profit-seeking purposes. In China and Japan, "which had given such guests a try," their claims as visitors were "wisely" restricted to rights of passage rather than entry, preventing those to whom they had extended commercial favors (for example, the Dutch) from community with native populations.[46]

It is important to insist that what made these restrictions justified (and often necessary) was not an appeal to the territorial rights of inhabitants of host countries. Anyone, Kant argued, had the right to offer to enter into political relations with others without this offer resulting in "the other being authorized to behave toward it as an enemy because it has made this attempt."[47] What corrupted the spirit of these offers was the mode according to which they took place. In other words, what made the colonialism practiced by European states particularly abhorrent was its violation of standards of equality and reciprocity in setting up common political relations, and the consequent departure from a particular ideal of economic, social, and political association, a violation that was all the more despicable when exercised by "powers that make much ado of their piety and, while they drink wrongfulness like water, want to be known as the elect in orthodoxy."[48]

Notice that this critique of colonialism as a departure from a certain ideal of political association is not limited to the condemnation of violence. It includes peaceful but deceptive offers of exchange, as when, for example, native inhabitants of particular territories were persuaded by fraudulent means to sign contracts with colonizers selling the territory in which they lived. Kant gives as an example attempts to conquer or settle in areas used by shepherding and hunting populations who depended on such areas for their survival. Again, without denying the possibility of settling in these areas, he argues that these attempts "may not take place by force but only by contract." But it is a specific kind of

contract, one that "does not take advantage of the ignorance of those inhabitants with respect to ceding their lands."[49] Therefore, attempts to interact with the native inhabitants of these territories had to be made compatible with an ideal of political association that respected the claims of all those involved in the exchange, neither just the claims of visitors nor just the claims of residents.[50] Just as in the case of states, citizens had to submit to a common political authority adjudicating in an impartial and consistent manner their reciprocal rights and obligations; so in the case of interactions between citizens of different states, a just framework for political association was needed.

But how should we understand further the conditions under which such a right to associate with others can best be guaranteed? Kant's answer, in cases of both commercial and political association, is that reciprocity in communication can only be provided through the establishment of political institutions that allow people to relate to each other as equals, guaranteeing that their voice will be heard and that their claims will be equally taken into account when decisions affecting both are made. Whether it be rules of trade or rules regulating the movement of people (including their right to settle), an equal and reciprocal basis of interaction is one that ensures everybody will have a say and that the claims granted to one group are proportionally equal to those recognized for another. This ideal of equal consideration of each other's claims and of reciprocity in communication ought to be taken into account every time two previously unconnected political groups try to establish a basis for future political cooperation. To depart from that ideal is to legitimize an objectionable model of political association.

VI Explaining the Duty to Associate

Having examined some key features of Kant's cosmopolitan critique of colonialism, let us consider in what way it can be further developed, what distinguishes it from the theories we have examined, and how it provides a distinctive account of the wrong of colonial practices. The cosmopolitan critique shares with acquisition theories the concern with the conflicting claims of others and the importance of downsizing. It shares with legitimacy-based theories the appreciation of the role of institutions and the demand for equal and reciprocal treatment of those who shape such institutions. But it differs from both in two important dimensions.

First, the theories we have examined tend to begin with particular claims to territory and then emphasize how such claims can be constrained, revealing the need for a more inclusive perspective. In the account proposed here, the duty to associate politically with others takes precedence over the recognition of self-referential claims to territory. It gives rise to an imperative to set up just political relations and makes the recognition of territorial claims conditional upon the development of such relations.[51] But notice that to say that the status of territorial rights remains in question until such a condition is in place is not to say that all other claims (for example, to life or to self-defense) should also be questioned. I shall return to the implications of this point when discussing the conditions of political association.

Second, although the theories we have examined acknowledge constraints on territorial claims, they have little to say on the kind of political institution necessary to identify the exact scope of these constraints, how such constraints should be understood and interpreted, and who should enforce them. The cosmopolitan answer is of a deliberative (or, in Kant's terms, communicative) kind: when territorially distinct collective agents first make contact with each other, they have a duty (a) to not treat each other with hostility, (b) to communicate respecting criteria of equality and reciprocity, and (c) to set up a political association that reflects such criteria in the rules it generates.

Notice that the account does not take a stance on how thick or thin this new political association should be. That depends on the kinds of interaction at stake, the claims that trigger the duty to associate, and the degree to which it is possible to find common ground. The account can also afford to remain neutral on the best mechanism for democratic decision making, and on how to aggregate views so that adequate representation (including representation of minorities) is ensured. That depends on who the parties that come into contact with each other are, how they choose to articulate their interests and preferences, and what kind of representation best reflects their institutional claims. Finally, this critique of colonialism holds independently of the question of what kind of principles the new political association should enforce, how formal or substantive these principles ought to be, and what metric we should deploy in identifying them. A more detailed answer requires more specific analysis of the kind of relation being established, of the nature of new associative structures, and of the circumstances in which the need for distributive justice arises.[52]

The obligation to enter into a political association offering equal and reciprocal terms of interaction is important for procedural reasons: it allows those whose territorial claims come into conflict with each other to join the effort of constructing political institutions able to respect equality and reciprocity in adjudicating the claims of everyone. Once that association is in place, it should continue to reflect the criteria that helped set it up, remain open to potential newcomers, ensure that members retain equal authorship of associative rules and that such rules are established on the basis of reasons accessible to them all, and make certain that reciprocity in communication continues to hold.

I have insisted throughout that the duty to join a political association guaranteeing equal and reciprocal terms of interaction to its members ought to precede the recognition of substantive claims to territory, either in the strong form of acquisition by improvement/labor/desert/inheritance or in the weaker form of occupancy by attachment. This is not to say groups should never make such claims. Existing territorial claims are valuable in informing us about how people think about their environment, how they draw the line between insiders and outsiders, how they interact with the land and resources available to them, what kinds of social and political norms obtain within particular jurisdictions, and so on. All these are important descriptive components that the development of associative offers has to take into account. To say that existing territorial claims are normatively irrelevant is not to say that once appropriate institutions are in place, such claims should be ignored or rejected. The point is that existing territorial claims should be considered analogous to other (individual or collective) interests and preferences: we can be neutral on whether they are intrinsically important. Your preference for wearing red clothes may not carry any normative significance, but this does not mean I should be indifferent to it every time I buy you a birthday present. In the same fashion, territorial attachment may not be intrinsically relevant. This is not to say that it should be ignored. Once a just political association is in place, with procedures for adjudicating territorial claims that respect equality and reciprocity in the establishment and enforcement of its rules, we might well want to accommodate some group preferences for land use and resource management. But it is important to insist that we do not arrive at this conclusion because we think such territorial claims are in themselves valid, whatever other reasons we may have. (Consider again the analogy with subjective preferences: we do not buy red clothes for people who like wearing red because we think red is the only color worth wearing.)

VII Conditions of Association

In the account developed so far, the wrong of colonialism consists in the establishment of a form of association that fails to offer equal and reciprocal terms of interaction to all its members. To put this more precisely, an ideal association is one that reflects equality and reciprocity along two dimensions. The first has to do with the creation of associative norms. It draws attention to the process through which such norms are first established, and to the correct mode of participation in setting them up (condemning, for instance, their unilateral imposition). The second relates to the principles around which that association is structured. It draws attention to the substantive criteria of political cooperation and asks us to ensure that equality and reciprocity are reflected in the design of institutions facilitating that cooperation. Colonialism is wrong because it violates the ideal in the first but often also in the second of these dimensions (and in fact most historical practices of colonial association unambiguously departed from both).

The previous pages also emphasized that the creation of a political association able to guarantee equal and reciprocal terms of cooperation is an obligation. The question is: What kind of obligation? Can associative offers be coercively enforced? If not, should they be consented to? What kind of consent is at stake? Under what conditions can associative offers be refused?

Let us begin with the first issue. An offer with the potential to be coercively imposed is not really an offer at all, even if it promises an association reflecting criteria of equality and reciprocity of decision making after it has been imposed. That offer is more like a threat, and those who resist its forceful implementation do not commit an injustice, even if they may be morally wrong. But it is important to insist that the reason it would not be unjust to resist a coercive enforcer of associative offers is not that those who oppose such offers are entitled to the territory they occupy. As already emphasized, although territorial rights are suspended, other rights (including the right to self-defense in the face of hostility) may not be. Resistance might be justified by considerations pertaining to these other rights, and depends on what we think their content is.

To see this point, consider the following example. Suppose Susan has a duty to form an association with

Lina. And suppose that for them to work out what the right terms of association would be, they should deliberate with each other. Suppose Lina refuses to engage in deliberation. It would be wrong for Susan to assault Lina in order to make Lina talk to her. This would corrupt the reciprocity of deliberation, and compromise Lina's equal authorship of the terms of political association. This is not to say Lina is not committing a moral wrong in refusing to associate with Susan. But Lina may appeal to other rights in refusing coercive enforcement of that association, and it is precisely appeal to such rights that prevents Susan from coercing her.[53]

For an associative offer to be considered effectively equal and reciprocal, the consent of those on the receiving end is required. One might wonder whether this commits us to a consent theory of obligation claiming that all political associations (including the state) are illegitimate unless all those subjected to it authorize its creation (in some normatively acceptable form or another). Of course, not all readers will find this inference problematic. But those who want to resist the analogy might insist on the asymmetry between those who make the offer and those who receive it in colonial and domestic cases. In the colonial case, colonizers impose their will over the colonized, and the rules of association endorsed by the latter reflect the power of the former. In most cases of domestic subjection to political authority, we think of all citizens as equal in their subjection to the laws, but also equal in their capacity to change the content of such laws. To take a domestic analogy, colonialism is more similar to forced marriage, whereas the relation of citizens within the state is more similar to that of children in a family. The absence of consent in the latter case is less troubling if we grant that children will eventually develop to look after the older generation and take responsibility for the direction of the household. Of course, this metaphor also simplifies matters: many domestic political associations have been wrongfully imposed on some groups of citizens by other more powerful groups. When that is the case, and if the asymmetry in the creation of norms continues to affect the lives of subsequent generations of historically wronged groups, we can condemn that association as wrongful for the same reasons we condemn colonialism as wrongful. If, with the passage of time, the position of the historically wronged group changes such that the subsequent substantive principles of political association genuinely track its will and the effects of path dependence disappear, we can say that injustice has been superseded. And the same point could be made about the supersession of injustice in colonial cases, a point to which we shall return.

I have argued that for an associative offer to be considered effectively equal and reciprocal, the consent of those on the receiving end is required. Consent is of course an imperfect proxy for tracking an agent's will (that is, one can consent to a manipulative offer and the resulting association would still be wrongful), but if we bracket these complications, and in the absence of a better alternative (to which I would be open), consent might give us a first approximation. Yet, to say that consent is required does not mean there would be no wrong involved in withholding it. Residents might be committing a moral wrong in refusing fair and reciprocal offers to associate, and visitors should exercise moral pressure to persuade such societies to join such associations. But it is important to insist that such moral pressure ought to reflect what lawyers call "negotiation in good faith," and although it may appear difficult to be more specific on what this criterion positively entails, it is easy to see what it rules out. Most historical instances of interaction between colonizers and colonized and most offers of political association culminating in signed treaties and contracts were far from exemplifying negotiations in good faith. In many cases, exchanges took place under conditions of dependence on particular goods that Europeans had introduced for the first time: alcohol was one clear example, guns and other weapons that set up arms races between neighboring tribes another.[54] Yet in other circumstances the terms of exchange were deceptive and manipulated to benefit the colonizers at the expense of the colonized. Consider one example: the treaty of Waitangi, stipulated in 1840 between Queen Victoria's representative Captain William Hobson and Maori leaders, resulting in the annexation of New Zealand to the British Crown Colony of New South Wales. The English and Maori texts differ so radically from each other as to warrant suspicion about the character of the negotiations of her Majesty's representatives with Maori people. Where the English version of the treaty says that the chiefs cede to the Queen "all the rights and powers of Sovereignty," the Maori text has them surrender "the government over their land." Where the English text guarantees to the Chiefs and Tribes "the full exclusive and undisturbed possession of their Lands," in the Maori text the Queen agrees to protect the chiefs, the subtribes, and all the people of New Zealand in the "unqualified exercise of their chieftainship." It is not difficult to see that unqualified exercise of chieftainship is very close to what we might nowadays think of as sovereignty and that it is

precisely what Maori people thought they retained and what British authorities claimed to have acquired.[55]

Of course one might argue here that the colonizers' bad faith may not be the sole reason for why such associative offers fail to meet the conditions of equality and reciprocity. The diversity of interpretation of concepts like rights, sovereignty, and property might have an important role to play. It is well known that in the case of land contracts between English settlers and indigenous peoples, one oft-cited reason for the discrepancy in interpretation is the mutually exclusive nature of their conceptions of property. While the English tended to view land as a commodity to be bought and sold, and property rights as claims authorizing absolute and exclusive access to them, indigenous conceptions were based on land usufruct and deeds were viewed as provisional agreements that needed to be revisited over time.[56] Yet, as those (admittedly few) cases of successful negotiation remind us, it is important not to overstate such differences. As the case of William Penn's negotiations with the Lenape and Susquehannock tribes between 1680 and 1718 illustrates, settlers possessed a sophisticated understanding of the cultures and protocols of these groups. They were able to interact with them supported by a whole range of administrators, diplomats, and cultural mediators whose role went beyond simply translating speeches and trading goods, and included learning about their cultural practices, interpreting manners and gestures, attending public ceremonies and social events, and more generally developing appropriate terms and styles of interaction that could accommodate the demands of both visitor and resident. The case for cultural conflict, incompatibility of ways of life, and justified fear of the other can therefore be easily overstated.

VIII The Status Quo Objection

We might wonder at this point whether we are not erring too much on the side of accommodation. Why should those who come last, simply because they are last, make such an effort to convince residents about the need to share the land and resources if we deny that they are entitled to such land and resources in the first place? Does such a strategy not simply legitimize the status quo, ignoring pressing needs? Are we not de facto acknowledging the rights of those who occupy particular territories to continue doing so?

The status quo objection is an important one. If current residents have a duty to associate with visitors on equal and reciprocal terms, and such requests are continuously ignored, we need to think about the conditions under which visitors can pursue their vital ends in a way that does not end up simply endorsing the status quo. We need to strike a balance between the claims of visitors to a fair share of territory and resources and those rights of current residents that can be affirmed independently of territorial claims (for example, the right to life). In the absence of common institutions, it is difficult to provide nonarbitrary and unbiased criteria on how this might be done. But in cases where visitors are truly abject, deprived of weapons, and in conditions of vulnerability, we might concede that they are permitted to take portions of the territory and resources that do not interfere with these other (nonterritorial) rights of current residents.[57]

One might wonder at this point whether the cost of this concession is to end up legitimizing settler colonialism. But this need not be the case. The claims of visitors to nonessential portions of the territory and resources used by residents are nonexclusive and provisional. They apply in conjunction with an ongoing duty to associate, and they can be radically revisited once appropriate political institutions are in place (just as the claims of residents can be radically revisited). They also remain open to be challenged by the claims of other prospective newcomers. Settler colonialism is neither provisional nor open-ended nor welcoming of newcomers. It is based on the enforcement of unilateral claims to acquisition. Although I have conceded that the unilateral use (but not acquisition) of particular resources can be permitted in some circumstances, this right to use is grounded in necessity but does not legitimize the political institutions built on it.[58] Settler colonialism justifies colonial institutions to consolidate prior rights to unilaterally appropriate surplus land and resources. In my account, all such institutions remain illegitimate. Even if claims to appropriate land and resources can sometimes be permitted, no legitimate institutions can be constructed on their basis.

What about commercial colonialism? If we grant that outsiders can have certain claims to the use of land and resources, and if we deny that institutions can be built on that basis, are we not complicit in a weaker form of colonialism, one that leaves intact the institutional setup of both residents and newcomers but nevertheless legitimizes their unilateral form of political association? Again, this need not be the case. The problem with commercial colonialism arises from not recognizing that even if pressing needs may occasionally justify the

unilateral use of particular resources, the claims arising or attachments developed in the course of such interventions cannot be invoked to justify the continuous enjoyment of such resources. Whatever patterns of interaction were established under these conditions need to be revisited, and might radically change, once an association built on appropriate terms of interaction is in place. On the account presented here, both residents' unilateral enjoyment of certain benefits and outsiders' unilateral appropriation of them are wrong. They may be wrong to different degrees, but, as mentioned at the outset, I am not interested in the issue of degree here. It may be that in some circumstances particular actions are permitted but such actions are still not right; they remain dictated by claims of necessity. Just as in the case of settler colonialism, in the case of commercial colonialism, if at any point an appropriate political association is established, its distribution of each party's claim to land and resources need not follow the preinstitutional claims of its members, however they came to be established.[59]

IX The Legitimate State Objection

In Section II, colonialism was defined as a phenomenon that involves politically organized groups. But very little was said about the internal composition and degree of democratic representation in such groups. One might wonder at this point whether endorsing this particular ideal of political association implies that if a certain agent (be it a state, a tribe, or any other institution claiming authority on behalf of a minority group) denies equal and reciprocal voice to the claims of its members, it is plausible to incorporate it into another one that respects the reciprocity criteria of political association. If a group is ruled paternalistically, shouldn't another, allegedly less paternalistic group annex the territory in which the group resides and offer its members equal and reciprocal representation? It is hard to see why. If members of a group are denied representation within the group, it is not clear that they should be unilaterally forced into another association, one whose terms are also initially imposed on them. Two wrongs do not make a right. Conquest and annexation are wrong because they are unilateral forms of political association, failing to establish equal and reciprocal terms of political interaction. The unilaterality of these actions remains the same regardless of whether the agent one is trying to associate with is free from internal constraint or governed in a paternalistic way. It also remains the same in cases where a violation of reciprocity and equality in the creation of associative norms brings with it a degree of improvement in the substantive principles structuring that association.

To see this argument, consider a domestic analogy. Suppose your ideal of marriage is one in which you are allowed to choose your life partner, and in which you have an equal say on how you ought to live together. Suppose you find yourself in an unhappy marriage your parents have arranged for you. Your partner drinks, hardly listens to you, and rules the household with an iron fist. Your parents at some point realize they were wrong to force you into this partnership and claim to have found a way out for you, one that requires terminating the present marriage (with some cost involved, however little) and forcing you into another. The second candidate is richer, more handsome, more sophisticated, and on the whole has a better reputation. Is the fact that the second marriage offers seemingly better prospects any less wrong than the first? I believe it is not. The reason is that in both cases you are not allowed a say in whom you ought to marry and the conditions according to which life together should go. This is not to deny of course that the second husband is better than the first. But the question of what is wrong with forced marriage is distinct from the question of which husband is better. It is also distinct from the question of whether it is a good thing to end the first marriage and start another or whether in some circumstances there may be an obligation to do so. Likewise, as I anticipated in Section II, this article is not asking you to choose between colonialism and domestic oppressive relations. It is also not asking you to rank more or less acceptable instances of colonialism. And it is not asking you to decide about the rightfulness of humanitarian intervention or how to realize the associative ideal we have discussed. The article is trying to provide an argument for why even colonialism of a benign sort (the colonialism of humanitarian interveners, say) should be considered a wrong of a distinctive kind.

To sum up this point: the issue of what constitutes a departure from a particular ideal should be distinguished from the issue of how to act to realize that ideal. Recall that there is no question mark at the end of my title. I asked you to grant that *something* is wrong with colonialism. The wrong of colonialism can be shown in the departure from an associative ideal that fails to respect equality and reciprocity in the creation of its norms and often also in the substantive principles governing that association. If we ask ourselves how to act in

order to bring about a particular kind of association, we might concede that a gain in the latter (substantive principles) dimension would offset the wrong involved in the former (norm creation). But the question of what is wrong with colonialism can be distinguished from questions regarding the acceptability of the costs of, say, ending domestic oppression, humanitarian intervention, beneficial deals obtained through elite manipulation, or benign paternalistic regimes. Conversely, even if it is (reluctantly) conceded (for the sake of argument) that some or all of these practices are necessary in order to advance some substantive principles, the resulting relation is no less colonial with regard to how associative norms are created, and therefore no less wrong.

X Colonialism in the Past, Present, and Future

At this point we can afford to illustrate the implications of our framework for understanding the wrong of colonialism independently of territorial claims. Colonialism, we argued, is an objectionable form of political association, objectionable on the grounds of its failure to reflect an ideal of equal treatment and reciprocity that should underpin every attempt to expand the boundaries of political cooperation. Human beings are brought by the contingent conditions of their life to constantly seek interaction with others, including sharing land and resources with people situated in distant geographical areas. It would be hard to deny the plausibility of their attempts. But it would be wrong to inflict those attempts while refusing to hear the claims of those affected by them. And it would be perverse to interpret those claims in a way that denies equality and reciprocity to those with whom association is sought. Disentangling colonialism from territorial rights implies accepting that there is no pressure to keep the territories of political communities isolated from one another, that there may well be a cosmopolitan pull to existing political institutions. But it also implies that the mode of political association should give voice to the claims of both residents and prospective newcomers, that the way we seek to expand the boundaries of political association should reflect jointly authored norms reflecting equality and reciprocity. If colonized people are forced to join a political association where the rules are established and maintained without their say, they are being wronged. In all such cases, the critique of colonialism can be generated regardless of the defense of territorial claims.

This attempt to disentangle the critique of colonialism from the defense of territorial rights has several implications. One concerns the past. To the extent that descendants of colonized groups make a claim to rectification for past wrongdoing, appropriate rectificatory measures may or may not be related to the return of land and to the use of natural resources available to their ancestors. This is particularly important in the case of conflicts involving indigenous people and descendants of colonizing groups in places like New Zealand, Australia, and North America. If we understand colonial injustice not as the wrongful taking of territory but as the establishment of an objectionable form of political association, we do not need to insist that would-be sacred land or particular resources should, at all costs, be returned to these groups. Of course in many cases there will be all sorts of reasons for respecting the preferences of these groups, and if such preferences are for access to particular land and resources, we might want to accommodate them as much as possible. But it is important to insist that we are not doing it because we grant the force of acquisition, occupancy, or attachment claims. We do it because in some cases the best way to make amends for our past wrongful behavior is to grant people what they want, regardless of why they want it and even if what they want is not something they may have been entitled to in the first place.

Therefore, arguing that no territorial rights have been violated does not imply that injustice has never been committed; even less does it imply that injustice has been superseded.[60] The path dependency of colonial institutions might well imply that descendants of colonized groups continue to be disenfranchised (either formally or substantially) from the countries in which they reside.[61] If that is the case, they remain vulnerable to colonial injustice simply being renewed, regardless of what we think of their territorial claims. Rectificatory measures involving the distribution of land and resources should be taken seriously only if they help these groups overcome that ongoing objectionable form of political association.

Another implication of my account has to do with the effects of decolonization in the present. On the critique of colonialism proposed here, colonial wrongs are not necessarily remedied when territory is returned to members of the former colony. Instead, they are remedied when the terms of political interaction between former colonizers and colonized are closer to the ideal of political association sketched above. A group can be formally independent and enjoy territorial rights but remain

factually dependent on the previous colonial master in almost all economic and political matters: *Françafrique* is a case in point.[62] Vice versa, a group may still share the same political association with a former colonial master but its members may now be fully enfranchised, reflecting criteria of equality and reciprocity. Two relevant examples are the French overseas departments of Guadeloupe and Martinique: their residents are French citizens with full legal and political rights and their representatives sit in the National French Assembly and the French Senate. On the critique of colonialism advanced in this article, justice has not been restored in the first case. And no injustice is currently being committed in the second.

A related implication concerns the present. The critique of colonialism presented in this article introduces a new way of thinking about ongoing political relations between states. Even if their current practices of interaction no longer affect groups' territorial claims, when equality and reciprocity in communication and exchange are violated, there may still be grounds for criticizing these practices as practices of a neocolonial nature.[63] Whether these practices characterize the behavior of a single country like the United States or a group of countries acting in concert like the European Union, whether they extend only to commercial relations or also include a social, political, and cultural dimension, we need to assess them as specific models of political association. To the extent these models are based on political relations that deny equality and reciprocity in the process of communication and commercial exchange to all members, to the extent they seek to secure strategic advantages for their companies and markets, the difference from institutions like the British and the Dutch East India companies and from the colonial powers that sponsored them is only of degree rather than kind.

A third implication concerns the future. The critique of colonialism pursued in this article implies that the territorial rights of current states (whether they were formerly colonizers or colonized) could be challenged. That means that states' rights to exclude outsiders and unilaterally control natural resources (to the extent these claims are associated with territorial rights) could also be challenged. That challenge remains in place even if we deny that the claim to territorial jurisdiction relates to the right to control the movement of people and the distribution of resources in a particularly straightforward way. Although exploring the issue in further detail exceeds the scope of this article, its relevance should be clear when we turn to debates on migration, the legitimacy of border control, and global distributive justice.

Finally, a similar account of colonialism puts pressure on the idea that there is an intrinsic link between colonialism and territorial self-determination, or between past colonial injustice and the right to secession. But it does so while accepting that there is no significant difference between former colonized groups and oppressed domestic minorities.[64] Not every instance of colonial wrongdoing triggers a claim either to territorial self-determination or to secession; nor do remedial principles relate exclusively to the political capacity of colonized people to form their own state. This is not to say that we must necessarily rule them out. Much depends on the possibility of restoring equal and reciprocal terms of political cooperation between colonizers and colonized and on the background conditions underpinning such attempts at reconstruction. Historically, the pervasiveness and brutality of colonial oppression has meant that victims of colonial rule perceived breaking all political relations with their former masters as the only plausible way forward. But in different political circumstances, that choice may not be the only one.

XI Conclusion

The wrong of colonialism has often been examined in relation to the justification of territorial rights. The main purpose of these pages has been to disentangle these two issues. Colonialism, it was argued, remains a wrong whether or not colonizers are entitled to the particular piece of land they have historically occupied. The wrong of colonialism consists in its embodiment of a morally objectionable form of political relation, not in the allegedly wrongful occupation of others' land. To understand this wrong, we should not focus on the modalities of settlement and occupancy of a particular area of geographical space but on the terms of political interaction established between colonizers and colonized. The morally objectionable nature of this interaction is immediately revealed even if a conclusive justification of groups' territorial claims cannot be found.

My critique of colonialism was designed to appeal to those who tend to be skeptical of nationalism but remain persuaded of the wrong of colonialism independently of that claim. I had very little to offer by way of a direct assessment of nationalism. But it may be worth concluding simply by mentioning that perhaps not all readers will agree with the critique of colonialism outlined

and with the conclusions proposed. If that remains the case, my hope is that these thoughts will still have played a useful heuristic role. Those who continue to disagree might realize that, for them, colonialism is not wrong after all. Or if they still think colonialism is wrong but find it hard to share my reasons for explaining that wrong, it might be because nationalists, after all, have a point.

Notes

1 Mahatma Gandhi, "Quit India," in *The Broadview Anthology of British Literature: The Twentieth Century and Beyond*, ed. Joseph Laurence Black (Peterborough: Broadview Press, 2008), pp. 784–6.

2 See Harold Macmillan, "Winds of Change," in *I Have a Dream: The Speeches That Changed the World*, ed. Ferdie Addis (London: Michael O'Mara, 2011), p. 122.

3 My definition of territorial rights follows the recent literature in distinguishing between three different elements: (a) a right to jurisdiction; (b) a right to control and use the resources that are available in the territory; and (c) a right to control the movement of goods and people across the borders of the territory. For a review and critique of the main positions, see Lea Ypi, "Territorial Rights and Exclusion," *Philosophy Compass* 8 (2013): 241–53.

4 For discussions of territorial rights that relate to the critique of colonialism, see Lea Brilmayer, "Secession and Self-Determination: A Territorial Interpretation," *Yale Journal of International Law* 16 (1991): 177–202; Allen Buchanan, "Boundaries: What Liberalism Has to Say," in *States, Nations, and Borders: The Ethics of Making Boundaries*, ed. Allen Buchanan and Margaret Moore (Cambridge: Cambridge University Press, 2003), pp. 231–61; Margaret Moore, "The Territorial Dimension of Self-Determination," in *National Self-Determination and Secession*, ed. Margaret Moore (Oxford: Oxford University Press, 1998), pp. 134–57; and A. J. Simmons, "Historical Rights and Fair Shares," *Law and Philosophy* 14 (1995): 149–84.

5 Resolution 1514 (XV): see <http://www.un.org/en/decolonization/history.shtml>, accessed February 29, 2012.

6 See, on this issue, Matthew Craven, *The Decolonization of International Law: State Succession and the Law of Treaties* (Oxford: Oxford University Press, 2007), pp. 85–6.

7 See, e.g., Jeremy Waldron, "Superseding Historic Injustice," *Ethics* 103 (1992): 4–28, at p. 4.

8 See *Oxford English Dictionary*, <http://www.oed.com/view/Entry/36547>.

9 Ibid.

10 Bartolome de las Casas, *A Short Account of the Destruction of the Indies* (London: Penguin, 1992), p. 43, originally written in 1542 and published in 1552.

11 See Margaret Kohn, "Colonialism," in *Stanford Encyclopedia of Philosophy*, ed. Edward N. Zalta, Summer 2012 ed.; and Daniel Butt, "Colonialism and Postcolonialism," in *International Encyclopedia of Ethics*, ed. Hugh LaFolette (Oxford: Wiley-Blackwell, 2013).

12 It would be too restrictive to define colonialism as a relation that holds only between states since this leaves out the claims of indigenous groups who might share a political structure and channels for coordinated decision making. For a discussion of the implications of this point, see also Will Kymlicka, "Minority Rights in Political Philosophy and International Law," in *The Philosophy of International Law*, ed. Samantha Besson and John Tasioulas (Oxford: Oxford University Press, 2010), pp. 377–96.

13 For developments of the individualist version, see Hillel Steiner, "Territorial Justice and Global Redistribution," in *The Political Philosophy of Cosmopolitanism*, ed. Gillian Brock and Harry Brighouse (Cambridge: Cambridge University Press, 2005), pp. 28–38; A. J. Simmons, "On the Territorial Rights of States," *Philosophical Issues* 11 (2001): 300–26; for the collectivist interpretation, see Cara Nine, "A Lockean Theory of Territory," *Political Studies* 56 (2008): 148–65.

14 Hugo Grotius, *The Rights of War and Peace, Including the Law of Nature and of Nations*, trans. A. C. Campbell (New York: M. Walter Dunne, 1901), II.2.XVII, originally published in 1625.

15 "In the beginning," Locke writes, "all the world was America." See John Locke, *Two Treatises on Government*, ed. Peter Laslett (Cambridge: Cambridge University Press, 1988), II.49, originally published in 1690. For an excellent discussion of Locke's relationship to English colonialism, see Barbara Arneil, *John Locke and America: The Defence of English Colonialism* (Oxford: Clarendon Press, 1996).

16 John Locke, "The Fundamental Constitutions of Carolina," in *The Works of John Locke in Nine Volumes*, 12th edn. (London: Rivington, 1824), 9:xcvii.

17 Locke, *Two Treatises on Government*, II.30.

18 They may have been wrong about this. Many reports from early European settlers of North America informed that Indians did farm their land and distribute property. The story of how the Indians saved the earliest English colonists at Jamestown and Plymouth from starvation by bringing them corn and teaching them how to plant is also well known. See Stuart Banner, *How the Indians Lost Their Land* (Cambridge, MA: Harvard University Press, 2005), p. 20. But the point here is not whether Locke and others could find out about these reports or whether they selected evidence in bad faith. It is rather to draw attention to the account of territory they deployed to justify European settlement, given what they claimed to know.

19 Emer de Vattel, *The Law of Nations, Or Principles of the Law of Nature Applied to the Conduct of Nations and Sovereigns*, ed. Bela Kapossy and Richard Whatmore (Indianapolis: Liberty Fund, 2008), p. 68.
20 Ibid.
21 Many of the observations A. J. Simmons makes in his discussion on "downsizing" are compatible with these remarks: see Simmons, "Historical Rights and Fair Shares," p. 165.
22 For discussions on the right to treat foreigners hospitably, see Georg Cavallar, *The Rights of Strangers: Theories of International Hospitality, the Global Community and Political Justice since Vitoria* (Aldershot: Ashgate, 2002); Anthony Pagden, "Stoicism, Cosmopolitanism, and the Legacy of European Imperialism," *Constellations* 7 (2000): 3–22.
23 See Francisco de Vitoria, "On the American Indians," in *Political Writings*, ed. Anthony Pagden and Jeremy Lawrance (Cambridge: Cambridge University Press, 1991), pp. 231–92, at p. 279.
24 Ibid. For a discussion of this argument in the context of the Spanish conquest, see Anthony Pagden, "Dispossessing the Barbarian: The Language of Spanish Thomism and the Debate over the Property Rights of the American Indians," in *The Languages of Political Theory in Early-Modern Europe*, ed. Anthony Pagden (Cambridge: Cambridge University Press, 1987), pp. 79–98.
25 For an excellent discussion of this, see Steiner, "Territorial Justice and Global Redistribution," pp. 28–38.
26 Simmons, "Historical Rights and Fair Shares," p. 181.
27 See Christopher Heath Wellman, "Political Legitimacy and Territorial Rights," unpublished manuscript.
28 Allen Buchanan, *Justice, Legitimacy, and Self-Determination: Moral Foundations for International Law* (Oxford: Oxford University Press, 2004); Thomas Christiano, "A Democratic Theory of Territory and Some Puzzles about Global Democracy," *Journal of Social Philosophy* 37 (2006): 81–107; Anna Stilz, "Nations, States, and Territory," *Ethics* 121 (2011): 572–601.
29 Vitoria, "On the American Indians," p. 290.
30 John Stuart Mill, "A Few Words on Non-Intervention," in *Collected Works of John Stuart Mill: Essays on Equality, Law, and Education*, ed. John M. Robson (Toronto: University of Toronto Press, 1984), p. 118, originally published in 1859.
31 Ibid.
32 See, e.g., Buchanan, *Justice, Legitimacy, and Self-Determination*, pp. 275–8; Stilz, "Nations, States, and Territory," pp. 590–601.
33 One such argument is based on the idea of self-determination of cultural and historic communities that nationalists endorse.
34 The most sophisticated argument in favor of this criterion is given by Stilz, "Nations, States, and Territory," pp. 582–7.
35 See Anna Stilz, "Occupancy Rights and the Wrong of Removal," unpublished manuscript.
36 Grotius, *The Rights of War and Peace*, II.3.III.
37 Ibid.
38 See the discussion on this in Richard Tuck, *The Rights of War and Peace* (Oxford: Oxford University Press, 2001), p. 233.
39 The claim was not implausible: as some authors have argued, it was the growth of colonies that allowed England to eliminate the famine of 1623, the last famine the country was ever to experience. For a discussion of this point, see ibid.
40 Grotius, *The Rights of War and Peace*, II.2.XIII.
41 Ibid.
42 See Kenneth R. Andrews, *Trade, Plunder and Settlement: Maritime Enterprise and the Genesis of the British Empire, 1480–1630* (Cambridge: Cambridge University Press, 1984), p. 256.
43 Tuck, *The Rights of War and Peace*, pp. 78–108.
44 Immanuel Kant, "Toward Perpetual Peace," in *Practical Philosophy*, ed. Mary Gregor (Cambridge: Cambridge University Press, 1996), pp. 311–52, at p. 329, originally published in 1795.
45 Ibid.
46 Ibid.
47 Ibid.
48 Ibid.
49 Immanuel Kant, "The Metaphysics of Morals," in *Practical Philosophy*, ed. Mary Gregor (Cambridge: Cambridge University Press, 1996), pp. 353–604, at pp. 353, 490, originally published in 1797.
50 For an excellent discussion of this point, which also examines its implications for current debates on global justice, see Katrin Flikschuh, "The Idea of Philosophical Fieldwork: Global Justice, Moral Ignorance and Intellectual Attitudes," *Journal of Political Philosophy*, online early, doi: 10.1111/jopp.12006.
51 I have developed this point in Lea Ypi, "A Permissive Theory of Territorial Rights," *European Journal of Philosophy*, online early, doi: 10.1111/j.1468-0378.2011.00506.x.
52 I have discussed the issue of distributive justice as it applies to colonial relations in Lea Ypi, Robert E. Goodin, and Christian Barry, "Associative Duties, Global Justice and the Colonies," *Philosophy & Public Affairs* 37 (2009): 103–35; and I have defended an account of global egalitarian justice in Lea Ypi, *Global Justice and Avant-Garde Political Agency* (Oxford: Oxford University Press, 2012).
53 Interestingly, Kant believes that it is possible to coerce individuals into a political association with one another but not organized political agents. Kantians who think along similar lines would therefore resist my analogy with individual cases. I suspect the reason for Kant's differentiated stance on domestic and international coercion is that, for Kant, outside a political community, individuals have no substantive rights (including rights to self-defense) and so could not appeal to those other rights in resisting coercively enforced political association. But the same may not

apply to groups. Once an organized political system is in place that guarantees certain rights, it may command outside recognition of some claims (for example, self-defense) even if not others (for example, territory).

54 See Banner, *How the Indians Lost Their Land*, pp. 52–3.

55 For more discussion of this case and the moral problems it poses, see Robert E. Goodin, "Waitangi Tales," *Australasian Journal of Philosophy* 78 (2000): 309–33.

56 For a discussion, see Vicki Hsueh, "Under Negotiation: Empowering Treaty Constitutionalism," in *Colonialism and Its Legacies*, ed. Jacob T. Levy and Iris Marion Young (Lanham, MD: Lexington Books, 2011), pp. 53–78.

57 One can then imagine several possible responses to this unilateral act, with the most optimistic scenario envisaging residents and visitors living side by side in a condition of neither cooperation nor hostility, and the most pessimistic envisaging residents responding with violence to the peaceful appropriation of visitors. Although, as the previous section emphasized, it is important not to overstate the latter case, its moral assessment depends on one's theory of just war and assumptions about defensive harm, and requires more work to be answered properly. My own view is that unless we are very optimistic about the grounds of each party's claims and the possibility of adjudicating them without reference to shared institutions, anything we say in response to such cases will remain normatively problematic.

58 We can understand this claim in analogy with what is often called "the right to necessity." The "right to necessity" has a long pedigree in Western legal tradition and in the history of political thought: it was first developed in medieval canon law and then adopted in civil law and English common law. It was then appropriated by authors such as Grotius, Pufendorf, and Vattel and appeared in one form or another in the writings of Hobbes, Locke, Rousseau, Kant, Fichte, and Hegel. Although such right could not be considered a principle of justice proper, it was invoked to justify exceptional unilateral taking of certain external resources in cases of pressing need. For a recent discussion, see Siegfried Van Duffel and Dennis Yap, "Distributive Justice before the Eighteenth Century: The Right of Necessity," *History of Political Thought* 32 (2011): 449–64.

59 Although, as I emphasized in Section VI, it need not disappoint them either.

60 Waldron, for example, grants that indigenous people were initially entitled to the territory from which they were dispossessed: see Waldron, "Superseding Historic Injustice," pp. 18–20. He then defends the supersession of historic injustice with regard to Aboriginal lands on the basis of the need to make space for the competing territorial claims of other groups. But if that argument works, it can also be used to deny that indigenous groups were ever entitled to exclude outsiders from access to their land, implying that injustice is superseded not because circumstances change but because it was never there.

61 I have discussed this issue in Ypi, Goodin, and Barry, "Associative Duties, Global Justice and the Colonies," pp. 127–9.

62 "Françafrique" was a term coined by President Félix Houphouët-Boigny of Côte d'Ivoire to refer positively to the relation between France and its former colonies but has since been used negatively to highlight the neocolonial nature of France's relations to a number of French-speaking African countries. For one recent critique, see Samuël Foutoyet, *Nicolas Sarkozy ou la Françafrique décomplexée* (Brussels: Tribord, 2009).

63 Part of this critique is familiar in the recent literature in international law and international relations. See, e.g., S. James Anaya, *Indigenous Peoples in International Law* (Oxford: Oxford University Press, 2000); Paul Keal, *European Conquest and the Rights of Indigenous Peoples: The Moral Backwardness of International Society* (Cambridge: Cambridge University Press, 2003); but, with few exceptions, it has been relatively neglected by normative theorists. The exceptions are Charles Beitz, *The Idea of Human Rights* (Oxford: Oxford University Press, 2009), ch. 8; and Katrin Flikschuh, "On the Cogency of Human Rights," *Jurisprudence* 2 (2011): 17–36.

64 Many authors have criticized the way in which international law distinguishes between former colonized states and national minorities in the discussion on self-determination, suggesting that whatever reasons one has to grant self-determination to the former also apply to the latter: see Kymlicka, "Minority Rights in Political Philosophy and International Law." I agree with the critique but take the consistency requirement in a different direction, one that does not necessarily tie remedying colonial injustice with self-determination.

PART IX

International Affairs

42

Just War: The Case of World War II

G. E. M. Anscombe

I The Justice of the Present War Examined (1939)

(a) *Introductory*

In these days the authorities claim the right to control not only the policy of the nation but also the actions of every individual within it; and their claim has the support of a large section of the people of the country, and of a peculiar force of emotion. This support is gained, and this emotion caused by the fact that they are 'evil things' that we are fighting against. That they are evil we need have no doubt; yet many of us still feel distrust of these claims and these emotions lest they blind men to their duty of considering carefully, before they act, the justice of the things they propose to do. Men can be moved to fight by being made to hate the deeds of their enemies; but a war is not made just by the fact that one's enemies' deeds are hateful. Therefore it is our duty to resist passion and to consider carefully whether all the conditions of a just war are satisfied in this present war, lest we sin against the natural law by participating in it.

(b) *The Natural Moral Law*

This idea of natural moral law is one which modern men have lost; but without it they cannot live in peace within themselves, or socially or internationally. For the natural law is the law of man's own nature, showing how he must choose to act in matters where his will is free, if his nature is to be properly fulfilled. It is the proper use of his functions; their misuse or perversion is sin. So, lying is the misuse of speech, and is therefore wicked. So, justice is the proper working out of relations between man and man, and between societies, each having his due.

To those who believe in God it will rightly appear that His law, the eternal law, has its reflection in the ordered activity of Creation, that 'law of nature' which is the truth of things. In man, this activity is not wholly determined, but there is an element of choice. Thus far, 'to him the law is proposed; it is not imposed upon him'.[1] But it is not less law for that; it binds because it is the law of his nature. And in what it consists he can discover by reason, checked and guaranteed by the divine revelation of Scripture. Aquinas called it 'the participation in the eternal law of the rational creature' (Thomas Aquinas,

Originally published in her collected papers, *Ethics, Religion and Politics* (Minneapolis: University of Minnesota Press, 1981), pp. 72–81 and 62–71, respectively. Reproduced with permission from John Wiley & Sons.

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Summa Theologica, 1a 2ae. 91, art. 2 and 3); the law in him from his creation, which he, making use of the gifts of reason and revelation, will find for his salvation. Thus will he proceed to his eternal destiny in God; but the condition of the love of God is the observance of the natural law; if man does not live according to his proper nature he will not attain his proper end.[2]

With this in mind, let us proceed to consider what is justice in the matter of war, remembering that whatever human hopes for the happiness of mankind may be, the only way to that happiness is an observance of the law of God without any deviation.

(c) *The Conditions of the Just War*

There are seven conditions which must be all fulfilled for a war to be just:

1. There must be a just occasion: that is, there must be violation of, or attack upon, strict rights.
2. The war must be made by a lawful authority: that is, when there is no higher authority, a sovereign state.
3. The warring state must have an upright intention in making war: it must not declare war in order to obtain, or inflict anything unjust.
4. Only right means must be used in the conduct of the war.
5. War must be the only possible means of righting the wrong done.
6. There must be a reasonable hope of victory.
7. The probable good must outweigh the probable evil effects of the war.[3]

For this present war there is a just occasion; the rights of Poland have been infringed. The war was declared by a lawful authority. There is, so far as we can tell, a reasonable hope of victory. And though we may suspect that war could have been averted by a more intelligent policy up to a very short time before war broke out, yet at the time when war was declared it is possible that the wrong done could not have been righted by peaceful means. But there remain three conditions to be fulfilled: the intentions of our government must be upright, both (i) as to means, and (ii) as to ends, and (iii) the probable good effects of the war must outweigh the probable evil. If these conditions are not fulfilled, *this* war is rendered wrong, however just the occasion, however desirable that we should fight *a* war. Nor, if we know that a war is wrong, may we take part in it without sin, however grievous it may seem to stand apart from our fellow countrymen.

We must note that, if we fight a war, it is the government's war, since, as we have seen, wars can only be made by sovereign states. Therefore we cannot say: 'The government's intentions are *vicious*; but the things *I* am fighting for are just,' or 'The government intends to use evil means, but *I* shall do nothing unjust.' A private person may not make war; and if he joins in a war, he joins in it as justified or vitiated by the just or unjust intentions of the government under which he fights. By 'government' we mean the persons holding power in a sovereign state. Another point to note is that a government may succumb to temptation in the course of the war; if this involved departure from any of the seven conditions the justice of the war would be vitiated. But isolated pieces of wickedness, though participation in them would be wrong, would not themselves vitiate the whole war on grounds of intention; the probability of such would simply contribute to the balance of evil effects which must be considered.

(d) *On Aims*

If a war is to be just, the warring state must intend only what is just, and the aim of the war must be to set right certain specific injustices. That is, the righting of wrong done must be a sufficient condition on which peace will be made.

In the present war, we may have grave doubts about our government's sincerity. It may seem that we never cared about Poland, but made the Polish treaty as a pretext for seizing the next opportunity to oppose the German government. Our government was badly frightened; it had been weak; it wanted to take a strong line lest it be utterly discredited; and hence the Polish pact. These beginnings are dubious enough; partly because the injustice done to Poland seems our pretext, not our cause, for entering the war; partly because our government appears to have acted from fear and pride, rather than from a desire for justice. Nevertheless it is not wrong to be afraid of Germany's unjust encroachments and to make war in order to stop them, so long as we feared them because they attacked a just settlement and endangered our just interests. But what is the evidence? After the last war, we made the treaty of Versailles, now condemned by every one. But we have made no attempt to rectify it, even when it became urgently necessary that we should do so. We have not tried to make a just and reasonable settlement with Germany; we have merely allowed Germany to set aside portions of the treaty by force, and with grave injustice. Finally, we have

clamoured to negotiate at the last moment, when otherwise Germany would take by force; and our offers have been rejected. Unjustly, it may be; but the evil done by our enemies does not affect our own condemnation.

Our policy, it might be said, is incomprehensible, except as a policy, not of opposing German injustice, but of trying to preserve the status quo and that an unjust one. Some of us may think the case clear enough; yet such argument is likely to lead us into endless controversy. It may be that we could not prove irrefutably that our government's aims are positively vicious. Some might say that the government is not clear enough about its aims for them to be vicious. Yet if this is so, the government's intention in fighting the war must still be condemned. For it is a condition of a just war that it *should* be fought with a *just* intention; not that it should *not* be fought with an *unjust* intention. If the government's intentions cannot be known to be unjust because they are vague, that vagueness itself vitiates them. But the case is even clearer than this. For the truth is that the government's professed intentions are not merely vague, but unlimited. They have not said: 'When justice is done on points A, B and C, then we will stop fighting.' They have talked about 'sweeping away everything that Hitlerism stands for' and about 'building a new order in Europe'. What does this mean but that our intentions are so unlimited that there is no point at which we or the Germans could say to our government: 'Stop fighting; for your conditions are satisfied.' It is true that our government has said that it will not consider peace negotiations until certain injustices are set right. But it has made this only a necessary and not a sufficient condition; therefore it is nothing against our argument.

There results a tendency to interpret our government's phrases according to various predilections. A socialist will tell you that he is fighting for social justice and free speech, a Catholic that he is fighting for the Church. We should forget our own desires and consider narrowly what can be deduced from our government's actions, coupled with these vague and inevitable catchwords. There can be only one conclusion: we are fighting against an unjust cause, indeed; but not for a just one.

(e) *On the Morality of Means*

Before considering whether or not there are any persons who may not be attacked in war, we must try to elucidate, in however crude a fashion, the doctrine of intention in human acts. For in all actions of rational beings we can distinguish three ends of action: there is the motive or motives of the agent, the proper effect of the act as such, and the completed act itself. These are not always distinct in fact, but they can be; if they do coincide this does not make them less distinct in nature, though the distinction is sometimes subtle. For example, take the action of a carpenter in the stroke of a chisel. His motive may be the glory of God, or the obtaining of wages, or the satisfaction of a completed job, or several or all of these, and more besides. The proper effect of the act as such is the removal of a shaving of wood, and this may also be considered as one of the ends of the agent as well as of the action. The completed act itself is simply the completed successful stroke. Let us apply this analysis to military attack. The motive may be to win the war, or medals, or simply to attack successfully and destroy the enemy who receives the impact of the attack. The proper effect is the weakening, disabling or destruction of those who receive that impact. The completed act itself is the completed attack, or, in the case, let us say, of bombing, the dropping and explosion in the right place of the bomb.

Now as to morals. If an act is to be lawful, it is not sufficient that the motives of the agent should be good, though this is necessary. First, the act itself must not be intrinsically wrong; it must not be such an act as is wrong under any circumstance. Second, the proper effects of the act must be permissible. And unless these conditions are present, the act is wrong. To apply these principles once more in the case of military attack: an attack on men is not intrinsically vicious: is not, that is, a perverted act; it is circumstances that make it right or wrong. The motive of the attackers belongs to a consideration of aims rather than of means; or, if we are considering individual soldiers, it is matter for God at the Last Judgement, not for us here. But what of the proper effects of the completed action? These, as we have seen, consist in the destruction of the persons attacked. If, therefore, the attack is to be lawful, the persons attacked must be persons whom the attackers may legitimately destroy. Our object is to consider whether in warfare these persons include civilians.

(f) *On Means*

(i) The prospect of attack on civilians. It is generally recognized that, in certain circumstances, we shall attack civilians from the air; we are already attacking them by blockade. We have no space to prove these facts in detail: for the first, it suffices to recall the answer made by our government to President Roosevelt, when he asked for a

promise not to attack civilians. We said that we should adhere to international law on the matter, but that we reserved the right 'to adopt appropriate measures' if the Germans should break it. If the right to adopt appropriate measures is a reservation to a promise not to attack civilians, then it can only mean that, given certain circumstances, we should attack civilians. The language is veiled, but it can hardly be interpreted in any other way.

(ii) On blockade. As for blockade: it has been pretended, in justification, that the blockade is not a blockade; or that it does not attack civilians. But some people, when they are arguing on another subject, when they are assuring us of victory, *then* they tell us that we cannot but win because the Germans cannot survive the blockade, since it prevents things essential to their national life from reaching them. Others, at this point, say that we could not really be responsible for starving the German people, because they divert the supplies to the fighting forces, and therefore are responsible themselves. But this argument admits that civilians do suffer attack and therefore can be dealt with under that head.

(iii) The 'indivisibility' of modern war and the justification of killing enemies in war. It is argued that it is just to attack civilians in war because war is now 'indivisible'. The civilian population is really as much combatant as the fighting forces, for it is their essential backing. The military strength of a country is its whole economic and social strength. Therefore civilians may be attacked as combatants.

Here we must ask two questions: first, what is the justification of killing in war? And, second, in what does the indivisibility of war consist? It is no sin to kill a man in self-defence or in defence of rights, if there is no possibility of appeal to a higher authority. A private person can appeal to the authority of the state, and therefore has no right to choose the death of a man in order to defend his rights; though he commits no sin if his action in resisting attack, at the time of attack, results in the death of the attacker; for such death is accidental. But where there is no higher authority to which to appeal, as in the case of a sovereign state at war, men who are wrongfully attacking rights may be killed in order to defend those rights if they cannot be defended in any other way.

We must notice two things about this doctrine: first that those who are killed are killed as *wrongfully* attacking rights, in virtue of the fact that it is not possible to appeal to any higher authority than the parties in the dispute. In this sense, the justly warring state is 'in the stead of a judge', having chosen to inflict death on men for the general good. Those men *must* be *wrongfully attacking* rights, or retaining what they have *wrongfully* gained; for it is wrong to slay the innocent for the good of the people. But second, though it proceeds from this quasi-judicial position of the justly warring state, that it can give its ministers authority deliberately to kill its enemies, *yet* they may only kill as a means of self-defence or the defence of rights; the judicial power does not permit them to kill purely punitively; for it is not lawful to kill men simply punitively, except after trial. The justly warring state has to judge of the right or wrong done; but it has no power of judgement on personal guilt or innocence. These two points must therefore be maintained: to quote St Thomas Aquinas,

> it is unlawful for a man to intend to kill any one in order to defend himself, except for one with public authority; and he, intending to kill a man for his own defence, refers this to the general good, as is plain in the case of a soldier fighting enemies, and the minister of a judge fighting against robbers. (2a 2ae. 64, art. 7.)

We have it, then, that no one may be deliberately attacked in war, unless his actions constitute an attack on the rights which are being defended or restored. To deny this will be to assert that we may attack any one anywhere, whose life in any way hinders the prosecution of the war, or in any way assists our enemies; and such a conclusion is as immoral as to be a *reductio ad absurdum* in itself.

Now in what does the 'indivisibility' of war consist? It consists in this, that it would be impossible for the combatant forces to fight, unless they were backed by the economic and social strength of the nation behind them. Therefore, it is argued, the civil population is a military target. To this there is only one reply. The civilian population behind an army does not fulfil the conditions which make it right to kill a man in war. Civilians are not committing wrong acts against those who are defending or restoring rights. They are maintaining the economic and social strength of a nation, and that is not wrong, even though that strength is being used by their government as the essential backing of an army unjustly fighting in the field.

It has been argued that, as accessories to a murder are by law punished equally with the murderer, so the citizens of an enemy country may be killed equally with the fighting forces. But the analogy is false. An accessory is punished as morally guilty of murder. But we have seen that it is not right to kill merely punitively in war; so whatever the guilt of the enemy nation, we cannot

arrogate to ourselves the position of a judge, and execute them. A man cannot be judge in his own suit; and we are one of the parties in the quarrel. In default of a higher authority, we may kill those whose actions are an attack on our rights, in order to defend those rights: but the actions must themselves be wrong. The actions of a great mass of the civilian population are not in themselves wrongful attacks on us. Therefore they may not be killed by us, simply as deserving to die, nor yet because their death would be useful to us.

(iv) A note on reprisals. It follows from this analysis that no warring state may claim the right to reprisals as such, because the other side deserves them. It is not right to inflict a certain harm on the enemy simply because he has inflicted it on you.[4] The morality of the action itself must be considered before it can be justified.

(v) On double effect. It has been argued that it is justifiable to attack civilians because their death is an example of 'double effect'. But this is no example of double effect, which is exemplified when an action designed to produce one effect produces another as well by accident. If, for example, a military target is being attacked and in the course of the attack civilians are also destroyed, then their destruction is not wicked, for it is accidental. Obviously before their destruction can be passed over on these grounds, it must also be shown that the action is of sufficient importance to allow such grave incidental effects. No action can be excused whose consequences involve a greater evil than the good of the action itself, whether these consequences are accidental or not.[5] Double effect therefore only excuses a grave incidental consequence where the balance of the total effects of an action is on the side of the good.

There is a great distinction between attacking a group of persons directly, and killing them accidentally in the course of attack on others. But yet another distinction must be made. It is a different thing, while making one group of persons a target, to kill others by accident, and to make a group of persons a target, in order – by attacking them all – to attack some members of the group who are persons who may legitimately be attacked. The first case involves no sin; the second involves murder and is not an example of double effect. It has been claimed as such by some who, defending blockade, allow that civilians are not a proper military target, but who argue that attack may be made on a whole group of persons which includes both civilians and combatants. This claim cannot be allowed.

Again, we cannot say with regard to blockade that the starvation of a civilian population by the diversion of supplies to its army is an incidental and unintentional effect of an action intended to demoralize the army. For to do so it would be necessary not only to prove that such an evil effect would in fact be outweighed by the good effects expected, but also that there would be no causal relation between the preceding starvation of a civilian population and the demoralization of an army.[6] This aspect of the problem of double effect is distinct from that treated immediately above. There we were considering whether it is an example of double effect to attack one group of persons as a means of destroying a part of the same group; here, whether an alleged example of double effect is not rather an attack on one group of persons as a means to attacking another and distinct group. Both cases are immoral if a group of, or including, civilians, is made a military target; and neither is a case of double effect.

(vi) On the balance of good and evil. It is said that war admittedly produces a number of evil effects, including attacks on civilians, but that these must be balanced against the probable good effects of the war, and if they are outweighed by good, then they can be discounted. It is indeed true that such a balance must be made; but we cannot propose to sin, because that evil will be outweighed by the good effects of the war. That would be to commit sin that good might come; and we may not commit any sin, however small, for the sake of any good, however great, and if the choice lies between our total destruction and the commission of sin, then we must choose to be destroyed.

There is a sense in which it is true to say that the sinful means chosen by the government would not vitiate the whole of a war, on account of the smallness of the sin. Though we could not join in committing the sin, however small, yet if it were very small, it would not, on account of the 'parvity of matter' render the whole war wrong. But unjust deliberate killing is murder and this is a great sin which 'cries to heaven for vengeance'; if, therefore, the warring state intends, under any circumstances, to commit it as a means of prosecuting the war, then the war is made wicked. As we have seen, our government does intend to do that which is unlawful, and it is already blockading Germany with intent to starve the national life. The present war is therefore wrong on account of means.

(vii) On propaganda. Europe since the outbreak of war has been comparatively quiet, and in consequence indiscriminate hatred has been far less noticeable than it was during the last war. But as the conflict grows more serious, we cannot expect this state of things to last; already there is less moderation in public speeches and private conversation than at the outset. Worse, there is

already suppression and distortion of truth 'in the interests of the state'; and news has become propaganda and advocacy of a case. One man's lies are not justified because they contradict another's. We assert that, on the contrary, to fight for, while not observing, truth, is the same contradiction, madness and unreason which we condemn among the Nazis.

(g) *On the Probable Evil Effects of the War*

Finally it remains to consider the last condition. The probable good effects of a war must outweigh its probable evil ones. We hold to the contrary that in this present struggle this condition is not satisfied. We have seen that our government's aims are suspect at the outset; that it is fighting with no desire for justice, so far as we can see, and that it is either ignorant of morals or malicious as far as means are concerned. What is likely to be the end, if we win, if this is what we are like at the beginning? To quote Pope Pius XII in his first encyclical:

> Let us leave the past and turn our eyes to the future which according to those who control the fate and fortune of the peoples, is to consist, once the bloody conflicts have ceased, in a new order, founded on justice and prosperity. Will that future really be different: above all, will it really be better? Will the treaties of peace, will the new international order at the end of the war be animated by justice and equity towards all, by that spirit which frees and pacifies? Or will there be a lamentable repetition of the ancient and recent errors? To hope for a decisive change exclusively from the shock of war and its final issue is idle, as experience shows. The hour of victory is the hour of external triumph for the party to whom the victory falls, but it is, in equal measure, the hour of temptation. In this hour the angel of justice strives with the demon of violence … the excited passions of the people, often inflamed by the sacrifices and sufferings they have borne, obscure the vision, even of responsible persons, and make them inattentive to the warning voice of humanity and equity which is overwhelmed and drowned in the inhuman cry 'woe to the conquered'. There is danger lest settlements and decisions born under such conditions be nothing else than injustice under the cloak of justice.[7]

If, therefore, there is little chance of a just and lasting peace, of a 'new order in Europe', do not all the inevitable evils which accompany war also condemn this one?

It has been said that the victory of the Allies would at least be better than that of their enemies; for there would be a certain fluidity in the situation which we could scarcely expect if the Germans won. We must repeat that this in itself would supply no justification for the war. And the argument is fallacious. On the one hand no situation is purely static; on the other, a repeated Versailles would determine the future as inevitably and as evilly as the first. The 'preservation of democracy', the possibility of free speech and the other such ideals which are valuable only as means, cannot weigh against considerations which belong to the essence of the moral law. The death of men, the curtailment of liberty, the destruction of property, the diminution of culture, the obscuring of judgement by passion and interest, the neglect of truth and charity, the decrease in belief and in the practice of religion – all these are the normal accompaniments of a war. We have, as we have seen, little enough hope of a just settlement to set against such prospects. And finally, there is a widespread tendency to make what our country chooses to do the criterion of what may be done, and to call this patriotism. So a war against totalitarianism produces a totalitarian tendency; not only are morals lowered, but the very theory of morals is corrupted. If a war lasts a short while, the evils may be slight; but if the war should be engaged in for a long time with a bloody seriousness, then those evil effects will be enormous. Already men are talking of Germany as a pariah nation; they are already saying that she must henceforward be kept down and never allowed to become powerful again. And if they speak thus in England, is it not obvious that our French allies will be even fiercer in this insane determination, which is as foolish as it is immoral? Then after the war, what prospects have we, but of greater poverty, greater difficulties, greater misery than ever, for a space; until just another such war will break out.

Such are the probable evil effects; and they greatly outweigh the good effects of putting an end to the injustices of Germany at the present day, since we have so little hope of substituting anything for them but other injustices.

II Mr Truman's Degree (1957)

(a)

In 1939, on the outbreak of war, the President of the United States asked for assurances from the belligerent nations that civil populations would not be attacked.

In 1945, when the Japanese enemy was known by him to have made two attempts towards a negotiated peace, the President of the United States gave the order for dropping an atom bomb on a Japanese city; three days later a second bomb, of a different type, was dropped on another city. No ultimatum was delivered before the second bomb was dropped.

Set side by side, these events provide enough of a contrast to provoke enquiry. Evidently development has taken place; one would like to see its course plotted. It is not, I think, difficult to give an intelligible account:

(i) The British Government gave President Roosevelt the required assurance with a reservation which meant 'If the Germans do it we shall do it too.' You don't promise to abide by the Queensberry Rules even if your opponent abandons them.

(ii) The only condition for ending the war was announced to be unconditional surrender. Apart from the 'liberation of the subject peoples', the objectives were vague in character. Now the demand for unconditional surrender was mixed up with a determination to make no peace with Hitler's government. In view of the character of Hitler's regime that attitude was very intelligible. Nevertheless some people have doubts about it now. It is suggested that defeat of itself would have resulted in the rapid discredit and downfall of that government. On this I can form no strong opinion. The important question to my mind is whether the intention of making no peace with Hitler's government necessarily entailed the objective of unconditional surrender. If, as may not be impossible, we could have formulated a pretty definite objective, a rough outline of the terms which we were willing to make with Germany, while at the same time indicating that we would not make terms with Hitler's government, then the question of the wisdom of this latter demand seems to me a minor one; but if not, then that settles it. It was the insistence on unconditional surrender that was the root of all evil. The connection between such a demand and the need to use the most ferocious methods of warfare will be obvious. And in itself the proposal of an unlimited objective in war is stupid and barbarous.

(iii) The Germans did a good deal of indiscriminate bombing in this country. It is impossible for an uninformed person to know how much, in its first beginnings, was due to indifference on the part of pilots to using their loads only on military targets, and how much to actual policy on the part of those who sent them. Nor do I know what we were doing in the same line at the time. But certainly anyone would have been stupid who had thought in 1939 that there would not be such bombing, developing into definite raids on cities.

(iv) For some time before war broke out, and more intensely afterwards, there was propaganda in this country on the subject of the 'indivisibility' of modern war. The civilian population, we were told, is really as much combatant as the fighting forces. The military strength of a nation includes its whole economic and social strength. Therefore the distinction between the people engaged in prosecuting the war and the population at large is unreal. There is no such thing as a non-participator; you cannot buy a postage stamp or any taxed article, or grow a potato or cook a meal, without contributing to the 'war effort'. War indeed is a 'ghastly evil', but once it has broken out no one can 'contract out' of it. 'Wrong' indeed must be being done if war is waged, but you cannot help being involved in it. There was a doctrine of 'collective responsibility' with a lugubriously elevated moral tone about it. The upshot was that it was senseless to draw any line between legitimate and illegitimate objects of attack. Thus the court chaplains of the democracy. I am not sure how children and the aged fitted into this story: probably they cheered the soldiers and munitions workers up.

(v) The Japanese attacked Pearl Harbour and there was war between America and Japan. Some American (Republican) historians now claim that the acknowledged fact that the American Government knew an attack was impending some hours before it occurred, but did not alert the people in local command, can only be explained by a purpose of arousing the passions of American people. However that may be, those passions were suitably aroused and the war was entered on with the same vague and hence limitless objectives; and once more unconditional surrender was the only condition on which the war was going to end.

(vi) Then came the great change: we adopted the system of 'area bombing' as opposed to 'target bombing'. This differed from even big raids on cities, such as had previously taken place in the course of the war, by being far more extensive and devastating and much less random; the whole of a city area would be systematically plotted out and dotted with bombs. 'Attila was a Sissy', as the *Chicago Tribune* headed an article on this subject.

(vii) In 1945, at the Potsdam conference in July, Stalin informed the American and British statesmen that he had received two requests from the Japanese to act as a mediator with a view to ending the war. He had refused. The Allies agreed on the 'general principle' – marvellous phrase! – of using the new type of weapon that

America now possessed. The Japanese were given a chance in the form of the Potsdam Declaration, calling for unconditional surrender in face of overwhelming force soon to be arrayed against them. The historian of the Survey of International Affairs considers that this phrase was rendered meaningless by the statement of a series of terms; but of these the ones incorporating the Allies' demands were mostly of so vague and sweeping a nature as to be rather a declaration of what unconditional surrender would be like than to constitute conditions. It seems to be generally agreed that the Japanese were desperate enough to have accepted the Declaration but for their loyalty to their Emperor: the 'terms' would certainly have permitted the Allies to get rid of him if they chose. The Japanese refused the Declaration. In consequence, the bombs were dropped on Hiroshima and Nagasaki. The decision to use them on people was Mr Truman's.

For men to choose to kill the innocent as a means to their ends is always murder, and murder is one of the worst of human actions. So the prohibition on deliberately killing prisoners of war or the civilian population is not like the Queensberry Rules: its force does not depend on its promulgation as part of positive law, written down, agreed upon, and adhered to by the parties concerned.

When I say that to choose to kill the innocent as a means to one's ends is murder, I am saying what would generally be accepted as correct. But I shall be asked for my definition of 'the innocent'. I will give it, but later. Here, it is not necessary; for with Hiroshima and Nagasaki we are not confronted with a borderline case. In the bombing of these cities it was certainly decided to kill the innocent as a means to an end. And a very large number of them, all at once, without warning, without the interstices of escape or the chance to take shelter, which existed even in the 'area bombings' of the German cities.

I have long been puzzled by the common cant about President Truman's courage in making this decision. Of course, I know that you can be cowardly without having reason to think you are in danger. But how can you be courageous? Light has come to me lately: the term is an acknowledgement of the truth. Mr Truman was brave because, and only because, what he did was so bad. But I think the judgement unsound. Given the right circumstances (for example that no one whose opinion matters will disapprove), a quite mediocre person can do spectacularly wicked things without thereby becoming impressive.

I determined to oppose the proposal to give Mr Truman an honorary degree here at Oxford. Now, an honorary degree is not a reward of merit: it is, as it were, a reward for being a very distinguished person, and it would be foolish to enquire whether a candidate deserves to be as distinguished as he is. That is why, in general, the question whether so-and-so should have an honorary degree is devoid of interest. A very distinguished person will hardly be also a notorious criminal, and if he should chance to be a non-notorious criminal it would, in my opinion, be improper to bring the matter up. It is only in the rather rare case in which a man is known everywhere for an action, in face of which it is sycophancy to honour him, that the question can be of the slightest interest.

I have been accused of being 'high-minded'. I must be saying 'You may not do evil that good may come', which is a disagreeably high-minded doctrine. The action was necessary, or at any rate it was thought by competent, expert military opinion to be necessary; it probably saved more lives than it sacrificed; it had a good result, it ended the war. Come now: if you had to choose between boiling one baby and letting some frightful disaster befall a thousand people – or a million people, if a thousand is not enough – what would you do? Are you going to strike an attitude and say 'You may not do evil that good may come'? (People who never hear such arguments will hardly believe they take place, and will pass this rapidly by.)

'It pretty certainly saved a huge number of lives'. Given the conditions, I agree. That is to say, if those bombs had not been dropped the Allies would have had to invade Japan to achieve their aim, and they would have done so. Very many soldiers on both sides would have been killed; the Japanese, it is said – and it may well be true – would have massacred the prisoners of war; and large numbers of their civilian population would have been killed by 'ordinary' bombing.

I do not dispute it. Given the conditions, that was probably what was averted by that action. But what were the conditions? The unlimited objective, the fixation on unconditional surrender. The disregard of the fact that the Japanese were desirous of negotiating peace. The character of the Potsdam Declaration – their 'chance'. I will not suggest, as some would like to do, that there was an exultant itch to use the new weapons, but it seems plausible to think that the consciousness of the possession of such instruments had its effect on the manner in which the Japanese were offered their 'chance'.

We can now reformulate the principle of doing evil that good may come: every fool can be as much of a knave as suits him.

I recommend this history to undergraduates reading Greats as throwing a glaring light on Aristotle's thesis that you cannot be or do any good where you are stupid.

I informed the Senior Proctor of my intention to oppose Mr Truman's degree. He consulted the Registrar to get me informed on procedure. The Vice-Chancellor was informed; I was cautiously asked if I had got up a party. I had not; but a fine House was whipped up to vote for the honour. The dons at St John's were simply told 'The women are up to something in Convocation; we have to go and vote them down'. In Worcester, in All Souls, in New College, however, consciences were greatly exercised, as I have heard. A reason was found to satisfy them: *It would be wrong to try to PUNISH Mr Truman!* I must say I rather like St John's.

The Censor of St Catherine's had an odious task. He must make a speech which should pretend to show that a couple of massacres to a man's credit are not exactly a reason for not showing him honour. He had, however, one great advantage: he did not have to persuade his audience, who were already perfectly convinced of that proposition. But at any rate he had to make a show.

The defence, I think, would not have been well received at Nuremberg.

We do not approve the action; no, we think it was a *mistake*. (That is how communists now talk about Stalin's more murderous proceedings.) Further, Mr Truman did not make the bombs by himself, and decide to drop them without consulting anybody; no, he was only responsible for the decision. Hang it all, you can't make a man responsible just because 'his is the signature at the foot of the order'. Or was he not even responsible for the decision? It was not quite clear whether Mr Bullock was saying that or not; but I never heard anyone else seem to give the lie to Mr Truman's boasts. Finally, an action of this sort is, after all, only one episode: an incidental, as it were, in a career. Mr Truman has done some good.

I know that in one way such a speech does not deserve scrutiny; after all, it was just something to say on its occasion. And he had to say something. One must not suppose that one can glean anything a man actually thinks from what he says in such circumstances. Professor Stebbing exposing the logical fallacies in politicians' speeches is a comic spectacle.

(b)

Choosing to kill the innocent as a means to your ends is always murder. Naturally, killing the innocent as an end in itself is murder too; but that is no more than a possible future development for us:[8] in our part of the globe it is a practice that has so far been confined to the Nazis. I intend my formulation to be taken strictly; each term in it is necessary. For killing the innocent, even if you know as a matter of statistical certainty that the things you do involve it, is not necessarily murder. I mean that if you attack a lot of military targets, such as munitions factories and naval dockyards, as carefully as you can, you will be certain to kill a number of innocent people; but that is not murder. On the other hand, unscrupulousness in considering the possibilities turns it into murder. I here print as a case in point a letter which I received lately from Holland:

> We read in our paper about your opposition to Truman. I do not like him either, but do you know that in the war the English bombed the dykes of our province Zeeland, an island where nobody could escape anywhere to. Where the whole population was drowned, children, women, farmers working in the field, all the cattle, everything, hundreds and hundreds, and we were your allies! Nobody ever speaks about that. Perhaps it were well to know this. Or, to remember.

That was to trap some fleeing German military. I think my correspondent has something.

It may be impossible to take the thing (or people) you want to destroy as your target; it may be possible to attack it only by taking as the object of your attack what includes large numbers of innocent people. Then you cannot very well say they died by accident. Here your action is murder.

'But where will you draw the line? It is impossible to draw an exact line.' This is a common and absurd argument against drawing any line; it may be very difficult, and there are obviously borderline cases. But we have fallen into the way of drawing no line, and offering as justifications what an uncaptive mind will find only a bad joke. Wherever the line is, certain things are certainly well to one side or the other of it.

Now who are 'the innocent' in war? They are all those who are not fighting and not engaged in supplying those who are with the means of fighting. A farmer growing wheat which may be eaten by the troops is not 'supplying them with the means of fighting'. Over this, too, the line may be difficult to draw. But that does not mean that no line should be drawn, or that, even if one is in doubt just where to draw the line, one cannot be crystal clear that this or that is well over the line.

'But the people fighting are probably conscripts! In that case they are just as innocent as anyone else.' 'Innocent' here is not a term referring to personal responsibility at all. It means rather 'not harming'. But the people fighting are 'harming', so they can be attacked; but if they surrender they become in this sense innocent and so may not be maltreated or killed. Nor is there ground for trying them on a criminal charge; not, indeed, because a man has no personal responsibility for fighting, but because they were not the subjects of the state whose prisoners they are.

There is an argument which I know from experience it is necessary to forestall at this point, though I think it is visibly captious. It is this: on my theory, would it not follow that a soldier can only be killed when he is actually attacking? Then, for example, it would be impossible to attack a sleeping camp. The answer is that 'what someone is doing' can refer either to what he is doing at the moment or to his role in a situation. A soldier under arms is 'harming' in the latter sense even if he is asleep. But it is true that the enemy should not be attacked more ferociously than is necessary to put them *hors de combat*.

These conceptions are distinct and intelligible ones; they would formerly have been said to belong to the Law of Nations. Anyone can see that they are good, and we pay tribute to them by our moral indignation when our enemies violate them. But in fact they are going, and only fragments of them are left. General Eisenhower, for example, is reported to have spoken slightingly once of the notion of chivalry towards prisoners – as if that were based on respect for their virtue or for the nation from which they come, and not on the fact that they are now defenceless.

It is characteristic of nowadays to talk with horror of killing rather than of murder, and hence, since in war you have committed yourself to killing – for example 'accepted an evil' – not to mind whom you kill. This seems largely to be the work of the devil; but I also suspect that it is in part an effect of the existence of pacifism, as a doctrine which many people respect though they would not adopt it. This effect would not exist if people had a distinct notion of what makes pacifism a false doctrine.

It therefore seems to me important to show that for one human being deliberately to kill another is not inevitably wrong. I may seem to be wasting my time, as most people do reject pacifism. But it is nevertheless important to argue the point because if one does so one sees that there are pretty severe restrictions on legitimate killing. Of course, people accept this within the state, but when it comes to war they have the idea that any restrictions are something like the Queensberry Rules – instead of making the difference between being guilty and not guilty of murder.

I will not discuss the self-defence of a private person. If he kills the man who attacks him or someone else, it ought to be accidental. To aim at killing, even when one is defending oneself, is murderous. (I fear even this idea is going. A man was acquitted recently who had successfully set a lethal booby trap to kill a thief in his absence.)

But the state actually has the authority to order deliberate killing in order to protect its people or to put frightful injustices right. (For example, the plight of the Jews under Hitler would have been a reasonable cause of war.) The reason for this is pretty simple: it stands out most clearly if we first consider the state's right to order such killing within its confines. I am not referring to the death penalty, but to what happens when there is rioting or when violent malefactors have to be caught. Rioters can sometimes only be restrained, or malefactors seized, by force. Law without force is ineffectual, and human beings without laws miserable (though we, who have too many and too changeable laws, may easily not feel this very distinctly). So much is indeed fairly obvious, though the more peaceful the society the less obvious it is that the force in the hands of the servants of the law has to be force up to the point of killing. It would become perfectly obvious any time there was rioting or gangsterism which had to be dealt with by the servants of the law fighting.

The death penalty itself is a completely different matter. The state is not fighting the criminal who is condemned to death. That is why the death penalty is not indispensable. People keep on discussing whether the point of it is deterrence or vengeance; it is neither. Not deterrence, because nobody has proved anything about that, and people think what they think in accordance with their prejudices. And not vengeance, because that is nobody's business. Confusion arises on this subject because the state is said, and correctly said, to *punish* the criminal, and 'punishment' suggests 'vengeance'. Therefore many humane people dislike the idea and prefer such notions as 'correction' and 'rehabilitation'. But the action of the state in depriving a man of his rights, up to his very life, has to be considered from two sides. First, from that of the man himself. If he could justly say 'Why have you done this to me? I have not deserved it', then the state would be acting with injustice. Therefore he must be proved guilty, and only as punishment has the state the right to inflict anything on him. The concept of

punishment is our one safeguard against being done 'good' to, in ways involving a deprivation of rights, by impudent powerful people. Second, from the side of the state, divine retributive justice is not its affair: it only has to protect its people and restrain malefactors. The ground of its right to deprive of liberty and even life is only that the malefactor is a nuisance, like a gangrenous limb. Therefore it can cut him off entirely, if his crime is so bad that he could not justly protest 'I have not deserved *this*.' But when I say that the sole ground of the state's right to kill him is that he is a nuisance, I only mean that he is a nuisance *qua* malefactor. The lives of the innocent are the actual point of society, so the fact that in some other way they may be a nuisance (troublesome to look after, for example) does not justify the state in getting rid of them. Though that is another thing we may yet come to. But the blood of the innocent cries to heaven for vengeance.

Thus the malefactor who has been found guilty is the only defenceless person whom the state may put to death. It need not; it can choose more merciful laws. (I have no prejudice in favour of the death penalty.) Any other defenceless person is as such innocent, in the sense 'not harming'. And so the state can only order to kill others of its subjects besides convicted criminals if they are rioting or doing something that has to be stopped, and can only be stopped by the servants of the law fighting them.

Now, this is also the ground of the state's right to order people to fight external enemies who are unjustly attacking them or something of theirs. The right to order to fight for the sake of other people's wrongs, to put right something affecting people who are not actually under the protection of the state, is a rather more dubious thing obviously, but it exists because of the common sympathy of human beings whereby one feels for one's neighbour if he is attacked. So in an attenuated sense it can be said that something that belongs to, or concerns, one is attacked if anybody is unjustly attacked or maltreated.

Pacifism, then, is a false doctrine. Now, no doubt, it is bad just for that reason, because it is always bad to have a false conscience. In this way the doctrine that it is a bad act to lay a bet is bad: it is all right to bet what it is all right to risk or drop in the sea. But I want to maintain that pacifism is a harmful doctrine in a far stronger sense than this. Even the prevalence of the idea that it was wrong to bet would have no particularly bad consequences; a false doctrine which merely forbids what is not actually bad need not encourage people in anything bad. But with pacifism it is quite otherwise. It is a factor in that loss of the conception of murder which is my chief interest in this pamphlet.

I have very often heard people say something like this: 'It is all very well to say "Don't do evil that good may come." But *war* is evil. We all know that. Now, of course, it is possible to be an Absolute Pacifist. I can respect that, but I can't be one myself, and most other people won't be either. So we have to accept the evil. It is not that we do not see the evil. And once you are in for it, you have to go the whole hog.'

This is much as if I were defrauding someone, and when someone tried to stop me I said: 'Absolute honesty! I respect that. But of course absolute honesty really means having no property at all …' Having offered the sacrifice of a few sighs and tears to absolute honesty, I go on as before.

The correct answer to the statement that 'war is evil' is that it is bad – for example a misfortune – to be at war. And no doubt if two nations are at war at least one is unjust. But that does not show that it is wrong to fight or that if one does fight one can also commit murder.

Naturally my claim that pacifism is a very harmful doctrine is contingent on its being a false one. If it were a true doctrine, its encouragement of this nonsensical 'hypocrisy of the ideal standard' would not count against it. But given that it is false, I am inclined to think it is also very bad, unusually so for an idea which seems as it were to err on the noble side.

When I consider the history of events from 1939 to 1945, I am not surprised that Mr Truman is made the recipient of honours. But when I consider his actions by themselves, I am surprised again.

Some people actually praise the bombings and commend the stockpiling of atomic weapons on the ground that they are so horrible that nations will be afraid ever again to make war. 'We have made a covenant with death, and with hell we are at an agreement.' There does not seem to be good ground for such a hope for any long period of time.

Pacifists have for long made it a point in their propaganda that men must grow more murderous as their techniques of destruction improve, and those who defend murder eagerly seize on this point, so that I imagine by now it is pretty well accepted by the whole world. Of course, it is not true. In Napoleon's time, for example, the means of destruction had much improved since the time of Henry V; but Henry, not Napoleon, was a great massacrer of civilians, saying when he did particularly atrocious things that the French were a sinful nation and that he had a mission from God to punish them. And, of course, really large-scale massacre up to now has belonged to times with completely primitive

methods of killing. Weapons are now manufactured whose sole point is to be used in massacre of cities. But the people responsible are not murderous because they have these weapons; they have them because they are murderous. Deprived of atomic bombs, they would commit massacres by means of other bombs.

Protests by people who have not power are a waste of time. I was not seizing an opportunity to make a 'gesture of protest' at atomic bombs; I vehemently object to *our* action in offering Mr Truman honours, because one can share in the guilt of a bad action by praise and flattery, as also by defending it. When I puzzle myself over the attitude of the Vice-Chancellor and the Hebdomadal Council, I look round to see if any explanation is available why so many Oxford people should be willing to flatter such a man.

I get some small light on the subject when I consider the productions of Oxford moral philosophy since the First World War, which I have lately had occasion to read. Its character can easily be briefly demonstrated. Up to the Second World War the prevailing moral philosophy in Oxford taught that an action can be 'morally good' no matter how objectionable the thing done may be. An instance would be Himmler's efforts at exterminating the Jews: he did it from the 'motive of duty' which has 'supreme value'. In the same philosophy – which has much pretence of moral seriousness, claiming that 'rightness' is an objective character in acts, that can be discerned by a moral sense – it is also held that it might be right to kill the innocent for the good of the people, since the 'prima facie duty' of securing some advantage might outweigh the 'prima facie duty' of not killing the innocent. This sort of philosophy is less prevalent now, and in its place I find another, whose cardinal principle is that 'good' is not a 'descriptive' term, but one expressive of a favourable attitude on the part of the speaker. Hand in hand with this, though I do not know if there is any logical connection, goes a doctrine that it is impossible to have any quite general moral laws; such laws as 'It is wrong to lie' or 'Never commit sodomy' are rules of thumb which an experienced person knows when to break. Further, both his selection of these as the rules on which to proceed, and his tactful adjustments of them in particular cases, are based on their fitting together with the 'way of life' which is his preference. Both these philosophies, then, contain a repudiation of the idea that any class of actions, such as murder, may be absolutely excluded. I do not know how influential they may have been or be; they are perhaps rather symptomatic. Whether influential or symptomatic, they throw some light on the situation.

It is possible still to withdraw from this shameful business in some slight degree; it is possible not to go to Encaenia; if it should be embarrassing to someone who would normally go to plead other business, he could take to his bed. I, indeed, should fear to go, in case God's patience suddenly ends.

Notes

1 Sertillanges, quoted 'Moral Principles and Practice', Cambridge Summer School (1932), p. 74.
2 For a fuller discussion of the natural law, see Thomas Aquinas, 1a 2ae, 91, 1a 2ae, 94, or any textbook of moral theology.
3 For sources concerning the conditions of the just war, see J. Eppstein, *Catholic Tradition and the Law of Nations* (London, 1935), and, more fully, Regaut, *La Doctrine de la Guerre Juste*.
4 This, of course, does not apply to denunciation of those parts of international law not affected by the natural law.
5 Ctr. Thomas Aquinas, *Summa Theologica* 2a 2ae. 64, *De Homicidio*, on the example of killing in self-defence. 'The force used must be proportioned to the necessity.'
6 See any textbook of moral theology.
7 *Summi Pontificatus*, pp. 29–30, in the Vatican Latin edition. When quoting from this encyclical we have sometimes made use of the Vatican official English translation, sometimes of the English version of Mgr Knox; but comparing these with the Latin original we have often found cause to alter the translation ourselves.
8 This will seem a preposterous assertion; but we are certainly on the way, and I can think of no reasons for confidence that it will not happen.

43

National Self-determination

Avishai Margalit and Joseph Raz

In the controversy-ridden fields of international law and international relations, the widespread recognition of the existence of national rights to self-determination provides a welcome point of agreement. Needless to say, the core consensus is but the eye of a raging storm concerning the precise definition of the right, its content, its bearers, and the proper means for its implementation. This chapter will not address such questions, though indirectly it may help with their investigation. Its concern is with the moral justification of the case for national self-determination. Its purpose is critical and evaluative, its subject lies within the morality of international relations rather than within international law and international relations proper.

It is assumed throughout that states and international law should recognize such a right only if there is a sound moral case for it. This does not mean that international law should mirror morality. Its concern is with setting standards that enjoy the sort of clarity required to make them the foundations of international relations between states and fit for recognition and enforcement through international organs. These concerns give rise to special considerations that should be fully recognized in the subtle process of applying moral principles to the law. The derivation of legal principles from moral premises is never a matter of copying morality into law. Still, the justification of the law rests ultimately on moral considerations, and therefore those considerations should also help shape the contours of legal principles. That is why the conclusions of this article bear on controversies concerning the proper way in which the law on this subject should develop, even though such issues are not here discussed directly.

Moral inquiry is sometimes understood in a utopian manner, i.e., as an inquiry into the principles that should prevail in an ideal world. It is doubtful whether this is a meaningful enterprise, but it is certainly not the one we are engaged in here. We assume that things are roughly as they are, especially that our world is a world of states and of a variety of ethnic, national, tribal, and other groups.[1] We do not question the justification for this state of affairs. Rather, we ask whether, given that this is how things are and for as long as they remain the same, a moral case can be made in support of national self-determination.

I Isolating the Issue

The core content of the claim to be examined is that there is a right to determine whether a certain territory shall become, or remain, a separate state (and possibly

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also whether it should enjoy autonomy within a larger state). The idea of national self-determination or (as we shall refer to it in order to avoid confusion) the idea of self-government encompasses much more. The value of national self-government is the value of entrusting the general political power over a group and its members to the group. If self-government is valuable then it is valuable that whatever is a proper matter for political decision should be subject to the political decision of the group in all matters concerning the group and its members. The idea of national self-government, in other words, speaks of groups determining the character of their social and economic environment, their fortunes, the course of their development, and the fortunes of their members by their own actions, i.e., by the action of those groups, in as much as these are matters which are properly within the realm of political action.[2] Given the current international state system, in which political power rests, in the main, with sovereign states,[3] the right to determine whether a territory should be an independent state is quite naturally regarded as the main instrument for realizing the ideal of self-determination. Consideration of this right usually dominates all discussions of national self-determination. To examine the justification of the right is the ultimate purpose of this article. But we shall continuously draw attention to the fact that, as we shall try to show, the right of self-determination so understood is not ultimate, but is grounded in the wider value of national self-government, which is itself to be only instrumentally justified.

The next section deals with the nature of the groups that might be the subject of such a right. Section III considers what value, if any, is served by the enjoyment of political independence by such groups. Section IV examines the case for conceding that there is a moral right to self-determination. This examination may lead to revising our understanding of the content of the right. It may reveal that moral considerations justify only a narrower right, or that the argument that justifies the right warrants giving it a wider scope. But the core as identified here will provide the working base from which to launch the inquiry.

Before we start, a few words about this way of identifying the problem may be in place. In two ways the chosen focus of our examination is narrower than many discussions of self-determination in international relations. First, we disregard the claims made, typically by third-world countries, in the name of self-determination, against the economic domination of multinational companies, the World Bank, or against powerful regional or world powers. The considerations canvassed in this paper are relevant to such issues, but fall short of directly tackling them. To be complete, a discussion of a right must examine both its grounds and its consequences. This paper is concerned mostly with the grounds for the right of self-determination. It asks the question: Who has the right and under what conditions is it to be exercised? It does not go into the question of the consequences of the right beyond the assumption, already stated, that it is a right that a territory be a self-governing state. A good deal of the current turmoil in international law, and international relations, has to do with the exploration of that last notion. What is entailed by the fact that a state is a sovereign, self-governing, entity? The claims that economic domination violate the right to self-determination belong to that discussion. The conclusions of this paper provide part of the grounds by which such claims are to be settled. But we do not propose to pursue this question here.

Second, claims of self-determination are invariably raised whenever one state invades and occupies another, or a territory belonging to another. Yet it is important to distinguish between the wrongness of military invasion or occupation, and the rights available against it, and the right (whatever it may turn one to be) to self-determination. In a word, the latter is a source of title, whereas the former is a possessory right based largely on public-order considerations. Any legal system, international law not excluded, recognizes certain ways as legitimate ways of solving disputes, and outlaws others. Subject to the exceptions of legitimate self-defense and self-help, the use of violence is forbidden. Violation of that prohibition gives rise to a right to have the *status quo ante* restored, before the deeper sources of the dispute between the parties are examined; that is, regardless of the soundness of one's title to a territory, one may not use force to occupy it. This is why the right to recover a territory lost by force is a possessory right. It does not depend on the ultimate soundness of one's title, and that is why it was said to be based on public-order considerations. A large part of its justification is in the need to establish that the proper means of dispute resolution be the only ones resorted to.

Not surprisingly, invocation of this possessory right is, however, accompanied by a claim of good title (the merits of which are not immediately relevant). The underlying title is often the right to self-determination. Hence the temptation to confuse the two. But notice that, apart from the different justificatory foundations, the two are far from identical in consequence. They merely overlap. The claims of a people who have been for

many years ruled by another cannot be based on the possessory right that applies only against a recent occupier. On the other hand, the occupation of portions of Antarctica, or of some uninhabited island, do violate the possessory right, but not the right of self-determination. The latter is that of the inhabitants, and does not apply when there are no inhabitants.[4]

II Groups

Assuming that self-determination is enjoyed by groups, what groups qualify? Given that the right is normally attributed to peoples or nations, it is tempting to give that as the answer and concentrate on characterizing "peoples" or "nations." The drawbacks of this approach are two: it assumes too much and it poses problems that may not require a solution.

It is far from clear that peoples or nations rather than tribes, ethnic groups, linguistic, religious, or geographical groups are the relevant reference group. What is it that makes peoples particularly suited to self-determination? The right concerns determination whether a certain territory shall be self-governing or not. It appears to affect most directly the residents of a territory, and their neighbors. If anyone, then residents of geographical regions seem intuitively to be the proper bearers of the right. Saying this does not get us very far. It does not help in identifying the residents of which regions should qualify. To be sure, this is the crucial question. But even posing it in this way shows that the answer, "the largest regions inhabited by one people or nation," is far from being the obvious answer.

We have some understanding of the benefits self-government might bring. We need to rely on this in looking for the characteristics that make groups suitable recipients of those benefits. We want, in other words, to identify groups by those characteristics which are relevant to the justification of the right. If it turns out that those do not apply to peoples or nations, we shall have shown that the right to self-determination is misconceived and, as recognized in international law, unjustified. Alternatively, the groups identified may encompass peoples (or some peoples) as well as other groups. This will provide a powerful case for redrawing the boundaries of the right. Either way we shall be saved much argument concerning the characterization of nations which, interesting as it is in itself, is irrelevant to our purpose.

Having said that, it may be useful to take nations and peoples as the obvious candidates for the right. We need not worry about their defining characteristics. But we may gain insight by comparing them with groups, e.g., the fiction-reading public, or Tottenham Football Club supporters, which obviously do not enjoy such a right. Reflection on such examples suggests six characteristics that in combination are relevant to a case for self-determination.

1. The group has a common character and a common culture that encompass many, varied and important aspects of life, a culture that defines or marks a variety of forms or styles of life, types of activities, occupations, pursuits, and relationships. With national groups we expect to find national cuisines, distinctive architectural styles, a common language, distinctive literary and artistic traditions, national music, customs, dress, ceremonies and holidays, etc. None of these is necessary. They are but typical examples of the features that characterize peoples and other groups that are serious candidates for the right to self-determination. They have pervasive cultures, and their identity is determined at least in part by their culture. They possess cultural traditions that penetrate beyond a single or a few areas of human life, and display themselves in a whole range of areas, including many which are of great importance for the well-being of individuals.

2. The correlative of the first feature is that people growing up among members of the group will acquire the group culture, will be marked by its character. Their tastes and their options will be affected by that culture to a significant degree. The types of careers open to one, the leisure activities one learned to appreciate and is therefore able to choose from, the customs and habits that define and color relations with strangers and with friends, patterns of expectations and attitudes between spouses and among other members of the family, features of lifestyles with which one is capable of empathizing and for which one may therefore develop a taste – all these will be marked by the group culture.

They need not be indelibly marked. People may migrate to other environments, shed their previous culture, and acquire a new one. It is a painful and slow process, success in which is rarely complete. But it is possible, just as it is possible that socialization will fail and one will fail to be marked by the culture of one's environment, except negatively, to reject it. The point made is merely the modest one that, given the pervasive nature of the culture of the groups we are seeking to identify, their influence on individuals who grow up in their midst is profound and far-reaching. The point needs to be made in order to connect concern with the

prosperity of the group with concern for the well-being of individuals. This tie between the individual and the collective is at the heart of the case for self-determination.

As one would expect, the tie does not necessarily extend to all members of the group, and failure of socialization is not the only reason. The group culture affects those who grow up among its members, be they members or not. But to say this is no more than to point to various anomalies and dilemmas that may arise. Most people live in groups of these kinds, so that those who belong to none are denied full access to the opportunities that are shaped in part by the group's culture. They are made to feel estranged and their chances to have a rewarding life are seriously damaged. The same is true of people who grow up among members of a group so that they absorb its culture, but are then denied access to it because they are denied full membership of the group.

Nothing in the above presupposes that groups of the kind we are exploring are geographically concentrated, let alone that their members are the only inhabitants of any region. Rather, by drawing on the transmission of the group culture through the socialization of the young, these comments emphasize the historical nature of the groups with which we are concerned. Given that they are identified by a common culture, at least in part, they also share a history, for it is through a shared history that cultures develop and are transmitted.

3. Membership in the group is, in part, a matter of mutual recognition. Typically, one belongs to such groups if, among other conditions, one is recognized by other members of the group as belonging to it. The other conditions (which may be the accident of birth or the sharing of the group culture, etc.) are normally the grounds cited as reasons for such recognition. But those who meet those other conditions and are yet rejected by the group are at best marginal or problematic members of it. The groups concerned are not formal institutionalized groups, with formal procedures of admission. Membership in them is a matter of informal acknowledgment of belonging by others generally, and by other members specifically. The fiction-reading public fails our previous tests. It is not identified by its sharing a wide-ranging pervasive culture. It also fails the third test. To belong to the fiction-reading public all we have to do is to read fiction. It does not matter whether others recognize us as fiction-reading.[5]

4. The third feature prepares the way for, and usually goes hand in hand with, the importance of membership for one's self-identification. Consider the fiction-reading public again. It is a historically significant group. Historians may study the evolution of the fiction-reading public, how it spread from women to men, from one class to others, from reading aloud in small groups to silent reading, from reliance on libraries to book buying, etc.; how it is regarded as important to one's qualification as a cultured person in one country, but not in another; how it furnishes a common topic of conversation in some classes but not in others; how belonging to the group is a mark of political awareness in some countries, while being a sign of escapist retreat from social concerns in another.

Such studies will show, however, that it is only in some societies that the existence of these features of the fiction-reading public is widely known. For the most part, one can belong to the group without being aware that one is a typical reader, that one's profile is that of most readers. Sometimes this is a result of a mistaken group image's being current in that society. Our concern is rather with those cases where the society lacks any very distinct image of that group. This indicates that, in such societies, membership of that group does not have a highly visible social profile. It is not one of the facts by which people pigeonhole each other. One need not be aware who, among people one knows, friends, acquaintances, shopkeepers one patronizes, one's doctor, etc., shares the habit. In such societies, membership of the fiction-reading public is not highly visible, that is, it is not one of the things one will normally know about people one has contact with, one of the things that identify "who they are." But it happens in some countries that membership of the reading public becomes a highly visible mark of belonging to a social group, to the intelligentsia, etc. In such countries, talk of the recently published novel becomes a means of mutual recognition.

One of the most significant facts differentiating various football cultures is whether they are cultures of self-recognition: whether identification as a fan or supporter of this club or that is one of the features that are among the main markers of people in the society. The same is true of occupational groups. In some countries, membership is highly visible and is among the primary means of pigeonholing people, of establishing "who they are"; in others, it is not.

Our concern is with groups, membership of which has a high social profile, that is, groups, membership of which is one of the primary facts by which people are identified, and which form expectations as to what they are like, groups membership of which is one of the primary clues for people generally in interpreting the conduct of others. Since our perceptions of ourselves are in

large measure determined by how we expect others to perceive us, it follows that membership of such groups is an important identifying feature for each about himself. These are groups, members of which are aware of their membership and typically regard it as an important clue in understanding who they are, in interpreting their actions and reactions, in understanding their tastes and their manner.

5. Membership is a matter of belonging, not of achievement. One does not have to prove oneself, or to excel in anything, in order to belong and to be accepted as a full member. To the extent that membership normally involves recognition by others as a member, that recognition is not conditional on meeting qualifications that indicate any accomplishment. To be a good Irishman, it is true, is an achievement. But to be an Irishman is not. Qualification for membership is usually determined by nonvoluntary criteria. One cannot choose to belong. One belongs because of who one is. One can come to belong to such groups, but only by changing, e.g., by adopting their culture, changing one's tastes and habits accordingly – a very slow process indeed. The fact that these are groups, membership of which is a matter of belonging and not of accomplishment, makes them suitable for their role as primary foci of identification. Identification is more secure, less liable to be threatened, if it does not depend on accomplishment. Although accomplishments play their role in people's sense of their own identity, it would seem that at the most fundamental level our sense of our own identity depends on criteria of belonging rather than on those of accomplishment. Secure identification at that level is particularly important to one's well-being.

6. The groups concerned are not small face-to-face groups, members of which are generally known to all other members. They are anonymous groups where mutual recognition is secured by the possession of general characteristics. The exclusion of small groups from consideration is not merely ad hoc. Small groups that are based on personal familiarity of all with all are markedly different in the character of their relationships and interactions from anonymous groups. For example, given the importance of mutual recognition to members of these groups, they tend to develop conventional means of identification, such as the use of symbolic objects, participation in group ceremonies, special group manners, or special vocabulary, which help quickly to identify who is "one of us" and who is not.

The various features we listed do not entail each other but they tend to go together. It is not surprising that groups with pervasive cultures will be important in determining the main options and opportunities of their members, or that they will become focal points of identification, etc. The way things are in our world, just about everyone belongs to such a group, and not necessarily to one only. Membership is not exclusive and many people belong to several groups that answer to our description. Some of them are rather like national groups, e.g., tribes or ethnic groups. Others are very different. Some religious groups meet our conditions, as do social classes, and some racial groups. Not all religions or racial groups did develop rich and pervasive cultures. But some did and those qualify.

III The Value of Self-government

(a) *The Value of Encompassing Groups*

The description of the relevant groups in the preceding section may well disappoint the reader. Some will be disappointed by the imprecise nature of the criteria provided. This would be unjustified. The criteria are not meant to provide operational legal definitions. As such they clearly would not do. Their purpose is to pick on the features of groups which may explain the value of self-determination. As already mentioned, the key to the explanation is in the importance of these groups to the well-being of their members. This thought guided the selection of the features. They are meant to assist in identifying that link. It is not really surprising that they are all vague matters of degree, admitting of many variants and many nuances. One is tempted to say "that's life." It does not come in neatly parceled parts. While striving to identify the features that matter, we have to recognize that they come in many shapes, in many shades, and in many degrees rife with impurities in their concrete mixing.

A more justified source of disappointment is the suspicion that we have cast the net too wide. Social classes clearly do not have a right to self-determination. If they meet the above conditions then those conditions are at best incomplete. Here we can only crave the reader's patience. We tried to identify the features of groups which help explain the value of self-determination. These may apply not only beyond the sphere in which the right is commonly recognized. They may apply to groups that really should not possess it for other reasons yet to be explored.

The defining properties of the groups we identified are of two kinds. On the one hand, they pick out groups

with pervasive cultures; on the other, they focus on groups, membership of which is important to one's self-identity. This combination makes such groups suitable candidates for self-rule. Let us call groups manifesting the six features *encompassing groups*. Individuals find in them a culture which shapes to a large degree their tastes and opportunities, and which provides an anchor for their self-identification and the safety of effortless secure belonging.

Individual well-being depends on the successful pursuit of worthwhile goals and relationships. Goals and relationships are culturally determined. Being social animals means not merely that the means for the satisfaction of people's goals are more readily available within society. More crucially it means that those goals themselves are (when one reaches beyond what is strictly necessary for biological survival) the creatures of society, the products of culture. Family relations, all other social relations between people, careers, leisure activities, the arts, sciences, and other obvious products of "high culture" are the fruits of society. They all depend for their existence on the sharing of patterns of expectations, on traditions preserving implicit knowledge of how to do what, of tacit conventions regarding what is part of this or that enterprise and what is not, what is appropriate and what is not, what is valuable and what is not. Familiarity with a culture determines the boundaries of the imaginable. Sharing in a culture, being part of it, determines the limits of the feasible.

It may be no more than a brute fact that our world is organized in a large measure around groups with pervasive cultures. But it is a fact with far-reaching consequences. It means, in the first place, that membership of such groups is of great importance to individual well-being, for it greatly affects one's opportunities, one's ability to engage in the relationships and pursuits marked by the culture. Secondly, it means that the prosperity of the culture is important to the well-being of its members. If the culture is decaying, or if it is persecuted or discriminated against, the options and opportunities open to its members will shrink, become less attractive, and their pursuit less likely to be successful.

It may be no more than a brute fact that people's sense of their own identity is bound up with their sense of belonging to encompassing groups and that their self-respect is affected by the esteem in which these groups are held. But these facts, too, have important consequences. They mean that individual dignity and self-respect require that the groups, membership of which contributes to one's sense of identity, be generally respected and not be made a subject of ridicule, hatred, discrimination, or persecution.

All this is mere common sense, and is meant to be hedged and qualified in the way our common understanding of these matters is. Of course, strangers can participate in activities marked by a culture. They are handicapped, but not always very seriously. Of course, there are other determinants of one's opportunities, and of one's sense of self-respect. Membership of an encompassing group is but one factor. Finally, one should mention that groups and their culture may be pernicious, based on exploitation of people, be they their members or not, or on the denigration and persecution of other groups. If so, then the case for their protection and flourishing is weakened, and may disappear altogether.

Having regard for this reservation, the case for holding the prosperity of encompassing groups as vital for the prosperity of their members is a powerful one. Group interests cannot be reduced to individual interests. It makes sense to talk of a group's prospering or declining, of actions and policies as serving the group's interest or of harming it, without having to cash this in terms of individual interests. The group may flourish if its culture prospers, but this need not mean that the lot of its members or of anyone else has improved. It is in the interest of the group to be held in high regard by others, but it does not follow that, if an American moon landing increases the world's admiration for the United States, Americans necessarily benefit from this. Group interests are conceptually connected to the interests of their members but such connections are nonreductive and generally indirect. For example, it is possible that what enhances the interest of the group provides opportunities for improvement for its members, or that it increases the chance that they will benefit.

This relative independence of group interest is compatible with the view that informs this article: that the moral importance of the group's interest depends on its value to individuals. A large decline in the fortunes of the group may, e.g., be of little consequence to its members. There is no a priori way of correlating group interest with that of its members or of other individuals. It depends on the circumstances of different groups at different times. One clear consequence of the fact that the moral significance of a group's interest is in its service to individuals is the fact that it will depend, in part, on the size of the group. The fortunes of a larger group may be

material to the well-being of a larger number of people. Other things being equal, numbers matter.

(b) *The Instrumental Case*

Does the interest of members in the prosperity of the group establish a right to self-determination? Certainly not, at least not yet, not without further argument. For one thing we have yet to see any connection between the prosperity of encompassing groups and their political independence. The easiest connection to establish under certain conditions is an instrumental one. Sometimes the prosperity of the group and its self-respect are aided by, sometimes they may be impossible to secure without, the group's enjoying political sovereignty over its own affairs. Sovereignty enables the group to conduct its own affairs in a way conducive to its prosperity.[6] There is no need to elaborate the point. It depends on historical conditions. Hence the prominence of a history of persecution in most debates concerning self-determination. But a history of persecution is neither a necessary nor a sufficient condition for the instrumental case for self-government. It is not a necessary condition, because persecution is not the only reason why the groups may suffer without independence. Suffering can be the result of neglect or ignorance of or indifference to the prosperity of a minority group by the majority. Such attitudes may be so well entrenched that there is no realistic prospect of changing them.

Persecution is not a sufficient condition, for there may be other ways to fight and overcome persecution and because whatever the advantages of independence it may, in the circumstances, lead to economic decline, cultural decay, or social disorder, which only make their members worse off. Besides, as mentioned above, pernicious groups may not deserve protection, especially if it will help them to pursue repressive practices with impunity. Finally, there are the interests of nonmembers to be considered. In short, the instrumental argument (as well as others) for self-government is sensitive to counterarguments pointing to its drawbacks, its cost in terms of human well-being, possible violations of human rights, etc.

We shall return to these issues below. First, let us consider the claim that the instrumental argument trivializes the case for self-government by overlooking its intrinsic value. Of the various arguments for the intrinsic value of self-government which have been and can be advanced, we examine one which seems the most promising.

(c) *An Argument for the Intrinsic Value of Self-government*

The argument is based on an extension of individual autonomy or of self-expression (if that is regarded as independently valuable). The argument unravels in stages: (1) people's membership of encompassing groups is an important aspect of their personality, and their well-being depends on giving it full expression; (2) expression of membership essentially includes manifestation of membership in the open, public life of the community; (3) this requires expressing one's membership in political activities within the community. The political is an essential arena of community life, and consequently of individual well-being; (4) therefore, self-government is inherently valuable, it is required to provide the group with a political dimension.

The first premise is unexceptionable. So is the second, though an ambiguity might be detected in the way it is often understood. Two elements need separating. First, given the importance of membership to one's well-being, it is vital that the dignity of the group be preserved. This depends, in part, on public manifestations of respect for the group and its culture, and on the absence of ridicule of the group, etc., from the public life of the society of which one is a member. One should not have to identify with or feel loyalty to a group that denigrates an encompassing group to which one belongs. Indeed, one should not have to live in an environment in which such attitudes are part of the common culture. Second, an aspect of well-being is an ability to express publicly one's identification with the group and to participate openly in its public culture. An encompassing group is centered on mutual recognition and is inevitably a group with a public culture. One cannot enjoy the benefits of membership without participation in its public culture, without public participation in its culture.

Both elements are of great importance. Both indicate the vital role played by public manifestations of group culture and group membership among the conditions of individual well-being. To the extent that a person's well-being is bound up with his identity as a member of an encompassing group it has an important public dimension. But that dimension is not necessarily political in the conventional narrow sense of the term. Even where it is, its political expression does not require a political organization whose boundaries coincide with those of the group. One may be politically active in a multinational, multicultural polity.

Here supporters of the argument for the intrinsic value of self-government may protest. The expression of membership in the political life of the community, they will say, involves more than its public expression. It involves the possibility of members of an encompassing group participating in the political life of their state, and fighting in the name of group interests in the political arena. Such actions, they will insist, may be not only instrumentally valuable to the group, but intrinsically important to its politically active members. They are valuable avenues of self-fulfillment. These points, too, have to be readily admitted. There is no reason to think that everyone must take part in politics, or else his or her development is stunted and personality or life are deficient. In normal times, politics is but an option that people may choose to take or to leave alone. Although its availability is important, for its absence deprives people of valuable opportunities, its use is strictly optional. Even if it is possible to argue that one's personal well-being requires some involvement with larger groups, and the avoidance of exclusive preoccupation with one's own affairs and those of one's close relations or friends, that involvement can take nonpolitical forms, such as activity in a social club, interest in the fortunes of the arts in one's region, etc.

Politics is no more than an option, though this is true in normal times only. In times of political crises that have moral dimensions, it may well be the duty of everyone to stand up and be counted. In Weimar, Germans had a moral duty to become politically involved to oppose Nazism. There are many other situations where an apolitical attitude is not morally acceptable. But all of them are marked by moral crises. In the absence of crisis there is nothing wrong in being nonpolitical.

Having said this, we must repeat that the option of politics must remain open, and with it the option of fighting politically for causes to do with the interests of one's encompassing groups. But there is nothing here to suggest that this should be done in a political framework exclusive to one's group or dominated by it. There is nothing wrong with multinational states, in which members of the different communities compete in the political arena for public resources for their communities. Admittedly, prejudice, national fanaticism, etc., sometimes make such peaceful and equitable sharing of the political arena impossible. They may lead to friction and persecution. This may constitute a good argument for the value of self-government, but it is an instrumental argument of the kind canvassed above. There is nothing in the need for a public or even a political expression of one's membership of an encompassing group which points to an intrinsic value of self-government.

(d) *The Subjective Element*

In an indirect way, the attempt to argue for the intrinsic value of self-government does point to the danger of misinterpreting the instrumental approach to the question. First, the argument does not deny the intrinsic value of the existence of the political option as a venue for activity and self-expression to all (adult) members of society. We are not advocating a purely instrumentalist view of politics generally. The intrinsic value to individuals of the political option does not require expression in polities whose boundaries coincide with those of encompassing groups. That is the only point argued for above.

Second, the pragmatic, instrumentalist character of the approach advocated here should not be identified with an aggregating impersonal consequentialism. Some people tend to associate any instrumentalist approach with images of a bureaucracy trading off the interest of one person against that of another on the basis of some cost–benefit analysis designed to maximize overall satisfaction; a bureaucracy, moreover, in charge of determining for people what is really good for them, regardless of their own views of the matter. Nothing of the kind should be countenanced. Of course, conflicts among people's interests do arise, and call for rational resolution that is likely to involve sacrificing some interests of some people for the sake of others. Such conflicts, however, admit of a large degree of indeterminacy, and many alternative resolutions may be plausible or rational. In such contexts, talking of maximization, with its connotations of comparability of all options, is entirely out of place.

Furthermore, nothing in the instrumentalist and pragmatic nature of our approach should be allowed to disguise its sensitivity to subjective elements, its responsiveness to the perceptions and sensibilities of the people concerned. To a considerable extent, what matters is how well people feel in their environment: Do they feel at home in it or are they alienated from it? Do they feel respected or humiliated? etc. This leads to a delicate balance between "objective" factors and subjective perceptions. On the one hand, when prospects for the future are concerned, subjective perceptions of danger and likely persecution, etc., are not necessarily to be trusted. These are objective issues on which the opinion of independent spectators may be more reliable than that of those directly involved. On the other hand, the factual

issue facing the independent spectators is how people will respond to their conditions, what will be their perceptions, their attitudes to their environment, to their neighbors, etc. Even a group that is not persecuted may suffer many of the ills of real persecution if it feels persecuted. That its perceptions are mistaken or exaggerated is important in pointing to the possibility of a different cure: removing the mistaken perception. But that is not always possible, and up to a point in matters of respect, identification, and dignity, subjective responses, justified or not, are the ultimate reality so far as the well-being of those who have them is concerned.

IV A Right to Self-determination

It may seem that the case for self-government establishes a right to self-determination. That is, it establishes the reasons for the right sort of group, an encompassing group, to determine that a territory shall be self-governing. But things are not that simple. The case for self-government shows that sometimes, under certain conditions, it is best that the political unit be roughly an encompassing group. A group's right to self-determination is its right to determine that a territory be self-governing, regardless of whether the case for self-government, based on its benefits, is established or not. In other words, the right to self-determination answers the question "who is to decide?," not "what is the best decision?" In exercising the right, the group should act responsibly in light of all the considerations we mentioned so far. It should, in particular, consider not only the interests of its members but those of others who may be affected by its decision. But if it has the right to decide, its decision is binding even if it is wrong, even if the case for self-government is not made.[7]

The problem in conceding the existence of such a right is, of course, not the possibility that a group that would best be self-governing does not wish to be so. Given the strong subjectivist element in the instrumentalist argument, such reluctance to assume independence would suggest that the case for its being self-governing is much weakened. The problem is that the case for self-government is hedged by considerations of the interest of people other than members of the groups, and by the other interests of members of the groups, i.e., other than their interests as members of the groups. These include their fundamental individual interests which should be respected, e.g., by a group whose culture oppresses women or racial minorities. These considerations raise the question whether encompassing groups are the most suitable bodies to decide about the case for self-government. Can they be entrusted with the decision in a matter in which their group interests are in conflict with other interests of members of the group as well as with the interests of other people? At the very least this suggests that the right must be qualified and hedged to protect other interests.

More fundamental still is the question of how the right of self-determination fits within our general conception of democratic decision making. We are used to a two-level structure of argument concerning social issues, such as just taxation, the provision of public education, etc. First, we explore the principles that should govern the matter at issue. Second, we devise a form of democratic procedure for determining what shall be done. The first level answers the question "what should be done?" The second responds to the question "who should decide?"

On a simple majoritarian view, the issue of self-government seems to defy a democratic decision procedure. The question is "what is the relevant democratic unit?" and that question cannot be democratically decided, at least not entirely so. In fact, of course, we are not simple majoritarians. We adopt a whole range of democratic procedures such as constitution-making privileged majorities, ordinary legislative processes, plebiscites, administrative processes, and decisions by special agencies under conditions of public accountability and indirect democratic control. We match various democratic processes with various social and political problems. This means that there is no universal democratic formula serving as the universal answer to "who decides?" questions. Rather, we operate a mixed principled-democratic system in which principles, whose credentials do not derive entirely from their democratic backing, determine what form of a democratic procedure is suited for what problem. Within this mixed principled-democratic framework, the right to self-determination fits as just another qualified democratic process suited to its object.

What are the principles involved? It is tempting to see here a principle giving the part veto over the issue of membership in a larger whole. To form a new political unit, or to remain part of an existing one, all component parts should agree. To break up a political unit, or to foil the creation of a new one, all that is required is the will of the group that wants to secede or to stay out. This principle derives its appeal from its voluntaristic aura. It seems to regard the justification of all political units as

based on consent. But this is an undesirable illusion. It is undesirable since, as was explained above regarding encompassing groups, the more important human groupings need to be based on shared history, and on criteria of non-voluntaristic (or at least not wholly contractarian) membership to have the value that they have. The principle presents no more than an illusion of a contractarian principle since it refers to groups, not to individuals. But the whole contractarian ethos derives its appeal from the claim that each individual's consent is a condition of the legitimacy of political units. Beyond all that, the principle simply begs the question that it is meant to answer, namely, what are the parts? Which groupings have the veto and which do not? Can the group of all the people whose surnames begin with a "*g*" and end with an "*e*" count for these purposes? Do they have the veto on membership in a larger political unit?

The right to self-determination derives from the value of membership in encompassing groups. It is a group right, deriving from the value of a collective good, and as such opposed in spirit to contractarian-individualistic[8] approaches to politics or to individual well-being. It rests on an appreciation of the great importance that membership in and identification with encompassing groups has in the life of individuals, and the importance of the prosperity and self-respect of such groups to the well-being of their members. That importance makes it reasonable to let the encompassing group that forms a substantial majority in a territory have the right to determine whether that territory shall form an independent state in order to protect the culture and self-respect of the group, provided that the new state is likely to respect the fundamental interests of its inhabitants, and provided that measures are adopted to prevent its creation from gravely damaging the just interests of other countries. This statement of the argument for the right requires elaboration.

1. The argument is an instrumental one. It says, essentially, that members of a group are best placed to judge whether their group's prosperity will be jeopardized if it does not enjoy political independence. It is in keeping with the view that, even though participation in politics may have intrinsic value to individuals, the shape and boundaries of political units are to be determined by their service to individual well-being, i.e., by their instrumental value. In our world, encompassing groups that do not enjoy self-government are not infrequently persecuted, despised, or neglected. Given the importance of their prosperity and self-respect to the well-being of their members, it seems reasonable to entrust their members with the right to determine whether the groups should be self-governing. They may sacrifice their economic or other interests for the sake of group self-respect and prosperity. But such a sacrifice is, given the circumstances of this world, often not unreasonable.

One may ask why should such matters not be entrusted to international adjudication by an international court, or some other international agency. Instead of groups having a right to self-determination which makes them judges in their own cause, the case for a group's becoming self-governing should be entrusted to the judgment of an impartial tribunal. This would have been a far superior solution to the question "who is to decide?" Unfortunately, there simply does not exist any international machinery of enforcement that can be relied upon in preference to a right of self-determination as the right of self-help, nor is there any prospect of one coming into existence in the near future. In the present structure of international relations, the most promising arrangement is one that recognizes group rights to self-determination and entrusts international bodies with the duty to help bring about its realization, and to see to it that the limits and preconditions of the right are observed (these are enumerated in the points two to five below).

2. The right belongs to the group. But how should it be exercised? Not necessarily by a simple majority vote. Given the long-term and irreversible nature of the decision (remember that while independence is up to the group, merger or union is not), the wish for a state must be shared by an overwhelming majority, reflecting deep-seated beliefs and feelings of an enduring nature, and not mere temporary popularity. The precise institutional requirements for the exercise of the right are issues that transcend the topic of this paper. They are liable to vary with the circumstances of different national and ethnic groups. Whatever they are they should reflect the above principle.

3. The right is over a territory. This simply reflects the territorial organization of our political world. The requirement that the group be a substantial majority of the territory stems from further considerations aimed at balancing the interest in self-government against the interests of nonmembers. First, it is designed to ensure that self-government for a territory does not generate a problem as great as it is meant to solve, by ensuring that the independence will not generate a large-scale new minority problem. That risk cannot be altogether avoided. As was remarked before, numbers count in the end.

A further factual assumption underlying this condition is that people are, even today, most directly affected

by the goings-on in their region. It is true that one's economic conditions are affected by the economic activities in faraway places. This, however, is more and more true of the international system generally. The ideal of economic autarchy died a natural death. (Correspondingly, the condition of economic viability which used to figure in theories of the states in international relations has little role in the modern world.) What can be secured and protected, and what vitally matters to the quality of life, is its texture as determined by the local culture and custom, the nature of the physical environment, etc. Hence the right is given only to a group that is the majority in a territory. The case for self-government applies to groups that are not in the majority anywhere, but they do not have the right to self-determination anywhere. Their members, like other people, may have a right to immigration on an individual basis to a territory of their choice. But their case is governed by general principles of freedom of movement and the sovereign rights of existing states. This means that their communal interests remain an important consideration to be born in mind by the decision makers, but they have no right, i.e., the decision is not up to them.

Do historical ties make a difference? Not to the right if voluntarily abandoned. Suppose that the group was unjustly removed from the country. In that case, the general principle of restitution applies, and the group has a right to self-determination and control over the territory it was expelled from, subject to the general principle of prescription. Prescription protects the interests of the current inhabitants. It is based on several deep-seated concerns. It is meant to prevent the revival of abandoned claims, and to protect those who are not personally to blame from having their life unsettled by claims of ancient wrongs, on the ground that their case now is as good as that of the wronged people or their descendants. Prescription, therefore, may lose the expelled group the right even though its members continue to suffer the effects of the past wrong. Their interest is a consideration to be borne in mind in decisions concerning immigration policies, and the like, but because of prescription they lost the right to self-determination. The outcome is not up to them to decide.

4. The right is conditional on its being exercised for the right reasons, i.e., to secure conditions necessary for the prosperity and self-respect of the group. This is a major protection against abuse. Katanga cannot claim a right to self-determination as a way of securing its exclusive control over uranium mines within its territory. This condition does not negate the nature of a right. The group is still entrusted with the right to decide, and its decision is binding even if wrong, even if the case for self-government does not obtain, provided the reasons that motivate the group's decision are of the right kind.

5. Finally, there are the two broad safeguards on which the exercise of the right is conditional. First, that the group is likely to respect the basic rights of its inhabitants, so that its establishment will do good rather than add to the ills of this world. Secondly, since the establishment of the new state may fundamentally endanger the interests of inhabitants of other countries, its exercise is conditional on measures being taken to prevent or minimize the occurrence of substantial damage of this kind. Such measures, which will vary greatly from case to case, include free-trade agreements, port facilities, granting of air routes, demilitarization of certain regions, etc.

Two kinds of interests do not call for special protection. One is the interest of a people to regard themselves as part of a larger rather than a smaller grouping or country. The English may have an interest in being part of Great Britain, rather than mere Englanders. But that interest can be justly satisfied only with the willing cooperation of, e.g., the Scots. If the other conditions for Scottish independence are met, this interest of the English should not stand in its way. Secondly, unjust economic gains, the product of colonial or other form of exploitation of one group by another, may be denied to the exploiting group without hesitation or compensation (barring arrangements for a transitory period). But where secession and independence will gravely affect other and legitimate interests of other countries, such interests should be protected by creating free-trade zones, demilitarized areas, etc.

6. A right in one person is sufficient ground to hold some other person(s) to be under a duty.[9] What duties arise out of the right to self-determination? How is this matter to be settled? As the previous discussion makes clear, the right of self-determination is instrumentally justified, as the method of implementing the case for self-government, which itself is based on the fact that in many circumstances self-government is necessary for the prosperity and dignity of encompassing groups. Hence, in fixing the limits of the right, one has to bear in mind the existing system of international politics, and show that, given other elements in that system, certain duties can be derived from the right to self-determination, whereas others cannot. The first and most important duty arising out of the right is the duty not to impede the exercise of the right, i.e., not to impede groups in their attempts to decide whether appropriate territories

should be independent, so long as they do so within the limits of the right. This duty affects in practice first and foremost the state that governs the territory concerned and its inhabitants.

There may be other duties following from the right of self-determination. In particular, there may be a duty on the state governing the territory to provide aid in exercising the right, and a duty on other states to aid the relevant group in realizing its right, and thus to oppose the state governing the territory if it impedes its implementation. But the extent of these duties must be subject to the general principles of international morality, which indicate what methods may and may not be used in pursuit of worthwhile goals and in preventing the violation of rights. As indicated at the outset, the examination of the details of such implications of the right is beyond the scope of this article.

This brings to an end our consideration of the outlines of the case for a right to self-determination and its limits. It is an argument that proceeds in several stages from fundamental moral concerns to the ways in which they can be best implemented, given the way our world is organized. The argument is meant to present the normal justification for the right. It does not claim that there could not be alternative justifications. But it does claim to be the central case, which alternatives presuppose or of which they are variations.[10]

Two conclusions emerge from this discussion. On the one hand, the right to self-determination is neither absolute nor unconditional. It affects important and diverse interests of many people, from those who will be citizens of the new state, if it comes into being, to others far away from it. Those who may benefit from self-government cannot insist on it at all costs. Their interests have to be considered along those of others. On the other hand, the interests of members of an encompassing group in the self-respect and prosperity of the group are among the most vital human interests. Given their importance, their satisfaction is justified even at a considerable cost to other interests. Furthermore, given the absence of effective enforcement machinery in the international arena, the interest in group prosperity justifies entrusting the decision concerning self-government to the hands of an encompassing group that constitutes the vast majority of the population in the relevant territory, provided other vital interests are protected.

Notes

1 This fact is doubly relevant. It is a natural fact about our world that it is a populated world with no unappropriated lands. It is a social and a moral fact that it is a world of nations, tribes, peoples, etc., that is, that people's perception of themselves and of others and their judgments of the opportunities and the responsibilities of life are shaped, to an extent, by the existence of such groups and their membership of them. It may be meaningful to claim that our views regarding national self-determination apply only to a populated world like ours. One may point to different principles that would prevail in a world with vast unoccupied fertile lands. Such speculation is utopian but it may serve to highlight some of the reasons for the principles that apply in our condition. To speculate concerning a reality different from ours in its basic social and moral constitution is pointless in a deeper way. Such social facts are constitutive of morality. Their absence undercuts morality's very foundations. We could say that under such changed conditions people will have normative beliefs and will be guided by some values. But they are not ones for which we can claim any validity.

2 This qualification is to take account of the fact that, according to doctrines of limited government, certain matters are outside the realm of politics, and no political action regarding them may be undertaken.

3 Among the exceptions to this rule are the slowly growing importance of supernational, especially regional, associations, such as the European Community, the growth of a doctrine of sovereignty limited by respect for fundamental human rights, and the continuing (usually thinly veiled) claims of some states that they are not bound by the international law regarding the sovereignty of states.

4 The substantive right protected indirectly by the possessory right in cases of this kind is one of the other rights providing a title in a territory. The right to self-determination is only one of the possible sources of title.

5 The fiction-reading public can take the character of a literary elite with mutual recognition as part of its identity. The importance of "acceptability" in such groups has often been noted and analyzed.

6 This is not meant to suggest that there are not often drawbacks to self-rule. They will be considered below.

7 It should be made clear that these observations relate to the right to self-determination as it is commonly understood in the discourse of international relations and international morality. In principle, there could be a different right of self-determination, i.e., a right that, when the case for self-government is established, self-government should be granted, i.e., that all the international agents have a duty to take what action is necessary to grant self-government to the

encompassing group regarding which the case for self-government has been established. That is, there could in principle have been a substantive right to have self-government when it is right that one should have it, rather than a "who is to decide" right, that an encompassing group should be entitled to decide whether it should be self-governing. Below we touch briefly on the reasons that explain why the right of self-determination as we know it today is not of this kind.

8 The reference is to moral individualism, or value individualism, not to methodological individualism. It is impossible here to deal with the matter adequately. Let us simply indicate our position briefly. There is no accepted characterization of the term. In *The Morality of Freedom* [(New York: Oxford, 1986), p. 198], Raz identified moral individualism with the view that only individual goods, and no collective goods, have intrinsic values. According to individualism so understood, membership of encompassing groups, and the prosperity of such groups, cannot be of intrinsic value. But we believe that it is intrinsically valuable. Hence, on this definition our approach is not individualistic. In "Three Grades of Social Involvement" [*Philosophy and Public Affairs*, XVIII (1989), p. 133], George Sher characterizes moral individualism as the belief that moral justification proceeds through premises relating to individuals and their preferences. His characterization is too vague to be conclusively disputed (e.g., all holistic justifications will include premises relating to preferences as well as to everything else – does that make them individualistic?). But if Sher has in mind the standard type of (actual or hypothetical) contractarian justifications, then our approach is not individualistic. Because actual individual preferences heavily depend on social practices, there is no reason to give them justificatory primacy. The content of hypothetical preferences is either too indefinite to yield any results or is made definite by assuming a certain social context to give them meaning. Either way it cannot be endowed with justificatory primacy, though of course people's capacity to respond to various conditions, and to form various goals and attachments, is central to any moral justification.

9 See Raz, *The Morality of Freedom*, ch. 7: The Nature of Rights. On the relations of moral and legal rights, see also Raz, "Legal Rights," *Oxford Journal of Legal Studies*, IV (1984), p. 1. Raz has applied this analysis to the case of constitutional rights in general in ch. 10 of *The Morality of Freedom*.

10 On the notion of a "normal justification," and the reasons why it cannot be analyzed as either a necessary or a sufficient condition, see Raz, *The Morality of Freedom*, ch. 3.

44

The Ethical Significance of Nationality

David Miller

I

My object in this paper is to defend the view that national boundaries may be ethically significant. The duties we owe to our compatriots may be more extensive than the duties we owe to strangers, simply because they are compatriots. On the face of it, such a view is hardly outlandish. On the contrary almost all of us, including our leaders, behave as though it were self-evidently true. We do not, for instance, hesitate to introduce welfare measures on the grounds that their benefits will be enjoyed only by Americans, or Britons, or whomever. Why, then, is it worth defending this view at length? Precisely because there is a powerful thrust in the ethical theories that are most prominent in our culture toward what I shall call universalism: namely, the view that the subject matter of ethics is persons considered merely as such, independent of all local connections and relations; and that the fundamental questions of ethics can be posed in some such form as: What duties do I owe to my fellow human beings? What rights do they have against me?[1] Here the basic principles are worked out without reference to social boundaries. Boundaries may come into the picture at some later point – for instance, as a convenient way of parceling out basic duties – but they themselves never have fundamental ethical significance. The fact that we do normally attribute deeper significance to boundaries is to be explained as some sort of moral error – for instance, as the intrusion of irrational emotional attachments into an arena that ought to be governed by impartial reason.

Although my aim is to show that conationals can rightly make special claims on us, I do not want to suggest that these claims exhaust the ethical universe. There may indeed be duties that we owe to our fellow human beings in the abstract. The point is rather that, once we see why national boundaries make a difference, we shall be in a position to see what space they leave for duties that transcend these limits. Thus the argument is not intended to be a defense of narrow-minded and exclusive nationalism; nor for that matter is it intended to underwrite all national identities regardless of their content. It is directed rather against a naive form of internationalism that is grounded on an inadequate view of ethics and that appears to offer a simple solution to the problem of international obligations but does so at the cost of losing touch with the way we actually think about such issues.

Before embarking on a critique of universalism, I need to explain briefly the idea of nationality which I am

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counterposing to it. National boundaries, it hardly needs saying, are not the same as borders between states. A state may include more than one national grouping; conversely, people sharing a common national identity may be found living under the auspices of two or more states. How, then, are nations to be individuated? It is fairly clear that no objective criterion, such as language, race, or religion, will be adequate to mark all national distinctions, even though these criteria may enter into particular national identities.[2] Thus nationality is essentially a subjective phenomenon, constituted by the shared beliefs of a set of people: a belief that each belongs together with the rest; that this association is neither transitory nor merely instrumental but stems from a long history of living together which (it is hoped and expected) will continue into the future; that the community is marked off from other communities by its members' distinctive characteristics; and that each member recognizes a loyalty to the community, expressed in a willingness to sacrifice personal gain to advance its interests. We should add, as a final element, that the nation should enjoy some degree of political autonomy. The classic nationalist belief, of course, was that every nation should have its own sovereign state, but I can see no reason for making it part of the definition of a nation that its members should be nationalists in this strong sense. On the other hand, a social group that had no political aspirations at all would surely be counted as an ethnic group rather than as a nation. (I shall say more about the relation between ethnicity and nationality below.)

One feature of this definition deserves underlining. Whether a nation exists depends on whether its members have the appropriate beliefs; it is no part of the definition that the beliefs should in fact be true. This makes the question about the ethical significance of nationality a particularly pointed one. If national allegiances can be based on false beliefs, how is it possible for a purportedly rational institution such as morality to accommodate them?

II

The view I have called ethical universalism may at first sight seem simply to *be* the ethical point of view. Surely it is definitive of ethics that all of its particular injunctions should be derived from universal, rationally grounded principles?[3] Against this, I want to suggest that such a way of looking at ethics embodies a specific and potentially controversial view of moral agency. The moral subject is seen as an abstract individual, possessed of the general powers and capacities of human beings – especially the power of reason – but not fundamentally committed to any particular persons, groups, practices, institutions, and so forth. In arriving at his most basic principles, the subject can disengage himself from commitments of this latter sort and see himself simply as one member of a moral universe made up of symmetrically placed persons, each of whom likewise possesses only general human capacities. A view of this kind is presented, for example, in Rawls's notion of the original position, in which subjects are asked to choose principles under conditions in which they are deprived of all particular knowledge of their identities, existing commitments, personal values, and so on.[4] Having adopted such an abstract point of view, the subject asks: What duties is it rational for each of us to acknowledge toward all the rest (or, conversely, what rights can each of us claim against all the rest)? Once the basic duties have been established, it is then possible to work out derivative duties for people placed in particular circumstances. Broadly speaking, there are two ways in which this can be done. First, the basic duties can be distributed in such a way that particular persons become responsible for carrying out specific aspects of those duties. To illustrate, suppose that we endorse the basic principle that the needs of children who are not able to look after themselves should be provided for. Feeding in some familiar facts, we can easily derive the subsidiary principle that the primary responsibility for discharging this duty should fall on the parents of each child. Second, the basic rights and duties can empower individuals to create particular duties by voluntary acts – promises, contracts, and so forth. These powers are justified by general considerations about human beings advanced at the basic level.

Most theories of a universalist type do therefore make room for individuals' particular duties, responsibilities, and rights – the duties of parents, colleagues, and so on – but these are never regarded as fundamental commitments. The moral self is defined by its rational capacities, so only general principles can have this basic status; other commitments are contingent and subject to revision if, for example, new facts come to light which demand this. In contrast, consider a second view of ethical agency in which the subject is seen as already deeply embedded in social relationships. Here the subject is partly defined by its relationships and the various rights, obligations, and so forth that go along with these,

so these commitments themselves form a basic element of personality. To divest oneself of such commitments would be, in one important sense, to change one's identity. On this view, the agent can still aspire to rationality, but the rationality in question cannot be that of abstract principle. Rather it consists in the capacity to reflect on existing commitments, jettisoning some and reaffirming others, depending on how they stand up to scrutiny. How might such rational appraisal proceed?

First, each commitment can be examined singly to see whether it stands up to the facts of the case, so far as these can be ascertained. For instance, I may have pledged my loyalty to a group of people, but it turns out on closer inspection that the group does not really exist as a group, in the sense that no one, except myself, takes his or her commitment seriously. My commitment is based on false assumptions and, once these are brought to light, it must simply evaporate. (In a similar way, it is possible to *discover* commitments by reflecting on what is already the case.)

Second, one can investigate the coherence of one's existing set of commitments – that is, the extent to which the understanding of personal identity provided by each is consistent with that provided by the others. For instance, someone committed both to being a caring father and to being a ruthless tycoon might come to believe that this involved an incoherence – not in the relatively superficial sense that the two commitments might require incompatible actions on certain occasions,[5] but in the deeper sense that he simply could not be both kinds of person at the same time; that the qualities needed to be a good father just could not be reconciled with those needed to be a tycoon. Having reached this point, he must then decide which of his two commitments really is the more fundamental.

These remarks are made to deflect the charge that ethical particularism is simply an irrationalist outlook which elevates our existing prejudices to the status of objective truths. Plainly it does embody a less sweeping notion of rationality than universalism, which tends to identify rationality with the adoption of the impersonal point of view. But it is not so clear that this is finally a drawback.[6] An ethical theory must presumably have practical ambitions in the sense that it aspires to be the theory which people will use to guide their activities. If the theory embodies a view of the subject which is far removed from people's actual experience of agency, what claims can it make on them? Why should they accept its interpretation of rationality? Put slightly differently, the issue is one of ethical motivation. Impartial reason dictates that I should perform such-and-such an action: but why should that give *me* a reason to perform it? These issues have been pursued in far greater depth than is possible here, for instance by Michael Sandel in his critique of the Rawlsian theory of the self[7] and by Bernard Williams in his displacement of "morality" – a term he reserves for universalist theories of obligation – from the central position in ethics.[8] My aim has been not so much to defend particularism as to indicate why it is at least a plausible view, and to show how it differs from universalism.

III

I now want to show – what may already be intuitively clear – that if nationality is going to have an ethical significance, it must be from a particularist perspective. I do not at this stage attempt to demonstrate that nationality *does* have such a significance. My concern is only to investigate what we need to assume for this even to be a possibility. Universalism can generate surrogates for national attachments but not the genuine article. The main options for the universalist are outlined in Robert Goodin's contribution to this symposium, so I will simply draw on that discussion to make the point.

If we seek to demonstrate, from universalist premises, that people owe special duties to their compatriots, there are broadly two ways in which we can attempt to do so. First, we can interpret the significance of social boundaries, in contractual or quasi-contractual terms (this approach is likely to recommend itself to Kantians). As Goodin puts it, we are to think of nations as "mutual benefit societies" in which our special obligations to fellow countrymen are derived from our common participation in a practice from which all may expect to benefit – perhaps along the lines of the principle of fair play defended by Hart and Rawls.[9] But this approach is fraught with difficulties. We have first to show that the scope of the mutual benefit practice coincides with existing social boundaries, rather than running within them or across them.[10] Then we have to show that mutual benefit logic accurately models the obligations we do in fact acknowledge to fellow countrymen.[11] Beyond these there is a further difficulty that is particularly salient for my purposes. Obligations of this kind are clearly tied to established practices. If there currently exists a practice toward which all participants contribute in some way, and in return receive certain benefits, then as a beneficiary I have an obligation to contribute. But in the

absence of the practice I clearly have no obligation of this kind, even if the practice would be beneficial to me and others if it did exist (and therefore *ought* to exist). This suggests that, if the contractual argument works at all (leaving aside the two earlier difficulties), it will be targeted on states rather than nations. States, with their codified systems of rules, *might* qualify as mutual benefit societies. Nationality, however, is not so much a cooperative practice as the *grounding* for such a practice. It is because we already share an attachment to our compatriots that we support the setting up of mutual benefit practices and the like. The ethical significance of nationality is not obliterated if, for some reason, the practices in question do not exist.[12] So if we assume that nationality *does* have an ethical significance, it will not be captured in these terms.

An alternative approach is contained in Goodin's suggestion that we see social boundaries as a convenient way of allocating responsibilities that themselves derive from general duties.[13] This in general is how utilitarians may be expected to approach the boundaries issue – essentially as a solution to a coordination problem. This approach, too, has difficulties which occur at different levels. At ground level we face the fact that boundaries enclose sets of people whose mean standards of living vary very greatly, so if the general duty from which the special responsibilities derive is something like a duty to promote welfare (to meet needs, to relieve suffering, etc.), it would seem odd to put the well-off in charge of the well-off and the badly-off in charge of the badly-off. To put this another way, simple coordination rules, like "Help the person standing next to you," make sense when, as far as we know, each person is equally in need of help and each is equally able to provide it. But this is hardly an accurate representation of the international scene. De facto, of course, British officials have been "given responsibility" for the welfare of Britons, and so forth, but the question must be whether this is the mode of assigning responsibilities that the general principle demands.

This leads naturally to the second level of difficulty, which is similar to that facing the contractual account. It may be possible to find considerable room for conventions in a consequentialist ethical theory on the grounds that it often matters much more that *someone* should discharge a duty than that some particular person should. But this line of thought leads us toward states as the institutions which currently assign most of the relevant responsibilities. Nationality as such has no place in this picture. If we move away from existing conventions toward those conventions which we can show to be optimal from the point of view of our underlying goal (e.g., the promotion of welfare), along the lines suggested in the last paragraph, it is again difficult to see where nationality can get a foothold. The consideration which, for instance, would justify us in assigning primary responsibility for children to their parents (essentially that parents are very likely to be in the best position to know what the child's interests are) can hardly be extended to nations, composed as they are of people who are mainly strangers to one another, with widely varying patterns of life.

I conclude that the most plausible accounts of special duties from a universalist perspective will give no weight to nationality. The universalist may of course reply, "So much the worse for nationality." I want instead to take the claims of nationality seriously, which therefore means examining them according to particularist criteria. At the end I shall throw some crumbs to comfort the universalist.

IV

It is perhaps not a surprise that when particularists offer examples to rebut the claims of universalism, they usually choose very specific attachments to make their point, in the expectation that these will carry most weight with their readers. Forster's remark, "If I had to choose between betraying my country and betraying my friend, I hope I should have the guts to betray my country," seems now to represent the conventional wisdom. But does this merely signify a failure of nerve on the part of the particularist? If his aim is to replace the abstract individual as ethical subject with the embedded individual, then it might seem that he should give pride of place, among constitutive attachments, to those that are *not* voluntarily acquired and therefore not a matter of choice. This would leave family, ethnic group, and nation as prime candidates, and of these the family seems, as our century advances, to be taking on more and more the characteristics of a voluntary institution. Why, then, is there so much coyness about holding up national allegiances as precisely the kind of attachments that make up the substance of ethical life, properly understood? Part of the reason, obviously, is the twentieth-century experience of rampant nationalism, an experience distasteful to liberals and the Left alike. But behind this lies a feeling that 'the nation' is itself a suspect category and therefore not a fitting object of loyalty. One way of

expressing this doubt is to say that nations are, in Benedict Anderson's phrase, "imagined communities."[14] Those who acknowledge national attachments believe themselves to be bound to their compatriots by ties of community, but these ties are in an important sense fictitious. Thus, it is claimed, national allegiances cannot withstand rational reflection, even of the more limited kind recognized by particularists. Such reflection would reveal the imaginary quality of the community in question and, in so doing, destroy it as a possible object of allegiance.

In one sense it is clear that nations cannot be genuine communities. If a community is a face-to-face group based on personal acquaintance and direct practices of mutual aid, then it is obvious enough that nations cannot qualify. But this understanding of community is a very narrow one. Normally we would speak of community in cases where a group is held together by common recognition, a shared culture, and mutually acknowledged obligations, even where the group is spatially dispersed and its members are not all linked by personal acquaintance. It is in this sense that we speak of ethnic groups as constituting communities ("the Jewish community," for instance), and this seems a justifiable extension of the concept.

However, this only serves to sharpen the problem. For it is characteristic of nations that their identities are formed not through spontaneous processes of ethnic self-definition but primarily according to the exigencies of power – the demands of states seeking to assure themselves of the loyalty of their subjects. Nationality is to a greater or lesser degree a manufactured item. This is brought out in Anthony Smith's recent study of the formation of nations out of older ethnic communities.[15] Smith distinguishes broadly between two cases. In the first, the nation is based on a single dominant ethnic group, and the culture of that group is imposed more or less successfully on ethnic minorities falling within the territorial boundaries of the emergent nation. In the second, a dominant culture is lacking and has to be forged in order to create a nation out of a series of disparate ethnic groups. In both cases, but especially the second, nation-building is a work of invention, in particular the invention of a common national past. As Smith puts it, "If the nation is to become a 'political community' on the Western territorial and civic model, it must, paradoxically, seek to create those myths of descent, those historical memories and that common culture which form the missing elements of their ethnic make-up, along with a mutual solidarity. It must differentiate itself from its closest neighbours, distinguish its culture from theirs, and emphasize the historic kinship of its constituent *ethnie* and their common ties of ideological affinity. This is done by creating or elaborating an 'ideological' myth of origins and descent."[16]

Let us take it, then, that nations require histories which are to a greater or lesser degree "mythical" (as judged by the standards of impartial scholarship) and that those stories are not only needed at the time during which a national identity is first being created, but they also pass into that identity itself – so that in order to understand what it means to be French or Greek, one has to accept (some version of)[17] the common story. Do these facts imply that national loyalties cannot withstand rational reflection?

To answer this question we need to make a distinction between beliefs that are constitutive of social relationships and background beliefs which support those constitutive beliefs. To illustrate the former, consider the example of friendship. For A and B to be friends, it must minimally be true that each is willing to put himself out for the other. Suppose that A believes that B would put himself out, but in fact the belief is false. B is merely a fair-weather friend: should an occasion arise on which he is called on to sacrifice something for A's sake, he will certainly renege. A's loyalties to B are then drained of their value, since the reciprocal attitudes that constitute friendship are not in place. An indicator of this is that A, if he is rational, must want to be informed if indeed it is the case that his "friendship" is not being reciprocated.[18]

But now consider a different case. Suppose there is a family, call them the Smiths, who exemplify all the best features of that institution: there is love, mutual support, and a wide range of activities performed in common. If asked what it is that makes these attitudes to one another appropriate, the Smiths would point, among other things, to the fact that members of the family are biologically related. Suppose now that owing to some dreadful mix-up at the hospital, one of the Smith children is in fact not a Smith. We can then say that the family relationship is backed up by a false belief: the love and concern they feel for one another is supported by a supposed genetic connection which in one case fails to obtain. But a falsity of this kind does not mean that the attachment of each member to the family is itself valueless. The *constitutive* beliefs are all in order; each does genuinely identify with the family unit, and his beliefs about the others' attitudes are correct. In contrast to the first case, it would not be rational in these circumstances to want to have the false belief brought to light.[19]

If we apply this distinction to the case of nations, the imagined national past, which as we have seen appears to be an essential element in the process of nation-building, must count as a background (rather than constitutive) belief. It does of course matter (given my definition in Sec. I above) that nations should see their identities as extending over time, but the constitutive belief is only that there should be some national past. The particular story which a nation tells itself about its past is a background belief. It is important that the story should be generally believed – or to put the point more precisely, that there should be substantial convergence in the versions of the story that are believed[20] – but not that it should be historically accurate.[21] Indeed, since the story is told for the purpose of self-definition, and since the nation's self-definition bears on the goals that its members will try to pursue in the future, we should expect a dynamic nation, actively engaged in critical debate on its common purposes, regularly to reinterpret the past as well.

But there may be doubts whether the distinction I have invoked can do all the work that it is needed to do. For even if we can successfully interpret the national past as a background belief, we may not be able to do the same with the national present. Nations need a common view about what they now are; a view about what distinguishes membership of this nation from membership of others. To use an old-fashioned phrase, they need some conception of "national character." But, it might be urged, these beliefs are also to a large extent mythical, in the sense that they attribute a spurious homogeneity to a set of people who, if looked at objectively, vary enormously in values, lifestyles, cultural attributes, and so on. And this observation destroys a *constitutive* belief, because it is constitutive of national identity that members of a nation should have characteristics in common which make it appropriate for them to be lumped together politically, rather than parceled out in some other way. Take away national character and all we are left with is de facto boundaries between states.

To rehearse the most persuasive version of this objection, the real bases of social identity are ethnic groups defined by their shared inheritance of strong cultural traits. Nationalities are heterogeneous populations, *masquerading* as ethnic groups, which often in practice means that the dominant ethnic group has its cultural norms paraded as the national culture, with other groups being ignored and by implication disparaged.

As a description of existing national practice, this criticism obviously has much force. But we need to ask to what extent it is essential to the very idea of nationality that it should trespass in this way on ethnicity. The question could be posed in this form: Can we separate nationality from ethnicity without collapsing the former into mere adherence to a set of political institutions? Nationality must be something more than de facto citizenship. It must amount to a common identity that *grounds* citizenship. Can it be this while still being less substantial than ethnic affiliation?

To ask this question is to ask whether there can be a public culture that is shared among groups of people with differing private cultures. How tenable is such a public/private distinction? Some elements of culture seem to fall naturally on one or the other side of this dividing line. Political beliefs – beliefs, say, in social equality or in toleration – fall into the public realm. Styles of dress, tastes in food, and forms of music fall into the private realm. Among the more difficult cases are likely to be language and religion. Language is obviously frequently used to designate ethnicity; at the same time it can hardly be considered irrelevant to nationality, since national identity needs linguistic expression (in speeches, histories, and so forth) and the form of the expression, on most theories of language, modifies what is expressed. One need not accept the strong Herder line on the centrality of language to nationality to see that a nation made up of ethnic groups none of which is willing to have its language relegated to the private realm is in difficulties.[22] The problems posed by religion are less sweeping, but in practice many nations surround important occasions (investitures, state funerals, memorials to war dead) with religious ceremony, and the ceremony must draw on some tradition or other. Limited ecumenical gestures are possible: Catholics can be invited to participate in Protestant rites (and vice versa) without much difficulty, but it would be hard to envisage this offer being extended to, say, Buddhists.

It is therefore almost inevitable that there will be areas in which nationality *does* trespass on ethnicity and the fostering of national identity will require the curtailment of certain aspects of ethnic identity in the interests of creating and maintaining a common public culture.[23] The extent of the trespass will depend on the particular national identity in question. To the extent, for instance, to which national rituals can be given secular trappings, there need be no intrusion on the religious element in ethnic self-definition. Equally, some ethnic identities are less vulnerable to intrusion than others. If a group can define itself entirely by, say, descent and private social practices (a group like Italian-Americans, e.g.) there is

no reason why ethnic identity and national identity cannot peacefully coexist, one nesting inside the other. So the size of the problem depends on empirical facts. But we cannot in general hope that it will disappear entirely. Either national identity is to a degree fraudulent because it supposes a cultural homogeneity which is denied by the existence of ethnic divisions, or it is genuine, but at the expense of overriding lesser identities, which, so it is argued, are more authentic because they arise in a less artificial way.

V

How might we respond to this critique of nationality? There are broadly two strategies. One remains within a particularist framework and tries to defend national identities from within – tries, that is, to defend the nation as an object of attachment in cases where this loyalty would conflict with other (especially ethnic) loyalties. The other looks at the issue in universalist terms and tries to show why, on impartialist criteria, it is a good thing for people to have such attachments. These strategies are not incompatible, though particularists will of course view the second as an irrelevance. I shall offer brief sketches of both.

From a particularist perspective, the first move is to show that the nation as an object of allegiance is not necessarily in much worse shape than other possible objects. Taking it for granted, in other words, that it is valuable for individuals to form attachments to various groups and institutions, we go on to challenge the view that there is something especially inappropriate in regarding nationality in this way. In particular, we may challenge the assumption that ethnicity is a more genuine form of allegiance than nationality. What makes this assumption plausible is that it is often fairly easy to see how national identities are being created and manipulated in the interests of those who hold (or aspire to hold) power in particular states. But ethnic identities, too, are far more plastic than they usually appear to be to those who define themselves by these identities. If we look historically at the ways in which specific ethnic groups have adapted their self-definitions and criteria of inclusion to advance their economic interests or social status,[24] we will see that ethnic identity is often as "fictitious" as national identity, in the sense that the self-understanding of an ethnic group relies on an interpretation of the past which is not borne out by the facts. Since, moreover, ethnicity is *defined* by descent, this revelation is liable to be more corrosive than the equivalent revelations about the national past. The point, then, is that ethnic identities tend to adapt spontaneously, in response to the economic or social needs of group members at any moment, whereas national identities tend to be manipulated consciously: this makes the artificiality of national identities more visible, but it is not at all clear that it makes national identities any less eligible as objects of loyalty.

Moving on to the offensive, it can be said in favor of nationality that the nation is potentially a self-sufficient object of allegiance and therefore one that is subject to rational control. If national aspirations are fulfilled, and the nation gains political autonomy, then it has the chance to determine its own destiny – subject, of course, to the activities of other members of the system of states. Some nations are just not viable, either for internal or for external reasons; but where nationality works, so to speak, members of the nation can exercise at the collective level the equivalent of autonomy at the individual level; that is, they can shape their future (including their own future character) by conscious decision, on the basis of a self-understanding informed by a common past.[25] Ethnic groups, having no aspirations to political autonomy, can hold out no such promise. They are at the mercy of nations, and whether a particular ethnic identity remains viable – whether one can maintain it without sacrificing other commitments to an intolerable degree – depends on the contingencies of national politics. That is not an argument for abandoning ethnicity in favor of nationality, but for harmonizing the two: it is an argument for having national allegiances that promise to protect your ethnic ties.[26]

Let me stress that this is not intended as an argument *for* national loyalties, in the sense of an argument that might appeal to someone starting out ethically with a clean slate. In particularist terms there can be no such argument: crudely speaking, either one has loyalties or one does not (this is too crude, because as I suggested earlier, one may be involved in social relationships that demand loyalty, but initially one may not grasp this fact; so there is room for persuasion). The argument is directed toward someone who feels the pull of nationality but thinks he has good reason to reject that pull; specifically, someone who is willing to entertain particularist commitments but believes that there is something fishy about nationality. To this person I have tried to present the nation as potentially a worthy object of allegiance, though without giving an a priori guarantee that an acceptable national identity will always be available.

VI

What can be said for nationality from a universalist perspective? Since I have already argued that universalist arguments for limited obligation will not converge on nationality, the answer might seem to be "nothing." However, there are forms of universalism that may claim to avoid this conclusion. One is the generalized analogue of what Bernard Williams has nicely labeled "Government House utilitarianism."[27] This is the view that only a select minority are capable of guiding their ethical behavior by universalist criteria; the remainder – the natives, as it were – need a localized set of rules that they do not attempt to derive from universal principles. Williams introduces this view in order to deride it, and we should follow him. A more appealing view looks for reasons *holding for every agent* for not applying universalist criteria directly to one's choice of action. A position of this kind requires that whatever has basic ethical value can in general only be created as a by-product of activities aimed overtly in a different direction. Philip Pettit, for example, has presented such a consequentialist case for acknowledging various specific loyalties.[28] The argument, essentially, is that the security of expectation that these loyalties bring – a consequentialist value – depends on the agents involved *not* taking up a calculating stance when deciding how to act. To make this stick, we would have to show how it is possible for agents to maintain a universalist conception of basic value while regulating their actual behavior by particularist standards (such as loyalties to friends and to groups). Does the universalist standard have practical force, and if so how are agents to avoid consulting it when deciding how to act? Or, to put the point the other way round, can loyalties be genuinely maintained if their ultimate justification (for the agent, not merely for an impartial spectator) is couched in universalist terms? What sort of moral psychology would make this possible? Suppose, though, that these doubts could be resolved and a Pettit-type position maintained. What could be said specifically in favor of nationality as a focus of loyalty?

The answer will depend on which universalist criteria we have in mind. I want to focus here on a particular principle of distributive justice, the principle of distribution according to need. There are two important respects in which this principle depends for its implementation on identifying a relevant community. First, since the principle is comparative in form – it specifies how people are to be treated relative to one another[29] – it requires that its field of application be identified. We have to know *which* people are to have their needs considered. Second, we must also know what is to count as a need. As soon as we move beyond indisputable biological needs, a social element enters the definition. A person's needs will be whatever they must have in order to enjoy a minimally decent existence in *this* society with its particular pattern of life. This is the truth in Michael Walzer's remark that "the idea of distributive justice presupposes a bounded world within which distribution takes place: a group of people committed to dividing, exchanging, and sharing social goods, first of all among themselves."[30] However, we have still to determine what the scope of this "bounded world" should be. There is nothing strictly incoherent in seeking to extend its range to cover the whole globe. Nonetheless, such an extension would be wildly implausible. We do not yet have a global community in the sense that is relevant to justice as distribution according to need. There is no consensus that the needs of other human beings considered merely as such make demands of justice on me, nor is there sufficient agreement about what is to count as a need. It is therefore unrealistic to suppose that the choice lies between distributive justice worldwide and distributive justice within national societies; the realistic choice is between distributive justice of the latter sort, and distributive justice within much smaller units – families, religious communities, and so forth.

The universalist case for nationality, therefore, is that it creates communities with the widest feasible membership, and therefore with the greatest scope for redistribution in favor of the needy. Smaller units would be hampered by their limited resource base; wider units, although advantageous for the reverse reason, would be unable to generate a distributive consensus. Backhanded testimony to the truth of this proposition can be obtained from those classical liberals who have been opposed to distributive justice, and by extension to nationality, as the basis for the state. This was Acton's argument for a multinational state,[31] and the same thought fuels Hayek's anxiety that liberal ideals are currently being threatened by "the inseparable forces of socialism and nationalism," which themselves represent a recrudescence of "tribal sentiments" wholly inappropriate to the "Great Society."[32] The liberal objection to nationality, then, is that it may create a consensus for redistribution at a level which allows redistributive ideals to be implemented politically rather than merely by voluntary transfers.

We may still be tempted to reply: if distributive justice can only function within communities with predefined memberships, so much the worse for distributive justice.

Our concern should be with the sick and the starving regardless of membership and regardless of how we conceptualize our obligations to them. The question this raises is whether we should think of ethical concern as a commodity in limited supply, such that if we intensify our concern for our fellow countrymen, we diminish our concern for those outside our borders. I have no space here to tackle this question properly, but it is worth saying that the picture of ethics implied in it is far from self-evident. Indeed a very different picture is intuitively more plausible: so long as different constituencies do not impose conflicting demands on our ethical capacities, a strengthening of commitment to a smaller group is likely to increase our commitment to wider constituencies. Empirically it does not seem that those most committed to distributive justice at home are in consequence less inclined to support foreign aid.

Let me stress in conclusion that I have not attempted here to derive national allegiances from universalist standards. The argument in Section III still stands: if we begin from universalist criteria, we shall not end up with nationality as the optimal basis for special obligations. The point rather is that if we start out with selves already heavily laden with particularist commitments, including national loyalties, we may be able to rationalize those commitments from a universalist perspective. Whether we should *seek* to do so is another matter, and it depends on how successfully we can resist the pull of a universalism which, as I remarked at the outset, is so prominent a feature of contemporary ethical culture.

Notes

1 Since the paper hinges on the contrast between universalism and particularism in ethics, and since, as many now think, the terms "moral" and "morality" tend to bias our thinking in a universalist direction, I try wherever possible to use "ethics" and "ethical" as comprehensive and neutral terms for the phenomena under discussion.

2 See B. Barry, "Self-Government Revisited," in *The Nature of Political Theory*, ed. D. Miller and L. Siedentop (Oxford: Clarendon Press, 1983).

3 A view advanced, e.g., in R. M. Hare, *Moral Thinking* (Oxford: Clarendon Press, 1981).

4 J. Rawls, *A Theory of Justice* (Cambridge, MA: Harvard University Press, 1971), ch. 3.

5 Anyone whose ethical outlook embraces a number of distinct commitments must be prepared to make judgments of priority when the demands of these commitments clash (e.g., whether to put friends or family first in a particular case). But such conflicts do not show that the commitments themselves are mutually incoherent. What I am envisaging in the text are commitments which draw upon incompatible qualities of character, so that someone trying to embrace both would experience a crisis of identity, not merely a problem of practical choice.

6 See the fuller discussion in A. MacIntyre, "Is Patriotism a Virtue?" (Lawrence: University of Kansas, Department of Philosophy, 1984), secs. 3–4.

7 M. Sandel, *Liberalism and the Limits of Justice* (Cambridge: Cambridge University Press, 1982).

8 B. Williams, *Ethics and the Limits of Philosophy* (London: Fontana, 1985).

9 R. Goodin, "What Is So Special about Our Fellow Countrymen?" *Ethics* 98 (1988): sec. 4; H. L. A. Hart, "Are There Any Natural Rights?" in *Political Philosophy*, ed. A. Quinton (Oxford: Oxford University Press, 1967); Rawls, secs. 18, 52.

10 For an attempt to derive international obligations in this way, see C. Beitz, *Political Theory and International Relations* (Princeton, NJ: Princeton University Press, 1979), pt. 3, ch. 3. For criticism, see B. Barry, "Humanity and Justice in Global Perspective," in *NOMOS XXIV: Ethics, Economics and the Law*, ed. J. R. Pennock and J. W. Chapman (New York: New York University Press, 1982).

11 See Goodin, sec. 4.

12 I leave aside here the difficult question whether attachments that have no practical expression can survive indefinitely. Certainly there seems to be a feedback mechanism whereby attachments motivate practices of mutual aid that in turn strengthen feelings of attachment.

13 Goodin, sec. 5.

14 B. Anderson, *Imagined Communities: Reflections on the Origin and Spread of Nationalism* (London: Verso, 1983). Anderson draws particular attention to the importance of the printed word in allowing dispersed bodies of people to think of themselves as belonging to a single community.

15 A. D. Smith, *The Ethnic Origins of Nations* (Oxford: Blackwell, 1986).

16 Ibid., p. 147.

17 Very often political disputes within a nation will surface as disputes about the precise character of the national past – see for instance the intense competition between Whig and Tory accounts of English history in eighteenth-century Britain. But the competing accounts will recognizably be different versions of the same general story with many basic facts not in dispute.

18 If A resists the passing on of this information, then the emotion he feels for B is not friendship but love, which (proverbially) is blind.

19 Some may think that it is always rational to divest yourself of irrational beliefs, but this is a superficial view. Here we

are on Jon Elster territory. See, e.g., his discussion of "decisions to believe" in J. Elster, *Ulysses and the Sirens* (Cambridge: Cambridge University Press, 1979), sec. 2.3. The essential point is that there may be beliefs which it is valuable for a person to have in the light of his underlying goals, in which case it is rational for him to set up mechanisms which ensure that he has them (and, if necessary, which protect the beliefs from later rational scrutiny).

20 See n. 17 above.

21 Historical accuracy is not important from the point of view of constituting the nation. In a wider perspective, it may make a good deal of difference how far removed the national myths are from historical truth. If the distance is great, this may have serious repercussions for scholarly research and intellectual toleration generally.

22 Herder's view was that nationality required the perpetuation of a distinct language in every nation. See *Herder on Social and Political Culture*, ed. F. M. Barnard (Cambridge: Cambridge University Press, 1969).

23 I have explored this further in "Socialism and Toleration," in *Justifying Toleration: Conceptual and Historical Perspectives*, ed. S. Mendus (Cambridge: Cambridge University Press, 1988).

24 See D. L. Horowitz, "Ethnic Identity," in *Ethnicity: Theory and Experience*, ed. N. Glazer and D. P. Moynihan (Cambridge, MA: Harvard University Press, 1975).

25 I hope it is clear that appealing to national identity in political debate is very different from endorsing the policies pursued at any time by the ruling authority. A patriot can be a radical critic of existing policy (and even, at some level, of existing institutions). This point is well made in MacIntyre, sec. 4.

26 There are of course cases in which harmonization is impossible, since the available national identity contains elements that are directly hostile to the ethnic group in question – the situation of Jews in Nazi Germany, for instance. Here the only option is to formulate an alternative nationality.

27 Williams, pp. 108–10.

28 P. Pettit, "Social Holism and Moral Theory," *Proceedings of the Aristotelian Society* 86 (1985–6): 173–97; P. Pettit and G. Brennan, "Restrictive Consequentialism," *Australian Journal of Philosophy* 64 (1986): 438–55.

29 For amplification of this point, see my "Social Justice and the Principle of Need," in *The Frontiers of Political Theory*, ed. M. Freeman and D. Robertson (Brighton: Harvester, 1980).

30 M. Walzer, *Spheres of Justice* (Oxford: Martin Robertson, 1983), p. 31.

31 See Barry, "Self-Government Revisited," p. 131.

32 F. A. Hayek, *The Mirage of Social Justice,* vol. 2 of *Law, Legislation and Liberty* (London: Routledge & Kegan Paul, 1976), pp. 133–4.

45

The Romance of the Nation-State

David Luban

The theory I espoused in "Just War and Human Rights" entitles nations to wage war to enforce basic human rights.[1] This entitlement stems from the cosmopolitan nature of human rights. The rights of security and subsistence, with which I was concerned, are necessary for the enjoyment of any other rights at all; no one can do without them. Basic rights, therefore, are universal. They are no respecters of political boundaries, and require a universalist politics to implement them, even when this means breaching the wall of state sovereignty.

Since the time of the French Revolution, which linked the Rights of Man with the demand for national sovereignty, cosmopolitan theories have been criticized by appealing to the ideology of nationalism. National sovereignty, it was thought, gives people their most important entitlement: a state that expresses their traditions, history and unity – their "national soul."[2] Attack the state, and you attack the soul of its people. The cosmopolitan vision of humanity is really a flattening universalism, a philosopher's conceit. As Herder says, "Every nation has its own core of happiness just as every sphere has its center of gravity! … Philosopher in a northern valley, with the infant's scales of your century in your hand, do you know better than Providence?"[3]

Nationalism may have originated as an ideology of liberation and tolerance; in our [twentieth] century it is drenched in blood. What Mazzini began, Il Duce ended; other examples are equally obvious and equally painful. The violence of modern nationalism and its indifference to basic human rights arises, I believe, from the conviction that the only right which matters politically is the right to a unified nation-state. Its picture of the nation-state, however, is a myth. It emphasizes a nation's commonality, affinity, shared language and traditions and history, what Mazzini called "unanimity of mind."[4] The picture glosses over intramural class conflict, turmoil, violence, and repression; these it represents as the reflection of inscrutable processes akin to national destiny.[5] This view I shall call the Romance of the Nation-State. In place of respect for people it sets respect for peoples, in place of universalism, relativism.

What disturbs me about Walzer's essay is its acceptance of the premises of nationalism.[6] Walzer embodies his anti-cosmopolitanism in five theses: (i) that nations are comparatively self-enclosed (p. 227); (ii) that "the state is constituted by the union of people and government" (p. 212); (iii) that the political and moral status of a nation is aptly characterized by the metaphor of the

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social contract; (iv) that "the only global community is … a community of nations, not of humanity" (p. 226); and (v) that the main moral principle of international politics is "pluralism": respect for the integrity of nations and their states; in particular, respect for their right to choose political forms which from our point of view are morally deficient.

This is a molecular theory of world politics, in which self-contained nation-states are the units of moral regard: molecular, because each is bound together from within and presents itself as a unit from without. The fourth and fifth theses yield the anti-cosmopolitan international morality that underlies Walzer's theory of *jus ad bellum*; these theses depend, however, on the first three, which represent the Romance of the Nation-State.

The social contract metaphor is central to this myth. It suggests reciprocity, coincident interests, mutual obligation, formal equality of the parties. But the presence of these features is not a conceptual truth about the nation-state, nor, I think, a factual one. The metaphor and the myth, I shall argue, lead Walzer to a deficient account of human rights and a blindness to the threat physical repression poses to political processes.

The controversial thesis of Walzer's essay is this: he believes that states which oppress their people may, nevertheless, be considered legitimate in international society, as long as they do not fall under what he calls the "rules of disregard." Intervention is allowable in a nation when a national minority is seceding from it; when a foreign power has intervened in a civil war it is fighting; or when it is massacring, enslaving, or expelling large numbers of people. In these instances, Walzer argues, "the absence of 'fit' between the government and community is radically apparent" (p. 214). The rest of the time we are obliged to act *as if* states are legitimate. Walzer calls this "the politics of *as if*" (p. 216); its leading principle is "a morally necessary presumption: that there exists a certain 'fit' between the community and its government and that the state is 'legitimate'" (p. 212). Hard as it is for liberal democrats to believe, foreigners may want their tyranny – there may be a "fit" between government and people.

What supports this presumption? According to Walzer, foreigners just can't judge an alien culture's fit with its government. "They don't know enough about its history, and they have no direct experience, and can form no concrete judgments of the conflicts and harmonies, the historical choices and cultural affinities, the loyalties and resentments, that underlie it" (p. 212).

I find no plausibility in this. True, *if* we don't know enough about a foreign culture to judge its "fit" with its government, we should give it the benefit of the doubt and presume the fit is there. But why presume we are ignorant? We aren't, usually. There are, after all, experts, experienced travelers, expatriates, scholars, and spies; libraries have been written about the most remote cultures. Bafflingly, Walzer does not mention the obvious sources of information even to dismiss them. He seems to take as an a priori truth – it is part of the Romance of the Nation-State – that without "direct experience" a member of one culture cannot, ultimately, know what it's really like to be a member of another. But this is of a piece with "no man can really know what it's like to be a woman" or "you can't know what it's really like to be me": even granting their validity, we don't assume that such considerations preclude making true judgments about other people. That is more like solipsism than pluralism, and if it were true it would spell the end, not the principle, of politics.

Of course Walzer is right that the lack of fit between government and people should be "radically apparent" to justify intervening, because intervention based on a misperception is horribly wrong. But what does it take to make things radically apparent? In my view, Walzer's rules of disregard set the threshold too high; what he calls "ordinary oppression" can make the lack of fit apparent enough. Let us look at ordinary oppression in a medium-size dictatorship. Each year there are a few score executions, a few hundred tortures, a few thousand political imprisonments, a few million people behaving cautiously because they know that a single slip will bring the police. The police and army believe that if the government falls they are dead men; it is the bargain they accepted to escape the poverty of their villages. They take their foreign-made fighters, small arms, and pepper gas and hope for the best.

If this is a "union of people and government," why are the jails so full? Surely all those strapped to the torture table are not misfits in their own culture. I think we should aim at a more commonsense explanation than Walzer's of why people put up with the regime, such as the idea that they are afraid of being "disappeared" (to use a phrase current in Argentina and the Philippines). The government fits the people the way the sole of a boot fits a human face: after a while the patterns of indentation match with uncanny precision.

It was central to my argument in "Just War and Human Rights" that under ordinary oppression peoples' socially basic human rights are violated – not, to be sure, on the scale envisioned in Walzer's third rule of disregard, which refers to what the Nuremberg court called

"crimes against humanity," but systematically enough to define the state's political physiognomy and justify intervention. Walzer's theory of intervention as aggression is also based on individual rights, but those that control are the rights emphasized by nationalism: to fight for the homeland and to live under institutions formed by one's fellow nationals. They are rights to a nation-state, not claims against it.

This difference is illustrated by Walzer's analysis of the recent Nicaraguan revolution. He emphasizes the fact that in the wake of their initial defeat the *Sandinistas* were forced to clarify their program and solidify their political base. This is indeed an instance of self-determination, and if Walzer's position is that, other things being equal, it is better that it should happen than not, he is undoubtedly right. Let us not forget, though, that other things were not equal. Fifty thousand people were killed in the second round of revolution, Nicaragua's productive capacity was ravaged, and Somoza's followers had an additional year to strip the country of everything they could crate. Because of this, the new government has been forced to make a number of deals that have weakened its political base. Neither should we dismiss as unimportant the fact that Nicaraguans had to live under an oppressive regime one year longer. We cannot ignore, as Walzer's theory does, the cost in blood, the bottom line in an account that makes socially basic human rights its guiding concept.

The problem with Walzer's argument is this. Human rights accrue to people no matter what country they live in and regardless of history and traditions. If human rights exist at all, they set a moral limit to pluralism. For this reason Walzer's appeal to pluralism begs the question, for making pluralism the overriding value is incompatible from the outset with a theory that grants universal human rights.

Rights, moreover, are crucial values for us – as Walzer points out, they are deeply connected with our notions of personality and moral agency. Thus, when murders, tortures, imprisonments go unchecked, more so when their perpetrators (the worst people in the world) are treated *as if* they are legitimate, the common humanity of all of us is stained. In this way, the politics of *as if*, in which we acknowledge rights but turn our backs on their enforcement (p. 226), fails to take our values seriously. It raises politics above moral theory.

Walzer sees it differently. He claims that he is defending politics while his critics are expressing "the traditional philosophical dislike for politics." This, he says, is because we are unwilling to tolerate unwanted outcomes of "the political process itself, with all its messiness and uncertainty, its inevitable compromises, and its frequent brutality"; we would restrict the outcomes by force of arms (p. 31).

But why is this less political than standing by while an uprising against a repressive regime is crushed by force of arms? Repression is itself an attempt to restrict, or rather, to eliminate the political process. It subjects politics to the essentially apolitical technology of violence, the "great unequalizer." Intervention, when it is just, should restore self-determination, not deny it. In this respect it is similar to counter-intervention of the sort countenanced by Walzer's second rule of disregard – an analogy which is particularly apposite in view of the fact that military technology is usually provided to repressive regimes by foreign powers.

Walzer dismisses the ability of sheer force to stifle the political process because force cannot prevail against the united community, while if the community is not united intervention would be wrong. But a united community is a rare political achievement, particularly under conditions of class oppression and terror, and I think it is wrong to make it the yardstick of politics – doing so is another metamorphosis of the Romance of the Nation-State. One might doubt whether in a civil war an intervener can know which side to support. But the entitlement to intervene derives from the cosmopolitan character of human rights; one intervenes, then, on behalf of socially basic human rights, for it is these which enable people to enjoy their political rights. Walzer's hands-off approach, on the other hand, waiting for the day when the nation unites, simply yields to guns and tanks.

Notes

1 See *Philosophy and Public Affairs* 9, no. 2 (Winter 1980): 160–81.

2 See Hannah Arendt, *The Origins of Totalitarianism*, rev. edn. (New York: Meridian, 1958), pp. 230–1.

3 "Auch eine Philosophie der Geschichte zur Bildung der Menschheit," *Werke*, ed. Suphan, vol. 5, pp. 501ff.; quoted in Ernst Cassirer, *The Philosophy of the Enlightenment*, trans. Koelln and Pettegrove (Princeton: Princeton University Press, 1951),

pp. 232–3. See also Cassirer, *The Myth of the State* (New Haven: Yale University Press, 1946), pp. 176–86; Isaiah Berlin, *Against the Current* (New York: Viking, 1979), chs. 1, 13; and Berlin, *Vico and Herder* (New York: Viking, 1976).

4 For this citation, together with a short survey of nineteenth-century nationalist ideology, see Victor Alba, *Nationalists Without Nations* (New York: Praeger, 1968), pp. 5–17.

5 Even Mill seems to subscribe to this, for according to Walzer it is his idea "that citizens get the government they deserve, or, at least, the government for which they are 'fit,'" *Just and Unjust Wars* (New York: Basic Books, 1977), p. 88.

6 Parenthetical references in the text are to Walzer, "The Moral Standing of States: A Response to Four Critics," *Philosophy & Public Affairs* 9, no. 3 (Spring 1980).

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Democracy: From City-States to a Cosmopolitan Order?

David Held

Democracy seems to have scored an historic victory over alternative forms of governance.[1] Nearly everyone today professes to be a democrat. Political regimes of all kinds throughout the world claim to be democracies. Yet what these regimes say and do is often substantially different from one to another. Democracy bestows an aura of legitimacy on modern political life: laws, rules and policies appear justified when they are 'democratic'. But it was not always so. The great majority of political thinkers from ancient Greece to the present day have been highly critical of the theory and practice of democracy. A uniform commitment to democracy is a very recent phenomenon. Moreover, democracy is a remarkably difficult form of government to create and sustain. The history of twentieth-century Europe alone makes this clear: fascism, Nazism and Stalinism came very close to obliterating democracy altogether.

Against this background, it is unsettling that some recent political commentators have proclaimed (by means of a phrase borrowed most notably from Hegel) the 'end of history' – the triumph of the west over all political and economic alternatives. The revolutions which swept across Central and Eastern Europe at the end of 1989 and the beginning of 1990 stimulated an atmosphere of celebration. Liberal democracy was championed as the agent of progress and capitalism as the only viable economic system: ideological conflict, it was said, is being steadily displaced by universal democratic reason and market-orientated thinking.[2] But such a view is quite inadequate in a number of respects.

In the first instance, the 'liberal' component of liberal democracy cannot be treated simply as a unity. There are distinctive liberal traditions which embody quite different conceptions from each other of the individual agent, of autonomy, of the rights and duties of subjects, and of the proper nature and form of community. In addition, the 'celebratory' view of liberal democracy neglects to explore whether there are any tensions, or even perhaps contradictions, between the 'liberal' and 'democratic' components of liberal democracy; for example, between the liberal preoccupation with individual rights or 'frontiers of freedom' which 'nobody should be permitted to cross', and the democratic concern for the regulation of individual and collective action, that is, for public accountability.[3] Those who have written at length on this question have frequently resolved it in quite different

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directions. Furthermore, there is not simply one institutional form of liberal democracy. Contemporary democracies have crystallized into a number of different types, which makes any appeal to a liberal position vague at best.[4] An uncritical affirmation of liberal democracy essentially leaves unanalysed the whole meaning of democracy and its possible variants.

This essay seeks to address this lacuna, first, by examining the development of different models of democracy; secondly, by considering the conditions of application of these models; thirdly, by exploring the meaning of democracy in the context of the progressive enmeshment today of states and societies in regional and global networks; and finally, by assessing the proper form and scope of democracy in relation to systems of international governance. The first two sets of issues will be examined in the next section, and the second two sets in the subsequent one. It will be argued, ultimately, that democracy can result from, and only from, a nucleus, or federation, of democratic states and societies. Or, to put the point differently, national democracies require international democracy if they are to be sustained and developed in the contemporary era. Paradoxically, perhaps, democracy has to be extended and deepened within and between countries for it to retain its relevance in the twenty-first century.

If the case for rethinking democracy in relation to the interconnectedness of states and societies is established successfully, a new agenda will have been created for democratic theory and practice. It is important to be clear about the meaning of 'new' in this context. The agenda will not be new in the sense of being without precedent; others before have sought to understand the impact of the international order on the form and operation of domestic politics within democratic states. Others before have also sought to set out the normative implications of changes in the international order for the role and nature of democratic government. Nor will the agenda be new in the sense that traditional questions of democratic theory will be wholly displaced. On the contrary, questions will remain about the proper form of citizenship, the nature of individual rights and duties and the extent of participation and representation, for instance. But the agenda will be new to the extent that the case is made that a theory of democracy (whether focusing on philosophical or empirical-analytic concerns) requires a theory of the interlocking processes and structures of the global system. For a theory of democracy must offer, it will be maintained, an account both of the changing meaning of democracy within the global order and of the impact of the global order on the development of democratic associations. Democratic institutions and practices have to be articulated with the complex arena of national and international politics, and the mutual interpenetration of the national and international must be mapped. Political understanding, and the successful pursuit of democratic political theory, is dependent on the outcome of these tasks.[5] Before pursuing them, however, the concept of democracy itself requires some clarification.

Models of Democracy

Within the history of democratic theory lies a deeply rooted conflict about whether democracy should mean some kind of popular power (a form of politics in which citizens are engaged in self-government and self-regulation) or an aid to decision-making (a means of conferring authority on those periodically voted into office). This conflict has given rise to three basic variants or models of democracy, which it is as well to bear in mind. First, there is direct or participatory democracy, a system of decision-making about public affairs in which citizens are directly involved. This was the 'original' type of democracy found in ancient Athens, among other places. Secondly, there is liberal or representative democracy, a system of rule embracing elected 'officers' who undertake to 'represent' the interests or views of citizens within the framework of the 'rule of law'. Thirdly, there is a variant of democracy based on a one-party model (although some may doubt whether this is a form of democracy at all). Until recently, the Soviet Union, East European societies and many third world countries have been dominated by this conception. The following discussion deals briefly with each of these models in turn, developing concepts and issues which will be drawn upon in later argument.

The Active Citizen and Republican Government

Athenian democracy has long been taken as a fundamental source of inspiration for modern western political thought. This is not to say that the west has been right to trace many elements of its democratic heritage exclusively to Athens; for, as recent historical and archaeological research has shown, some of the key political innovations, both conceptual and institutional, of the nominally western political tradition can be traced to older civilizations in the east. The city-state or *polis*

society, for example, existed in Mesopotamia long before it emerged in the west.[6] Nonetheless, the political ideals of Athens – equality among citizens, liberty, respect for the law and justice – have been taken as integral to western political thinking, and it is for this reason that Athens constitutes a useful starting point.

The Athenian city-state, ruled as it was by citizen-governors, did not differentiate between state and society. In ancient Athens, citizens were at one and the same time subjects of political authority and the creators of public rules and regulations. The people (*demos*) engaged in legislative and judicial functions, for the Athenian concept of citizenship entailed their taking a share in these functions, participating *directly* in the affairs of 'the state'.[7] Athenian democracy required a general commitment to the principle of civic virtue: dedication to the republican city-state and the subordination of private life to public affairs and the common good. 'The public' and 'the private' were intertwined. Citizens could properly fulfil themselves and live honourably only in and through the *polis*. Of course, who was to count as a citizen was a tightly restricted matter; among the excluded were women and a substantial slave population.

The Athenian city-state – eclipsed ultimately by the rise of empires, stronger states and military regimes – shared features with republican Rome. Both were predominantly face-to-face societies and oral cultures; both had elements of popular participation in governmental affairs, and both had little, if any, centralized bureaucratic control. Furthermore, both sought to foster a deep sense of public duty, a tradition of civic virtue or responsibility to 'the republic' – to the distinctive matters of the public realm. And in both polities, the claims of the state were given a unique priority over those of the individual citizen. But if Athens was a democratic republic, contemporary scholarship generally affirms that Rome was, by comparison, an essentially oligarchical system.[8] Nevertheless, from antiquity, it was Rome which was to prove the most durable influence on the dissemination of republican ideas.

Classical republicanism received its most robust restatement in the early Renaissance, especially in the city-states of Italy. The meaning of the concept of 'active citizenship in a republic' became a leading concern. Political thinkers of this period were critical of the Athenian formulation of this notion; shaped as their views were by Aristotle, one of the most notable critics of Greek democracy, and by the centuries-long impact of republican Rome, they recast the republican tradition. While the concept of the *polis* remained central to the political theory of Italian cities, most notably in Florence, it was no longer regarded as a means to self-fulfilment.[9] Emphasis continued to be placed on the importance of civic virtue but the latter was understood as highly fragile, subject particularly to corruption if dependent solely upon the political involvement of any one major grouping: the people, the aristocracy or the monarchy. A constitution which could reflect and balance the interests of all leading political factions became an aspiration. Niccolò Machiavelli thus argued that all singular constitutional forms (monarchy, aristocracy and democracy) were unstable, and only a governmental system combining elements of each could promote the kind of political culture on which civic virtue depends.[10] The best example of such a government was, he proclaimed, Rome: Rome's mixed government (with its system of consuls, Senate and tribunes of the people) was directly linked to its sustained achievements.

The core of the Renaissance republican case was that the freedom of a political community rested upon its accountability to no authority other than that of the community itself. Self-government is the basis of liberty, together with the right of citizens to participate – within a constitutional framework which creates distinct roles for leading social forces – in the government of their own common business.[11] As one commentator put it, 'the community as a whole must retain the ultimate sovereign authority', assigning its various rulers or chief magistrates 'a status no higher than that of elected officials'.[12] Such 'rulers' must ensure the effective enforcement of the laws created by the community for the promotion of its own good; for they are not rulers in a traditional sense, but 'agents of *ministri* of justice'.

In Renaissance republicanism, as well as in Greek democratic thought, a citizen was someone who participated in 'giving judgement and holding office'.[13] Citizenship meant participation in public affairs. This definition is noteworthy because it suggests that theorists within these traditions would have found it hard to locate citizens in modern democracies, except perhaps as representatives or office holders. The limited scope in contemporary politics for the active involvement of citizens would have been regarded as most undemocratic.[14] Yet the idea that human beings should be active citizens of a political order – citizens of their states – and not merely dutiful subjects of a ruler has had few advocates from the earliest human associations to the early Renaissance.[15]

The demise in the west of the idea of the active citizen, one whose very being is affirmed in and through political action, is hard to explain fully. But it is clear

enough that the antithesis of *Homo politicus* is the *Homo credens* of the Christian faith: the citizen whose active judgement is essential is displaced by the true believer.[16] Although it would be quite misleading to suggest that the rise of Christianity effectively banished secular considerations from the lives of rulers and ruled, it unquestionably shifted the source of authority and wisdom from this-worldly to other-worldly representatives. During the Middle Ages, the integration of Christian Europe came to depend above all on two theocratic authorities: the Roman Catholic Church and the Holy Roman Empire. There was no theoretical alternative to their account of the nature of power and rule.[17] Not until the end of the sixteenth century, when it became apparent that religion had become a highly divisive force and that the powers of the state would have to be separated from the duty of rulers to uphold any particular faith, did the nature and limits of political authority, law, rights and obedience become a preoccupation of European political thought from Italy to England.[18]

Liberal Representative Democracy

Modern liberal and liberal democratic theories have constantly sought to justify the sovereign power of the state while at the same time justifying limits on that power.[19] The history of this attempt since Thomas Hobbes is the history of arguments to balance might and right, power and law, duties and rights. On the one hand, states must have a monopoly of coercive power in order to provide a secure basis on which trade, commerce, religion and family life can prosper. On the other hand, by granting the state a regulatory and coercive capability, political theorists were aware that they had accepted a force that could, and frequently did, deprive citizens of political and social freedoms.

Liberal democrats provided the key institutional innovation to try to overcome this dilemma: representative democracy. The liberal concern with reason, law and freedom of choice could only be upheld properly by recognizing the political equality of all mature individuals. Such equality would ensure not only a secure social environment in which people would be free to pursue their private activities and interests, but also a state which, under the watchful eye of the electorate, would do what was best in the general or public interest. Thus, liberal democrats argued, the democratic constitutional state, linked to other key institutional mechanisms, particularly the free market, would resolve the problems of ensuring both authority and liberty.

Two classic statements of the new position can be found in the philosophy of James Madison and in the work of one of the key figures of nineteenth-century English liberalism: Jeremy Bentham. In Madison's account, 'pure democracies' (by which he means societies 'consisting of a small number of citizens, who assemble and administer the government in person') have always been intolerant, unjust and unstable.[20] By contrast, representative government overcomes the excesses of 'pure democracy' because regular elections force a clarification of public issues, and the elected few, able to withstand the political process, are likely to be competent and capable of 'discerning the true interest of their country'.

The central concern of Madison's argument is not the rightful place of the active citizen in the life of the political community but, instead, the legitimate pursuit by individuals of their interests, and government as a means for the enhancement of these interests. Although Madison himself sought clear ways of reconciling particular interests with what he called modern 'extended republics', his position signals a clear shift from the classical ideals of civic virtue and the public realm to liberal preoccupations.[21] He conceived the representative state as the chief mechanism to aggregate individuals' interests and to protect their rights. In such a state, he believed, security of person and property would be sustained and politics could be made compatible with the demands of large nation-states, with their complex patterns of trade, commerce and international relations.[22]

In parallel with this view, Bentham held that representative democracy 'has for its characteristic object and effect … securing its members against oppression and depredation at the hands of those functionaries which it employs for its defence'.[23] Democratic government is required to protect citizens from the despotic use of political power, whether it be by a monarch, the aristocracy or other groups. The representative state thus becomes an umpire or referee while individuals pursue in civil society, according to the rules of economic competition and free exchange, their own interests. The free vote and the free market are both essential, for a key presupposition is that the collective good can be properly realized in most domains of life only if individuals interact in competitive exchanges, pursuing their utility with minimal state interference. Significantly, however, this argument has another side. Tied to the advocacy of a 'minimal state', whose scope and power need to be strictly limited, there is a strong commitment to certain types of state intervention: for instance, to regulate the

behaviour of the disobedient, and to reshape social relations and institutions if, in the event of the failure of *laissez-faire*, the greatest happiness of the greatest number is not achieved – the only scientifically defensible criterion, Bentham held, of the public good.

From classical antiquity to the seventeenth century, democracy was largely associated with the gathering of citizens in assemblies and public meeting places. By the early nineteenth century it was beginning to be thought of as the right of citizens to participate in the determination of the collective will through the medium of elected representatives.[24] The theory of representative democracy fundamentally shifted the terms of reference of democratic thought: the practical limits that a sizeable citizenry imposes on democracy, and which had been the focus of so much critical (anti-democratic) attention, were practically eliminated. Representative democracy could now be celebrated as both accountable and feasible government, potentially stable over great territories and time spans.[25] It could even be heralded, as James Mill put it, as 'the grand discovery of modern times' in which 'the solution of all difficulties, both speculative and practical, will be found'.[26] Accordingly, the theory and practice of popular government shook off its traditional association with small states and cities, opening itself to become the legitimating creed of the emerging world of nation-states. But who exactly was to count as a legitimate participant, or a 'citizen' or 'individual', and what his or her exact role was to be in this new order, remained either unclear or unsettled. Even in the work of the enlightened John Stuart Mill ambiguities remained: the idea that all citizens should have equal political weight in the polity remained outside his actual doctrine, along with that of most of his contemporaries.[27]

It was left by and large to the extensive and often violently suppressed struggles of working-class and feminist activists in the nineteenth and twentieth centuries to accomplish a genuinely universal suffrage in some countries. Their achievement was to remain fragile in places such as Germany, Italy and Spain, and was in practice denied to some groups; for instance, many African-Americans in the US before the civil rights movement in the 1950s and 1960s. However, through these struggles the idea that the rights of citizenship should apply equally to all adults became slowly established; many of the arguments of the liberal democrats could be turned against existing institutions to reveal the extent to which the principles and aspirations of equal political participation and equal human development remained unfulfilled. It was only with the actual achievement of citizenship for all adult men and women that liberal democracy took on its distinctively contemporary form: a cluster of rules and institutions permitting the broadest participation of the majority of citizens in the selection of representatives who alone can make political decisions (that is, decisions affecting the whole community).

This cluster includes elected government; free and fair elections in which every citizen's vote has an equal weight; a suffrage which embraces all citizens irrespective of distinctions of race, religion, class, sex and so on; freedom of conscience, information and expression on all public matters broadly defined; the right of all adults to oppose their government and stand for office; and associational autonomy – the right to form independent associations including social movements, interest groups and political parties.[28] The consolidation of representative democracy, thus understood, has been a twentieth-century phenomenon; perhaps one should even say a late twentieth-century phenomenon. For it is only in the closing decades of this century that democracy has been securely established in the west and widely adopted in principle as a suitable model of government beyond the west.

Marxism and One-party Democracy

The struggle of liberalism against tyranny, and the struggle by liberal democrats for political equality, represented a major step forward in the history of human emancipation, as Karl Marx and Friedrich Engels readily acknowledged. But for them, and for the Marxist tradition more broadly, the great universal ideals of 'liberty, equality and justice' cannot be realized simply by the 'free' struggle for votes in the political system together with the 'free' struggle for profit in the market-place. Advocates of the democratic state and the market economy present these institutions as the only ones under which liberty can be sustained and inequalities minimized. However, according to the Marxist critique, the capitalist economy, by virtue of its internal dynamics, inevitably produces systematic inequality and massive restrictions on real freedom. The formal existence of certain liberties is of little value if they cannot be exercised in practice. Therefore, although each step towards formal political equality is an advance, its liberating potential is severely curtailed by inequalities of class.

In class societies the state cannot become the vehicle for the pursuit of the common good or public interest.

Far from playing the role of emancipator, protective knight, umpire, or judge in the face of disorder, the agencies of the liberal representative state are enmeshed in the struggles of civil society. Marxists conceive the state as an extension of civil society, reinforcing the social order for the enhancement of particular interests. Their argument is that political emancipation is only a step towards human emancipation: that is, the complete democratization of both society and the state. In their view, liberal democratic society fails when judged by its own promises.

Among these promises are, first, political participation, or general involvement mediated by representatives in decisions affecting the whole community; secondly, accountable government; and thirdly, freedom to protest and reform.[29] But 'really existing liberal democracy', as one Marxist recently put it, fails to deliver on any of these promises. For it is distinguished by the existence of a largely passive citizenry (significant numbers of eligible citizens do not vote in elections, for example); the erosion and displacement of parliamentary institutions by unelected centres of power (typified by the expansion of bureaucratic authority and of the role of functional representatives); and substantial structural constraints on state action and, in particular, on the possibility of the piecemeal reform of capitalism (the flight of capital, for example, is a constant threat to elected governments with strong programmes of social reform).[30]

Marx himself envisaged the replacement of the liberal democratic state by a 'commune structure': the smallest communities, which were to administer their own affairs, would elect delegates to larger administrative units (districts, towns); these in turn would elect candidates to still larger areas of administration (the national delegation).[31] This arrangement is known as the 'pyramid' structure of 'delegative democracy': all delegates are revocable, bound by the instructions of their constituency, and organized into a 'pyramid' of directly elected committees. The post-capitalist state would not, therefore, bear any resemblance to a liberal, parliamentary regime. All state agencies would be brought within the sphere of a single set of directly accountable institutions. Only when this happens will 'that self-reliance, that freedom, which disappeared from earth with the Greeks, and vanished into the blue haze of heaven with Christianity', as the young Marx put it, gradually be restored.[32]

In the Marxist-Leninist account, the system of delegative democracy is to be complemented, in principle, by a separate but somewhat similar system at the level of the Communist Party. The transition to socialism and communism necessitates the 'professional' leadership of a disciplined cadre of revolutionaries.[33] Only such a leadership has the capacity to organize the defence of the revolution against counter-revolutionary forces, to plan the expansion of the forces of production, and to supervise the reconstruction of society. Since all fundamental differences of interest are class interests, since the working-class interest (or standpoint) is the progressive interest in society, and since during and after the revolution it has to be articulated clearly and decisively, a revolutionary party is essential. The party is the instrument which can create the framework for socialism and communism. In practice, the party has to rule; and it was only in the 'Gorbachev era' in the Soviet Union (from 1984 to August 1991) that a pyramid of councils, or 'Soviets', from the central authority to those at local village and neighbourhood level, was given anything more than a symbolic or ritualistic role in the post-revolutionary period.

Democracy, the State, and Civil Society

What should be made of these various models of democracy in contemporary circumstances? The classical participatory model cannot easily be adapted to stretch across space and time. Its emergence in the context of city-states, and under conditions of 'social exclusivity', was an integral part of its successful development. In complex industrial societies, marked by a high degree of social, economic and political differentiation, it is very hard to envisage how a democracy of this kind could succeed on a large scale.

The significance of these reflections is reinforced by examining the fate of the conception of democracy advocated by Marx and Engels, and their followers. In the first instance, the 'deep structure' of Marxist categories – with its emphasis on the centrality of class, the universal standpoint of the proletariat, and a conception of politics which is rooted squarely in production – ignores or severely underestimates the contributions to politics of other forms of social structure, collectivity, agency, identity, interest and knowledge. Secondly, as an institutional arrangement that allows for mediation, negotiation and compromise among struggling factions, groups or movements, the Marxist model does not stand up well under scrutiny, especially in its Marxist-Leninist form. A system of institutions to promote discussion, debate and competition among divergent views – a system encompassing the formation of movements, pressure groups and/or political parties with independent

leaderships to help press their cases – appears both necessary and desirable. Further, the changes in Central and Eastern Europe after 1989 seem to provide remarkable confirmatory evidence of this, with their emphasis on the importance of political and civil rights, a competitive party system, and the 'rolling back of the state', that is, the freeing of civil society from state domination.

One cannot escape the necessity, therefore, of recognizing the importance of a number of fundamental liberal tenets, concerning the centrality, in principle, of an 'impersonal' structure of public power, of a constitution to help guarantee and protect rights, of a diversity of power centres within and outside the state, and of mechanisms to promote competition and debate among alternative political platforms. What this amounts to, among other things, is confirmation of the fundamental liberal notion that the 'separation' of state from civil society must be an essential element of any democratic political order. Conceptions of democracy that depend on the assumption that the state could ever replace civil society, or vice versa, must be treated with caution.

To make these points is not, however, to affirm any one liberal democratic model as it stands, although many advocates of democracy appear to take this view. It is one thing to accept the arguments concerning the necessary protective, conflict-mediating and redistributive functions of the democratic state, quite another to accept these as prescribed in existing accounts of liberal democracy. Advocates of liberal democracy have tended to be concerned, above all else, with the proper principles and procedures of democratic government. But by focusing on 'government', they have drawn attention away from a thorough examination of the relation between formal rights and actual rights; between commitments to treat citizens as free and equal and practices which do neither sufficiently; between concepts of the state as, in principle, an independent authority, and state involvement in the reproduction of the inequalities of everyday life; between notions of political parties as appropriate structures for bridging the gap between state and society, and the array of power centres which such parties and their leaders cannot reach. To ignore these questions is to risk the establishment of 'democracy' in the context of a sea of political, economic and social inequality. And it is to risk the creation of, at best, a very partial form of democratic politics – a form of politics in which the involvement of some bears a direct relation to the limited or non-participation of others.

The implications of these points are, I believe, of considerable significance. For democracy to flourish it has to be reconceived as a double-sided phenomenon: concerned, on the one hand, with the reform of state power and, on the other hand, with the restructuring of civil society. This entails recognizing the indispensability of a process of what I have elsewhere called 'double democratization': the interdependent transformation of both state and civil society.[34] Such a process must be premised on the principles that the division between state and civil society must be a central aspect of democratic life, and that the power to make decisions must be free of the inequalities and constraints which can be imposed by an unregulated system of private capital, as Marx foresaw. But, of course, to recognize the importance of both these points is to recognize the necessity of recasting substantially their traditional connotations.[35]

In short, if democratic life involves no more than a periodic vote, citizens' activities will be largely confined to the 'private' realm of civil society and the scope of their actions will depend largely on the resources they can command. Few opportunities will exist for citizens to act as citizens; that is, as participants in public life. But if democracy is understood as a double-sided process, this state of affairs might be redressed by creating opportunities for people to establish themselves 'in their capacity of being citizens'.[36] The 'active citizen' could once again return to the centre of public life, involving him- or herself in the realms of both state and civil society. Of course, the nature of this involvement would differ in each of these realms, according to their organizational and institutional features. But opportunities will at least have been created for all those affected by the decision-making structures of their communities to participate in the latters' regulation – or so the story of democracy has so far suggested. However, democracy has another side.

Democracy, Globalization and International Governance

Throughout the nineteenth and twentieth centuries democratic theory has tended to assume a 'symmetrical' and 'congruent' relationship between political decision-makers and the recipients of political decisions.[37] In fact, symmetry and congruence have often been taken for granted at two crucial points: first, between citizen-voters and the decision-makers whom they are, in principle, able to hold to account; and secondly, between the 'output' (decisions, policies, and so on) of decision-makers and their constituents – ultimately, 'the people' in a delimited territory.

Even the critics of modern democracies have tended to share this assumption; following the narrative of democracy as conventionally told, they have thought of the problem of political accountability as, above all, a national problem. Contemporary representative structures are, they hold, insufficiently responsive to their citizens; and, in discussing various forms of participatory democracy, or contemporary interpretations of the relevance of republicanism, they place emphasis on making the political process more transparent and intelligible, more open to, and reflective of, the heterogeneous wants and needs of 'the people'.[38]

But the problem, for defenders and critics alike of modern democratic systems, is that regional and global interconnectedness contests the traditional national resolutions of the key questions of democratic theory and practice. The very process of governance can escape the reach of the nation-state. National communities by no means exclusively make and determine decisions and policies for themselves, and governments by no means determine what is right or appropriate exclusively for their own citizens.[39] To take some topical examples: a decision to increase interest rates in an attempt to stem inflation or exchange-rate instability is most often taken as a 'national' decision, although it may well stimulate economic changes in other countries. Similarly, a decision to permit the 'harvesting' of the rainforests may contribute to ecological damage far beyond the borders which formally limit the responsibility of a given set of political decision-makers. These decisions, along with policies on issues as diverse as investment, arms procurement and AIDS, are typically regarded as falling within the legitimate domain of authority of a sovereign nation-state. Yet, in a world of regional and global interconnectedness, there are major questions to be put about the coherence, viability and accountability of national decision-making entities themselves.

Further, decisions made by quasi-regional or quasi-supranational organizations such as the European Community, the North Atlantic Treaty Organization, or the International Monetary Fund diminish the range of decisions open to given national 'majorities'. The idea of a community which rightly governs itself and determines its own future – an idea at the very heart of the democratic polity itself – is, accordingly, today deeply problematic. Any simple assumption in democratic theory that political relations are, or could be, 'symmetrical' or 'congruent' appears unjustified.

If the inadequacy of this assumption can be fully shown, issues are raised which go to the heart of democratic thought. The idea that *consent* legitimates government and the state system more generally has been central to nineteenth- and twentieth-century liberal democrats.[40] The latter have focused on the ballot box as the mechanism whereby the individual citizen expresses political preferences and citizens as a whole periodically confer authority on government to enact laws and regulate economic and social life. The principle of 'majority rule', or the principle that decisions which accrue the largest number of votes should prevail, is at the root of the claim of political decisions to be regarded as worthy or legitimate.[41] But the very idea of consent through elections, and the particular notion that the relevant constituencies of voluntary agreement are the communities of a bounded territory or a state, becomes problematic as soon as the issue of national, regional and global interconnectedness is considered and the nature of a so-called 'relevant community' is contested. Whose consent is necessary and whose participation is justified in decisions concerning, for instance, AIDS, or acid rain, or the use of nonrenewable resources? What is the relevant constituency: national, regional or international? To whom do decision-makers have to justify their decisions? To whom should they be accountable? Further, what are the implications for the idea of legitimate rule of decisions taken in polities, with potentially life-and-death consequences for large numbers of people, many of whom might have no democratic stake in the decision-making process?

Territorial boundaries demarcate the basis on which individuals are included and excluded from participation in decisions affecting their lives (however limited the participation might be), but the outcomes of these decisions most often 'stretch' beyond national frontiers. The implications of this are considerable, not only for the categories of consent and legitimacy, but for all the key ideas of democracy: the nature of a constituency, the meaning of representation, the proper form and scope of political participation, and the relevance of the democratic nation-state, faced with unsettling patterns of relations and constraints in the international order, as the guarantor of the rights, duties and welfare of subjects. Of course, these considerations would probably come as little surprise to those nations and countries whose independence and identity have been deeply affected by the hegemonic reach of empires, old and new, but they do come as a surprise to many in the west.

In order to explore the significance of these matters further, it is necessary to examine why for most of the nineteenth and twentieth centuries democracy *in*

nation-states has not been accompanied by democratic relations *among* states; why the inter-state system is now coming under pressure in a way which makes the relation between democracy within borders and democracy across borders a more urgent concern; why contemporary circumstances are creating the possibility of rethinking democracy at regional and global levels; and why democracy at such levels is an important condition for the development of democracy within local and national communities. I shall endeavour to show that democracy within a nation-state or region requires democracy within a network of interwoven international forces and relations; and that such a requirement is thwarted by the 'deep structure' of the sovereign state order and the grafting on to this structure of the United Nations system in the immediate aftermath of the Second World War. Nonetheless, one can glimpse the possibility, I shall also seek to show, of an alternative to this state of affairs.

Sovereignty and the Westphalian Order

The history of the modern inter-state system, and of international relations more generally, has borne little relation to any democratic principle of organization. In the arena of world politics, Hobbes's way of thinking about power and power relations has often been regarded as the most insightful account of the meaning of the state at the global level.[42] Hobbes drew a comparison between international relations and the state of nature, describing the international system of states as being in a continuous 'posture of war'.[43] A war of 'all against all' is a constant threat, since each state is at liberty to act to secure its own interests unimpeded by any higher religious or moral strictures.

In the study of international affairs, Hobbes's account has become associated with the 'realist' theory of international politics.[44] Realism posits, in the spirit of Hobbes's work, that the system of sovereign states is inescapably anarchic in character; and that this anarchy forces all states, in the inevitable absence of any supreme arbiter to enforce moral behaviour and agreed international codes, to pursue power politics in order to attain their vital interests. This *realpolitik* view of states has had a significant influence on both the analysis and practice of international relations in recent times as it offers a convincing *prima facie* explanation of the chaos and disorder of world affairs. In this account, the modern system of nation-states is a 'limiting factor' which will always thwart any attempt to conduct international relations in a manner which transcends the politics of the sovereign state.

A concomitant of each and every modern state's claim to supreme authority is a recognition that such a claim gives other states an equal entitlement to autonomy and respect within their own borders. In the context of the rapid erosion of 'Christian society' from the late sixteenth century, the development of sovereignty can be interpreted as part of a process of mutual recognition whereby states granted each other rights of jurisdiction in their respective territories and communities. Accordingly, sovereignty involved the assertion by the modern state of independence; that is, of its possession of sole rights to jurisdiction over a particular people and territory. And in the world of relations among states, the principle of the sovereign equality of all states gradually became adopted as the paramount principle governing the formal conduct of states towards one another, however representative or unrepresentative were their particular regimes.

The conception of international order which emerged to clarify and formalize the inter-state system has been referred to as the 'Westphalian' model (after the Peace of Westphalia of 1648 which brought to an end the German phase of the thirty years war).[45] The model covers a period from 1648 to 1945 (although some would argue it still holds today).[46] It depicts the emergence of a world community consisting of sovereign states which settle their differences privately and often by force; which engage in diplomatic relations but otherwise minimal cooperation; which seek to place their own national interest above all others; and which accept the logic of the principle of effectiveness, that is, the principle that might eventually makes right in the international world – appropriation becomes legitimation.[47] The model of Westphalia is summarized in Table 1.[48]

This framework of international affairs had a lasting and paradoxical quality rich in implications: an increasingly developed and interlinked states system simultaneously endorsed the right of each state to autonomous and independent action. As one commentator has aptly noted, the upshot of this was that states were 'not subject to international moral requirements because they represent separate and discrete political orders with no common authority among them'.[49] In this situation, the world consists of separate political powers, pursuing their own interests, backed ultimately by their organization of coercive power.[50]

The consolidation of the modern states system resulted from the expansion of Europe across the globe. If the Iberian monarchies led the early wave of

Table 1. The model of Westphalia.

1	The world consists of, and is divided by, sovereign states which recognize no superior authority.
2	The processes of law-making, the settlement of disputes and law-enforcement are largely in the hands of individual states subject to the logic of 'the competitive struggle for power'.
3	Differences among states are often settled by force: the principle of effective power holds sway. Virtually no legal fetters exist to curb the resort to force; international legal standards afford minimal protection.
4	Responsibility for cross-border wrongful acts are a 'private matter' concerning only those affected; no collective interest in compliance with international law is recognized.
5	All states are regarded as equal before the law: legal rules do not take account of asymmetries of power.
6	International law is orientated to the establishment of minimal rules of coexistence; the creation of enduring relationships among states and peoples is an aim, but only to the extent that it allows national political objectives to be met.
7	The minimization of impediments on state freedom is the 'collective' priority.

'European globalization', their position was eroded in the seventeenth century by the Dutch, and subsequently by the English. Key features of the modern states system – the centralization of political power, the expansion of administrative rule, the legitimation of power through claims to representation, the emergence of massed armies – which existed in Europe in embryo in the sixteenth century, were to become prevalent features of the entire global system.[51]

While the diffusion of European power mainly occurred through the medium of sea-going military and commercial endeavours, Europe became connected to a global system of trade and production relationships. At the centre of the latter were new and expanding capitalistic economic mechanisms which had their origins in the sixteenth century, or in what is sometimes called the 'long sixteenth century', running from about 1450 to 1640.[52] Capitalism was from the beginning an international affair:[53] capital never allowed its aspirations to be determined by national boundaries alone. Consequently, the emergence of capitalism ushered in a fundamental change in the world order: it made possible, for the first time, genuinely global interconnections among states and societies; it penetrated the distant corners of the world and brought far-reaching changes to the dynamics and nature of political rule.

The development of the world capitalist economy initially took the form of the expansion of market relations, driven by a growing need for raw materials and other factors of production. Capitalism stimulated this drive and was, in turn, stimulated by it. It is useful to make a distinction between the expansion of capitalist market relations based on the desire to buy, sell and accumulate mobile resources (capital), and the formation of industrial capitalism involving highly distinctive class relations – based initially on those who own and control the means of production and those who have only their labouring capacity to sell. It is only with the development of capitalism in Europe after 1500, and in particular with the formation of the capitalist organization of production from the middle of the eighteenth century, that the activities of capitalists and the capitalist system began to converge.[54] From this period, the objectives of war became linked to economic objectives: military endeavour and conquest became more directly connected with the pursuit of economic advantage than they had been in earlier periods.[55]

The globalization of economic life – broadly, the growth of complex economic interconnections among states and societies – has not by any means been, of course, a uniform process, affecting each region and country in a similar way. From the outset, this process has involved great costs for the autonomy and independence of many: for example, the progressive collapse of non-European civilizations, among them the Moslem, Indian and Chinese; the disorganizing effects of western rule on a large number of small societies; and the interlinked degradation of the non-European and European worlds caused by the slave trade. In fact, globalization has been characterized both by 'hierarchy' and 'unevenness'.[56] Hierarchy denotes the structure of economic globalization: its domination by those constellations of economic power concentrated in the west and north. With the decline of Europe's empires in the twentieth century, and the end of the cold war, economic globalization has arguably become more significant than ever as the determinant of hierarchy, and the front line of geopolitics. It is likely that the economic summits of the leading industrial countries will supplant superpower summits as the primary arena within which to discern new contours of hierarchy and power. While there may be uncertainty about the precise distribution of influence at the centre of the advanced industrial countries, the hierarchical structure of the economic processes of globalization firmly places the leading economic powers of the west or north in central positions.

The other side of hierarchy is unevenness. This refers to the asymmetrical effects of economic globalization upon the life-chances and well-being of peoples, classes, ethnic groupings, movements and the sexes. The contours of these processes of 'unevenness' are not difficult to discern, although they will not be documented here. They are broadly correlated with geography, race and gender and, accordingly, with the clusters of poverty and deprivation found among the countries of the south, among non-Whites and among women. However, the existence of significant poverty in the north (in Europe and the US), the persistence of unemployment in the most advanced industrial countries (even during periods of marked growth), and the fate of many indigenous peoples, indicates the approximate nature of conceiving unevenness in these terms alone. Unevenness is a phenomenon of both international and national development. The categories of social and political stratification must, therefore, be thought of as denoting systematic divisions within and across territories.[57]

The effective power which sovereignty bestows is, to a significant degree, connected to the economic resources at the disposal of a state or people. Clearly, the resources a polity can mobilize will vary according to its position in the global structure of economic relations, its place in the international division of labour, and the support it can muster from regional economic networks.[58] The growing awareness in many western countries that their sovereignty is under pressure from a variety of sources and forces places before them (often for the first time) issues that have been apparent to many countries for a long time. The struggle for sovereignty and autonomy in many third world countries was closely related to the struggle for freedom from colonial domination. *De jure* sovereignty has been of the utmost importance to those countries that had previously been denied it; but *de jure* sovereignty is not, of course, the same thing as *de facto* or practical sovereignty. The often weak and debt-ridden economies of many third world countries leave them vulnerable and dependent on economic forces and relations over which they have little, if any, control. Although the internationalization of production and finance places many instruments of economic control beyond even the most powerful countries, the position of those at the lower end of the globalization hierarchy, experiencing the worst effects of unevenness, is substantially worse.

Political independence often provides at best only a brief respite from the processes of marginalization in the world economy. In countries such as those of the Sub-Sahara, where the boundaries of the state (with two small exceptions) do not correspond to the boundaries of any that existed before colonization, where there has been no 'established habit' of exercising central authority and accepting its role, and where some of the most elementary human securities have often been absent, independence has been fraught with many types of difficulty.[59] Against this background, the achievement of any form of democracy is significant. Nevertheless, the achievement is handicapped by vulnerability to the international economy, by a fragile resource base which is threatening to the autonomy of political organizations, and by social groups often deeply divided by extreme poverty, hardship and ill-health as well as by ethnic, cultural and other considerations. In addition, it is handicapped by the very *structure* of the international political system which leaves individual states, locked into the competitive pursuit of their own security and interests, without systematic means to pursue the accountability and regulation of some of the most powerful forces ordering national and international affairs. It is political and economic might which ultimately determines the effective deployment of rules and resources within and beyond borders in the Westphalian world.

The International Order and the United Nations Charter

The titanic struggles of the first and second world wars led to a growing acknowledgement that the nature and process of international governance would have to change if the most extreme forms of violence against humanity were to be outlawed, and the growing interconnectedness and interdependence of nations recognized. Slowly, the subject, scope and very sources of the Westphalian conception of international regulation, particularly its conception of international law, were all called into question.[60]

First and foremost, opinion moved against the doctrine that international law, as Oppenheim put it, is a 'law between states only and exclusively'.[61] Single persons and groups became recognized as subjects of international law. It is generally accepted, for example, that persons as individuals are subjects of international law on the basis of such documents as the Charters of the Nuremberg and Tokyo War Crimes Tribunals, the Universal Declaration of Human Rights of 1948, the Covenants on Civil and Political Rights of 1966, and the European Convention on Human Rights of 1950.

Opinion has also moved against the doctrine that international law is primarily about political and strategic (state) affairs. According to this position, international

law is concerned progressively with orchestrating and regulating economic, social and environmental matters. Linked to substantial increases in the numbers of 'actors' in world politics – for example, the UN, the UN Economic and Social Council, UNCTAD, the World Bank, the International Monetary Fund, the Food and Agricultural Organization and the World Health Organization – there have been many pressures to increase the scope of international law. Faced with this development, there are those who characterize the changing reach of international law as being ever less concerned with the freedom or liberty of states, and ever more with the general welfare of all those in the global system who are able to make their voices count.[62]

Finally, the influential legal doctrine that the only true source of international law is the consent of states – either their expressed consent, or their implied consent – has been fundamentally challenged. Today, a number of sources of international law jostle for recognition. These include the traditional sources such as international conventions or treaties (general or particular) which are recognized by states; international custom or practice which provides evidence of an accepted rule or set of rules; and the underlying principles of law recognized by 'civilized nations'. They also include the 'will of the international community', which can assume the 'status of law' or the 'basis of international legal obligation' under certain circumstances.[63] The latter represents a break in principle with the requirement of individual state consent in the making of international rules and responsibilities.[64]

Although the Westphalian model of international law had its critics throughout the modern era, particularly during the ill-fated efforts of the League of Nations, it was not until after the Second World War that a new model of international law and accountability was widely advocated and accepted, culminating in the adoption of the UN Charter. The image of international regulation projected by the Charter (and related documents) was one of 'states still jealously "sovereign"', but linked together in a 'myriad of relations'; under pressure to resolve disagreements by peaceful means and according to legal criteria; subject in principle to tight restrictions on the resort to force; and constrained to observe 'certain standards' with regard to the treatment of all persons on their territory, including their own citizens.[65] Of course, how restrictive the provisions of the Charter have been to states, and to what extent they have been actually operationalized, are important questions. Before addressing them, however, leading elements of the Charter model should be sketched (see Table 2).[66]

Table 2. The UN Charter Model.

1 The world community consists of sovereign states, connected through a dense network of relations, both *ad hoc* and institutionalized. Single persons and groups are regarded as legitimate actors in international relations (albeit with limited roles).
2 Certain peoples oppressed by colonial powers, racist regimes or foreign occupants are assigned rights of recognition and a determinate role in articulating their future and interests.
3 Gradual acceptance of standards and values which call into question the principle of effective power; accordingly, major violations of given international rules are not in theory to be regarded as legitimate. Restrictions are placed on the resort to force, including the unwarranted use of economic force.
4 The creation of new rules, procedures and institutions designed to aid law-making and law-enforcement in international affairs.
5 The adoption of legal principles delimiting the form and scope of the conduct of all members of the international community, and providing a set of guidelines for the structuring of international rules.
6 Fundamental concern expressed for the rights of individuals, and the creation of a corpus of international rules seeking to constrain states to observe certain standards in the treatment of all, including their own citizens.
7 The preservation of peace, the advancement of human rights and the establishment of greater social justice are the stated collective priorities; 'public affairs' include the whole of the international community. With respect to certain values – peace, the prohibition of genocide – international rules now provide in principle for the personal responsibility of state officials and the attribution of criminal acts to states.
8 The recognition of systematic inequalities among peoples and states and the establishment of new rules – including the concept of 'the common heritage of mankind'[67] – to create ways of governing the distribution, appropriation and exploitation of territory, property and natural resources.

The shift in the structure of international regulation from the Westphalian to the UN Charter model raised fundamental questions about the nature and form of international law – questions which point to the possibility of a significant disjuncture between the law of nation-states, of the states system, and of the wider international community. At the heart of this shift lies a conflict between claims made on behalf of individual states and those made on behalf of an alternative organizing

principle of world affairs: ultimately, a democratic community of states, with equal voting rights in the General Assembly of nation-states, openly and collectively regulating international life while constrained to observe the UN Charter and a battery of human rights conventions. However, this conflict has not been settled, and it would be quite misleading to conclude that the era of the UN Charter model simply displaced the Westphalian logic of international governance. The essential reason for this is that the Charter framework represents, in many respects, an extension of the interstate system.

The organizations and procedures of the UN were designed partly to overcome weaknesses in the League of Nations. Its 'architecture', therefore, was drawn up to accommodate the international power structure as it was understood in 1945. The division of the globe into powerful nation-states, with distinctive sets of geopolitical interests, was built into the Charter conception. As a result, the UN was virtually immobilized as an autonomous actor on many pressing issues.[68] One of the most obvious manifestations of this was the special veto power accorded to the five Permanent Members of the UN Security Council. This privileged political status added authority and legitimacy to the position of each of the major powers; for although they were barred in principle from the use of force on terms contrary to the Charter, they were protected against censure and sanctions in the event of unilateral action in the form of their veto. Moreover, the Charter gave renewed credence (through Article 51) to unilateral strategic state initiatives if they were necessary in 'self-defence', since there was no clear delimitation of the meaning of this phrase. In addition, while the Charter placed new obligations on states to settle disputes peacefully, and laid down certain procedures for passing judgement on alleged acts of self-defence, these procedures have rarely been used and there has been no insistence on compliance with them. The possibility of mobilizing the collective coercive measures envisaged in the Charter itself against illegitimate state action has, furthermore, never materialized, and even the UN's peacekeeping missions have been restricted generally to areas in which the consent of the territorial state in question has first been given.

The UN's susceptibility to the agendas of the most powerful states has been reinforced by its dependence on finance provided by its members. This position of vulnerability to state politics is underscored by the absence of any mechanism to confer some kind of direct UN status on regional and transnational functional or cultural forces (agencies, groups or movements) who often might have a significant perspective on international questions. In sum, the UN Charter model, despite its good intentions, failed effectively to generate a new principle of organization in the international order – a principle which might break fundamentally with the logic of Westphalia and generate new democratic mechanisms of political coordination and change.

Nonetheless, it would be wrong simply to leave the argument here. The UN Charter system has been distinctively innovative and influential in a number of respects. It has provided an international forum in which all states are in certain respects equal, a forum of particular value to third world countries and to those seeking a basis for 'consensus' solutions to international problems. It has provided a framework for decolonization, and for the pursuit of the reform of international economic institutions. Moreover, it has provided a vision, valuable in spite of all its limitations, of a new world order based upon a meeting of governments and, under appropriate circumstances, of a supranational presence in world affairs championing human rights.[69] Further, some of the deficiencies attributed to the UN can be better placed at the door of the states system itself, with its deep structural embeddedness in the global capitalist economy.

It might, accordingly, be a considerable step forward in the cross-border regulation of world affairs if the UN system were to live up to its Charter. Among other things, this would involve pursuing measures to implement key elements of the rights Conventions, enforcing the prohibition on the discretionary right to use force, activating the collective security system envisaged in the Charter itself and, more generally, ensuring compliance with the Charter's main articles.[70] In addition, if the Charter model were extended – for example, by adding the requirement of compulsory jurisdiction in the case of disputes falling under the UN rubric, or by providing means of redress in the case of human rights violations through a new international human rights court, or by making a (near) consensus vote in the General Assembly a legitimate source of international law, or by modifying the veto arrangement in the Security Council and rethinking representation on it to allow for an adequate regional presence – a basis might be established for the Charter model to generate political resources of its own, and to act as an autonomous decision-making centre.

While each move in this direction would be significant, particularly in enhancing the prospects of world peace, it would still represent, at best, a movement towards a very partial or 'thin' form of democracy in international affairs.

Certainly, each state would enjoy formal equality in the UN system, and regional interests would be better represented. But it would still be possible for a plethora of different kinds of political regimes to participate on an equal footing in the Charter framework; the dynamics and logic of the inter-state system would still represent an immensely powerful principle of organization in global affairs, especially with its military machinery largely intact; the massive disparities of power and asymmetries of resources in the hierarchical and uneven global political economy would be left virtually unaddressed; the changing structure of the global order reflected in discussion about the proper subject, scope and sources of international law would remain marginal to the model; and transnational actors, civil associations, non-governmental organizations and social movements might still have a minimal role in this governance system. It would remain, then, a state-centred or sovereignty-centred model of international politics, and would lie at some considerable distance from what might be called a 'thicker' democratic ordering of international affairs. Furthermore, it would lie at some distance from an adequate recognition of the transformations being wrought in the wake of globalization – transformations which are placing increasing strain on both the Westphalian and Charter conceptions of international governance.

Cosmopolitan Democracy and the New International Order

There is a striking paradox to note about the contemporary era: from Africa to Eastern Europe, Asia to Latin America, more and more nations and groups are championing the idea of 'the rule of the people'; but they are doing so at just that moment when the very efficacy of democracy as a national form of political organization appears open to question. As substantial areas of human activity are progressively organized on a global level, the fate of democracy, and of the independent democratic nation-state in particular, is fraught with difficulty.

It could be objected that there is nothing particularly new about global interconnections, and that the significance of global interconnections for politics has, in principle, been plain for people to see for a long time. Such an objection could be elaborated by emphasizing, as I have done, that a dense pattern of global interconnections began to emerge with the initial expansion of the world economy and the rise of the modern state from the late sixteenth century. Further, it could be suggested that domestic and international politics have been interwoven throughout the modern era: domestic politics has always to be understood against the background of international politics, and the former is often the source of the latter.[71] However, it is one thing to claim that there are elements of continuity in the formation and structure of modern states, economies and societies, quite another to claim that there is nothing new about aspects of their form and dynamics. For there is a fundamental difference between, on the one hand, the development of particular trade routes, or select military and naval operations which have an impact on certain towns, rural centres and territories, and, on the other hand, an international order involving the emergence of a global economic system which stretches beyond the control of any single state (even of dominant states); the expansion of networks of transnational relations and communications over which particular states have limited influence; the enormous growth in international organizations and regimes which can limit the scope for action of the most powerful states; the development of a global military order, and the build-up of the means of 'total' warfare as an enduring feature of the contemporary world, which can reduce the range of policies available to governments and their citizens. While trade routes and military expeditions can link distant populations together in long loops of cause and effect, contemporary developments in the international order link peoples through multiple networks of transaction and coordination, reordering the very notion of distance itself.[72]

It needs to be emphasized that processes of globalization do not necessarily lead to growing global integration; that is, to a world order marked by the progressive development of a homogenous or unified society and politics. For globalization can generate forces of both fragmentation and unification. Fragmentation or disintegrative trends are possible for several reasons. The growth of dense patterns of interconnectedness among states and societies can increase the range of developments affecting people in particular locations. By creating new patterns of transformation and change, globalization can weaken old political and economic structures without necessarily leading to the establishment of new systems of regulation. Further, the impact of global and regional processes is likely to vary under different international and national conditions – for instance, a nation's location in the international economy, its place in particular power blocs, its position with respect to the international legal system. In addition, globalization can engender an awareness of political difference as much as an awareness of common identity; enhanced international communications can highlight

conflicts of interest and ideology, and not merely remove obstacles to mutual understanding.

In positive terms, globalization implies at least two distinct phenomena. First, it suggests that political, economic and social activity is becoming worldwide in scope. And, secondly, it suggests that there has been an intensification of levels of interaction and interconnectedness within and among states and societies.[73] What is new about the modern global system is the spread of globalization through new dimensions of activity – technological, organizational, administrative and legal, among others – each with their own logic and dynamics of change; and the chronic intensification of patterns of interconnectedness mediated by such phenomena as the modern communications industry and new information technology. Politics unfolds today, with all its customary uncertainty and indeterminateness, against the background of a world shaped and permeated by the movement of goods and capital, the flow of communication, the interchange of cultures and the passage of people.[74]

In this context, the meaning and place of democratic politics, and of the contending models of democracy, have to be rethought in relation to a series of overlapping local, regional and global processes and structures.[75] It is essential to recognize at least three elements of globalization: first, the way processes of economic, political, legal and military interconnectedness are changing the nature, scope and capacity of the sovereign state from above, as its 'regulatory' ability is challenged and reduced in some spheres; secondly, the way in which local groups, movements and nationalisms are questioning the nation-state from below as a representative and accountable power system; and, thirdly, the way global interconnectedness creates chains of interlocking political decisions and outcomes among states and their citizens, altering the nature and dynamics of national political systems themselves. Democracy has to come to terms with all three of these developments and their implications for national and international power centres. If it fails to do so, it is likely to become ever less effective in determining the shape and limits of political activity. The international form and structure of politics and civil society has, accordingly, to be built into the foundations of democratic thought and practice.

Three distinct requirements arise: first, that the territorial boundaries of systems of accountability be recast so that those issues which escape the control of a nation-state – aspects of monetary management, environmental questions, elements of security, new forms of communication – can be brought under better democratic control. Secondly, that the role and place of regional and global regulatory and functional agencies be rethought so that they might provide a more coherent and useful focal point in public affairs. Thirdly, that the articulation of political institutions with the key groups, agencies, associations and organizations of international civil society be reconsidered to allow the latter to become part of a democratic process – adopting, within their very *modus operandi*, a structure of rules and principles compatible with those of democracy.

How might this approach to democracy be developed? What are its essential characteristics? Addressing these questions requires recalling earlier arguments about the need to conceive democracy as a double-sided process, while reappraising the proper domain for the application of this process.[76] For if the above arguments are correct, democracy has to become a transnational affair if it is to be possible both within a restricted geographic domain and within the wider international community. The possibility of democracy today must, in short, be linked to an expanding framework of democratic institutions and agencies. I refer to such a framework as 'the cosmopolitan model of democracy'.[77] The framework can be elaborated by focusing initially on some of its institutional requirements.

In the first instance, the 'cosmopolitan model of democracy' presupposes the creation of regional parliaments (for example, in Latin America and Africa) and the enhancement of the role of such bodies where they already exist (the European Parliament) in order that their decisions become recognized, in principle, as legitimate independent sources of regional and international law. Alongside such developments, the model anticipates the possibility of general referendums, cutting across nations and nation-states, with constituencies defined according to the nature and scope of controversial transnational issues. In addition, the opening of international governmental organizations to public scrutiny and the democratization of international 'functional' bodies (on the basis perhaps of the creation of elected supervisory boards which are in part statistically representative of their constituencies) would be significant.

Hand in hand with these changes the cosmopolitan model of democracy assumes the entrenchment of a cluster of rights, including civil, political, economic and social rights, in order to provide shape and limits to democratic decision-making.[78] This requires that they be enshrined within the constitutions of parliaments and assemblies (at the national and international level); and that the influence of international courts is extended so

that groups and individuals have an effective means of suing political authorities for the enactment and enforcement of key rights, both within and beyond political associations.

In the final analysis, the formation of an authoritative assembly of all democratic states and societies – a reformed UN, or a complement to it – would be an objective. The UN, as previously noted, combines two contradictory principles of representation: the equality of all countries (one country, one vote in the General Assembly) and deference to geopolitical strength (special veto power in the Security Council to those with current or former superpower status). An authoritative assembly of all democratic states and societies would seek unreservedly to place principles of democratic representation above those of superpower politics. Moreover, unlike the UN General Assembly, it would not, to begin with at least, be an assembly of all nations; for it would be an assembly of democratic nations which would draw in others over time, perhaps by the sheer necessity of being a member if their systems of governance are to enjoy legitimacy in the eyes of their own populations. As such, the new Assembly in its early stages can best be thought of as a complement to the UN, which it would either replace over time or accept in a modified form as a 'second chamber' – a necessary meeting place for all states irrespective of the nature of their regimes.

Of course, the idea of a new democratic international Assembly is open to a battery of objections commonly put to similar schemes. Would it have any teeth to implement decisions? How would democratic international law be enforced? Would there be a centralized police and military force?[79] And so forth. These concerns are significant, but many of them can be met and countered. For instance, it needs to be stressed that any global legislative institution should be conceived above all as a 'standard-setting' institution. Although a distinction ought to be made between legal instruments which would have the status of law independently of any further negotiation or action on the part of a region or state or local government, and instruments which would require further discussion with them, implementation of the detail of a broad range of recommendations would be a matter for non-global levels of governance.[80] In addition, the question of law enforcement at a regional and global level is not beyond resolution in principle: a proportion of a nation-state's police and military (perhaps a growing proportion over time) could be 'seconded' to the new international authorities and placed at their disposal on a routine basis. To this end, avenues could be established to meet the concern that 'covenants, without the sword, are but words'.[81]

Equally, only to the extent that the new forms of 'policing' are locked into an international democratic framework would there be good grounds for thinking that a new settlement could be created between coercive power and accountability. If such a settlement seems like a fantasy, it should be emphasized that it is a fantasy to imagine that one can advocate democracy today without confronting the range of issues elaborated here. If the emerging international order is to be democratic, these issues have to be considered, even though their details are, of course, open to further specification.

The implications for international civil society of all this are in part clear. A democratic network of states and civil societies is incompatible with the existence of powerful sets of social relations and organizations which can, by virtue of the very bases of their operations, systematically distort democratic conditions and processes. At stake are, among other things, the curtailment of the power of corporations to constrain and influence the *political* agenda (through such diverse measures as the public funding of elections, the use of 'golden shares' and citizen directors), and the restriction of the activities of powerful transnational interest groups to pursue their interests unchecked (through, for example, the regulation of bargaining procedures to minimize the use of 'coercive tactics' within and between public and private associations, and the enactment of rules limiting the sponsorship of political representatives by sectional interests, whether these be particular industries or trade unions).

If individuals and peoples are to be free and equal in determining the conditions of their own existence there must be an array of social spheres – for instance, privately and cooperatively owned enterprises, independent communications media, and autonomously run cultural centres – which allow their members control of the resources at their disposal without direct interference from political agencies or other third parties.[82] At issue here is a civil society that is neither simply planned nor merely market orientated but, rather, open to organizations, associations and agencies pursuing their own projects, subject to the constraints of democratic processes and a common structure of action.[83]

The key features of this model are set out in Table 3. The cosmopolitan model of democracy presents a programme of possible transformations with short- and long-term political implications. It does not present an all-or-nothing choice, but rather lays down a direction

Table 3. The Cosmopolitan Model of Democracy.

1	The global order consists of multiple and overlapping networks of power including the political, social and economic.
2	All groups and associations are attributed rights of self-determination specified by a commitment to individual autonomy and a specific cluster of rights. The cluster is composed of rights within and across each network of power. Together, these rights constitute the basis of an empowering legal order – a 'democratic international law'.
3	Law-making and law-enforcement can be developed within this framework at a variety of locations and levels, along with an expansion of the influence of regional and international courts to monitor and check political and social authority.
4	Legal principles are adopted which delimit the form and scope of individual and collective action within the organizations and associations of state *and* civil society. Certain standards are specified for the treatment of all, which no political regime or civil association can legitimately violate.
5	As a consequence, the principle of non-coercive relations governs the settlement of disputes, though the use of force remains a collective option in the last resort in the face of tyrannical attacks to eradicate democratic international law.
6	The defence of self-determination, the creation of a common structure of action and the preservation of the democratic good are the overall collective priorities.
7	Determinate principles of social justice follow: the *modus operandi* of the production, distribution and the exploitation of resources must be compatible with the democratic process and a common framework of action.

of possible change with clear points of orientation (see Appendix I).

Would a cosmopolitan framework of democracy, assuming its details could be adequately fleshed out, have the organizational resources – procedural, legal, institutional and military – to alter the dynamics of resource production and distribution, and of rule creation and enforcement, in the contemporary era? It would be deeply misleading to suggest that it would initially have these capabilities. Nevertheless, its commitment to the extension and deepening of mechanisms of democratic accountability across major regions and international structures would help to regulate resources and forces which are already beyond the reach of national democratic mechanisms and movements. Moreover, its commitment to the protection and strengthening of human rights, and to the further development of a regional and international court system, would aid the process whereby individuals and groups could sue their governments for the enactment of key human rights.

In addition, the establishment of regional authorities as major independent voices in world politics might contribute further to the erosion of the old division of the world by the US and the former USSR. Likewise, the new institutional focus at the global level on major transnational issues would go some way towards eradicating sectarian approaches to these questions, and to countering 'hierarchy' and some of the major asymmetries in life chances. Finally, new sets of regional and global rules and procedures might help prevent public affairs from becoming a quagmire of infighting among nations wholly unable to settle pressing collective issues.

Of course, there would be new possible dangers – no political scheme is free from such risks. But what would be at issue would be the beginning of the creation of a new international democratic culture and spirit – one set off from the partisan claims of the nation-state. Such developments might take years, if not decades, to become entrenched. But 1989–91 has shown that political change can take place at an extraordinary speed, itself no doubt partially a result of the process of globalization.

Conclusion

In order to avoid possible misunderstandings about the arguments offered above, it might be useful, by way of a conclusion, to emphasize the terrain they occupy and the ground they reject. This can be done by assessing critically a number of conceptual polarities frequently found in political discourse: globalism versus cultural diversity; constitutionalism versus politics; political ambition versus political feasibility; participatory or direct democracy versus liberal representative democracy and global governance from above versus the extension of grassroots associations from below. Although these polarities provide much of the tension which charges the debate about the possibility of democracy beyond borders, there are good reasons for doubting their coherence.

To begin with, globalism and cultural diversity are not simply opposites. For global interconnectedness is already forming a dense web of relations linking cultures one to another. The issue is how and in what way cultures are linked and interrelated, not how a sealed cultural diversity can persist in the face of globalization.

Secondly, the juxtaposition of constitutionalism – or the elaboration of theoretical models of principles of political organization – with politics as a practical activity sets up another false polarity. Politics typically operates within a framework – albeit a shifting framework – of rules. Politics is rarely without some pattern, and is most often about the nature of the rules which will shape and delimit political activity. For politics is at root about the ways in which rules and resources are distributed, produced and legitimated. The question is whether politics will be shaped by an explicit, formal constitution or model which might, in principle, be open and contestable, or whether politics will be subject to an unwritten constitution, which is altogether more difficult to invoke as a defence in the face of unaccountable systems of power.

Thirdly, the question of feasibility cannot simply be set up in opposition to the question of political ambition. For what is ambitious today might be feasible tomorrow. Who anticipated the remarkable changes of 1989–90 in Eastern Europe? Who foresaw the fall of communism in the Soviet Union? The growing interconnectedness between states and societies is generating consequences, intended and unintended, for the stability of regimes, governments and states. While the question of political feasibility is of the utmost significance, it would be naive to juxtapose it simply with programmes of political ambition.

Fourthly, versions of participatory democracy cannot simply be opposed to liberal representative democracy. Programmes of participatory or direct democracy are fraught with complexities and questions. Likewise, liberal representative democracy does not simply mean one set of possible institutions or forms. The nature of liberal democracy is itself an intensely contested issue. So while there seem to be good grounds for accepting the liberal distinction between state and civil society, there are not equally good grounds for uncritically accepting either of these in their liberal form. The juxtaposition of participation with liberal representative democracy leaves most of political analysis to one side.

Fifthly, the problems of global governance from above cannot be solved through the extension of grassroots democracy alone. For the questions have to be posed: which grassroots, and which democracy? There are many social movements – for instance, right-wing nationalist movements or the Eugenics movement – which highlight

Appendix I. Objectives of the Cosmopolitan Model of Democracy: Illustrative Issues.

Polity/governance	
Short-term	*Long-term*
1 Reform of UN Security Council (to give the third world a significant voice)	1 Global Parliament (with limited revenue-raising capacity) connected to regions, nations and localities
2 Creation of a UN second chamber (on the model of the EC?)	2 New Charter of Rights and Duties locked into different domains of power
3 Enhanced political regionalization (EC and beyond)	3 Separation of political and economic interests; public funding of electoral processes
4 Compulsory jurisdiction before the International Court. New International Criminal Court and New Human Rights Court for the pursuit of rights	4 Interconnected global legal system
5 Establishment of a small but effective, accountable, international, military force	5 Permanent 'secondment' of a growing proportion of a nation-state's coercive capability to regional and global institutions. Aim: demilitarization and transcendence of war system
Civil society	
1 Enhancement of non-state, non-market solutions in the organization of civil society	1 Creation of a diversity of self-regulating associations and groups in civil society
2 Introduction of limits to private ownership of key 'public-shaping' institutions: media, information, etc.	2 Systematic experimentation with different democratic organizational forms in civil society
3 Provision of resources to those in the most vulnerable social positions to defend and articulate their interests	3 Multi-sectoral economy and pluralization of patterns of ownership and possession

how the very nature of a grassroots movement can be contested and fought over. Grassroots movements are by no means merely noble or wise. Like most social, economic or political forms, they can appear in a variety of shapes, with a variety of patterns of internal organization. Appeal to the nature of inherent goodness of grassroots associations and movements bypasses the necessary work of theoretical analysis.

Today, any attempt to set out a position of what could be called 'embedded utopianism' must begin both from where we are – the existing pattern of political relations and processes – and from an analysis of what might be: desirable political forms and principles.[84] If utopia is to be embedded it must be linked into patterns and movements as they are. But if this context of embeddedness is not simply to be affirmed in the shape and patterns generated by past groups and movements, it has to be assessed according to standards, criteria and principles. These, in my view, follow from a theory of democracy.

Finally, if the history and practice of democracy has until now been centred on the idea of locality (the city-state, the community, the nation), it is likely that in the future it will be centred on the international or global domain. It would be immensely naive to claim that there are any straightforward solutions to the problems posed by global interconnectedness, with its complex and often profoundly uneven effects; but there is, without doubt, an inescapably important set of questions to be addressed. Certainly, one can find many good reasons for being optimistic about finding a path forward, and many good reasons for thinking that at this juncture democracy will face another critical test.

Notes

1 The essay seeks to draw together and expand upon a number of themes discussed in my recent writings, particularly in *Models of Democracy* (Cambridge, Polity Press, 1987), ch. 9; 'Democracy, the nation-state and the global system', in D. Held (ed.), *Political Theory Today* (Cambridge, Polity Press, 1991); and 'Democracy and globalization', *Alternatives*, 16: 2 (1991).

2 See F. Fukuyama, 'The end of History', *The National Interest*, 16 (1989) and 'A reply to my critics', *The National Interest*, 18 (1989/90). For a more detailed commentary on these texts, cf. D. Held, 'Liberalism, Marxism and democracy', *Theory and Society*, 22 (1993): 249–281.

3 I. Berlin, *Four Essays on Liberty* (Oxford, Oxford University Press, 1969), pp. 164ff.

4 See, for example, A. Lijphart, *Democracies* (New Haven, CT, Yale University Press, 1984) and R. Dahl, *Democracy and Its Critics* (New Haven, CT, Yale University Press, 1989).

5 A fuller account of the nature and scope of political theory as outlined here can be found in the 'Introduction' to Held, *Political Theory Today*, pp. 1–21.

6 See M. Bernal, *Black Athena* (London, Free Association Books, 1987), vol. I and P. Springborg, *Western Republicanism and the Oriental Prince* (Cambridge, Polity Press, 1992).

7 When referring to the Greek *polis*, some scholars prefer to use the term 'city-republic' on the grounds that the concept of the state was an early modern formulation. For some of the issues underpinning this preference see Held, *Models of Democracy*, ch. 2.

8 M. Finley, *Politics in the Ancient World* (Cambridge, Cambridge University Press, 1983). pp. 84ff.

9 See J.G.A. Pocock, *The Machiavellian Moment: Florentine Political Thought and the Atlantic Republican Tradition* (Princeton, NJ, Princeton University Press, 1975), pp. 64–80.

10 See N. Machiavelli, *The Discourses* (Harmondsworth, Penguin, 1983), pp. 104–11.

11 The republican view emphasizes, in short, that the freedom of citizens consists above all in their unhindered pursuit of their self-chosen ends. The highest political ideal is the civic freedom of an independent, self-governing republic.

12 Q. Skinner, 'The state', in T. Ball, J. Farr and R. Hanson (eds.), *Political Innovation and Conceptual Change* (Cambridge, Cambridge University Press, 1989), p. 105.

13 Aristotle, *The Politics* (Harmondsworth, Penguin, 1981), p. 169.

14 See M. Finley, *Democracy Ancient and Modern* (London, Chatto and Windus, 1973).

15 The concern with aspects of 'self-government' in Renaissance Italy had a significant influence in seventeenth- and eighteenth-century England, France and America. The problem of how civic life was to be constructed, and public life sustained, was faced by diverse thinkers. While the meaning of the ideal of active citizenship was progressively altered – and denuded of many of its most challenging implications – threads of this ideal remained and continued to have an impact. It is possible to trace 'radical' and 'conservative' strains of republicanism throughout the early modern period. Cf. Pocock, *The Machiavellian Moment* and G.S. Wood, *The Creation of the American Republic: 1776–1787* (Chapel Hill, University of North Carolina Press, 1969).

16 Pocock, *The Machiavellian Moment*, p. 550.

17 H. Bull, *The Anarchical Society* (London, Macmillan, 1977), p. 27.

18 Q. Skinner, *The Foundations of Political Thought*, vol. 1 (Cambridge, Cambridge University Press, 1978), p. 352.

19 See D. Held, 'The development of the modern state', in S. Hall and B. Gieben (eds.), *Formations of Modernity* (Cambridge, Polity Press, 1992).
20 J. Madison, *The Federalist Papers*, edited by R. Fairfield (New York, Doubleday, 1966), No. 10, p. 20.
21 Madison, *The Federalist Papers*, No. 10, pp. 21–2.
22 See R. W. Krouse, 'Classical images of democracy in America: Madison and Tocqueville', in G. Duncan (ed.), *Democratic Theory and Practice* (Cambridge, Cambridge University Press, 1983), pp. 58–78.
23 J. Bentham, *Constitutional Code, Book 1*, in *The Works of Jeremy Bentham*, vol. IX (Edinburgh, W. Tait, 1843), p. 47.
24 N. Bobbio, *Democracy and Dictatorship* (Cambridge, Polity Press, 1989), p. 144.
25 See Dahl, *Democracy and Its Critics*, pp. 28–30.
26 Quoted in G.H. Sabine, *A History of Political Theory* (London, George G. Harrap, 3rd edn., 1963), p. 695.
27 See Held, *Models of Democracy*, ch. 3.
28 See N. Bobbio, *Which Socialism?* (Cambridge, Polity Press, 1987), p. 66 and Dahl, *Democracy and Its Critics*, pp. 221 and 233.
29 Bobbio, *Which Socialism?*, pp. 42–4.
30 A. Callinicos, *The Revenge of History: Marxism and the East European Revolutions* (Cambridge, Polity Press, 1991), pp. 108–9.
31 K. Marx, *The Civil War in France* (Peking, Foreign Languages Press, 1970), pp. 67–70.
32 Marx, Letter 2, from the *Deutsch-Französische Jahrbücher* (Paris, 1844).
33 See, for example, V. I. Lenin, *What Is To Be Done?* (Moscow, Progress Publishers, 1947).
34 Held, *Models of Democracy*, ch. 9.
35 For texts which seek to do this, see Held, *Models of Democracy*, chs. 8 and 9; Held, 'Democracy, the nation-state and the global system', pp. 227–35; and J. Keane, *Democracy and Civil Society* (London, Verso, 1988). See also Keane's essay in *Political Studies*, 40, Special Issue (1992), 116–29.
36 H. Arendt, *On Revolution* (New York, Viking Press, 1963), p. 256.
37 Held, 'Democracy, the nation-state and the global system', p. 198. Some of the material in the following paragraphs is adapted from pp. 201–5 of that essay.
38 Cf., for example, C.B. Macpherson, *The Life and Times of Liberal Democracy* (Oxford, Oxford University Press, 1977); C. Pateman, *The Problem of Political Obligation* (Cambridge, Polity Press, 2nd edn., 1985); and B. Barber, *Strong Democracy* (Berkeley, University of California Press, 1984).
39 C. Offe, *Disorganized Capitalism* (Cambridge, Polity Press, 1985), pp. 286ff.
40 R. Hanson, 'Democracy', in T. Ball, J. Farr and R. Hanson (eds.), *Political Innovation and Conceptual Change* (Cambridge, Cambridge University Press, 1989), pp. 68–9.
41 Cf. Dahl, *Democracy and Its Critics*, chs. 10 and 11.
42 See, for example, R. Aron, *Peace and War: A Theory of International Relations* (New York, Doubleday,1966).
43 T. Hobbes, *Leviathan* (Harmondsworth, Penguin, 1968), pp. 187–8.
44 Cf. H.J. Morgenthau, *Politics Among Nations* (New York, Knopf, 1948); M. Wight, *Power Politics* (Harmondsworth, Penguin, 1986); and S. Smith, 'Reasons of state', in D. Held and C. Pollitt (eds.), *New Forms of Democracy* (London, Sage, 1987).
45 See R. Falk, 'The interplay of Westphalia and Charter conceptions of the international legal order', in R. Falk and C. Black (eds.), *The Future of the International Legal Order*, vol. 1 (Princeton, NJ, Princeton University Press, 1969); R. Falk, *A Study of Future Worlds* (New York, The Free Press, 1975), ch. 2; and A. Cassese, *International Law in a Divided World* (Oxford, Clarendon Press, 1986), especially pp. 393ff. While the emergence of this model can be linked directly to the Peace of Westphalia, important qualifications ought also to be noted. First, the basic conception of territorial sovereignty was outlined well before this settlement (although not generally assented to). Secondly, there were few, if any, references in the classic texts of early modern political theory to an intrinsically territorial state; as T. Baldwin put it, 'political theory had still to catch up with practice'. On both these points see T. Baldwin, 'The territorial state', in H. Gross and T.R. Harrison (eds.), *Cambridge Essays in Jurisprudence* (Oxford, Clarendon Press, 1992).
46 By a 'model' I mean a theoretical construction designed to reveal and explain the main elements of a political form or order and its underlying structure of relations. Models in this context are 'networks' of concepts and generalizations about aspects of the political, economic and social spheres.
47 A. Cassese, 'Violence, war and the rule of law in the International Community', in D. Held (ed.), *Political Theory Today* (Cambridge, Polity Press, 1991), p. 256.
48 These points are adapted from Falk, 'The interplay of Westphalia and Charter conceptions of the international legal order', and Cassese, *International Law in a Divided World*, pp. 396–9.
49 C. Beitz, *Political Theory and International Relations* (Princeton, NJ, Princeton University Press, 1979), p. 25.
50 The resort to coercion or armed force by non-state actors is also, arguably, an almost inevitable outcome in such a world. For communities contesting established territorial boundaries have, as Baldwin succinctly wrote, 'little alternative but to resort to arms in order to establish "effective control" over the area they seek as their territory, and in that way make their case for international recognition (cf. Eritrea, East Timor, Kurdistan …)'. See Baldwin 'The territorial state'.
51 See G. Modelski, *Principles of World Politics* (New York, Free Press, 1972).
52 See F. Braudel, *Capitalism and Material Life* (London, Weidenfeld & Nicolson, 1973).
53 I. Wallerstein, *The Capitalist Economy* (Cambridge, Cambridge University Press, 1979), p. 19.

54 C. Tilly, *Coercion, Capital and European States, AD 990–1990* (Oxford, Blackwell, 1990), pp. 17 and 189.
55 See M. Mann, *The Sources of Social Power*, vol. 1 (Cambridge, Cambridge University Press, 1986), pp. 510–16.
56 The following analysis is indebted to R. Falk, 'Economic dimensions of global civilization: a preliminary perspective' (working paper prepared for the Cairo meeting of the Global Civilization Project, Oct. 1990), pp. 2–12.
57 See R. W. Cox, *Production, Power, and World Order: Social Forces in the Making of History* (New York, Columbia University Press, 1987), ch. 9.
58 I do not mean this to be an 'economistic' point. There are obviously other important factors involved in determining a state's effective power. See D. Held, *Political Theory and the Modern State* (Cambridge, Polity Press, 1989), ch. 8.
59 See G. Hawthorn, 'Sub-Saharan Africa', in D. Held (ed.), *Prospects for Democracy: North, South, East, West* (Cambridge, Polity Press, 1993). Cf. R.H. Jackson and C.G. Rosberg, 'Why Africa's weak states persist: the empirical and the juridical in statehood', *World Politics*, 17 (1982), 1–24.
60 For an overview see Bull, *The Anarchical Society*, ch. 6.
61 See L. Oppenheim, *International Law*, vol. 1 (London, Longman, 1905), ch. 1.
62 Cf., for example, B. Röling, *International Law in an Expanded World* (Amsterdam, Djambatan, 1960); W. Friedmann, *The Changing Structure of International Law* (London, Stevens and Son, 1964); and Cassese, *International Law in a Divided World*, especially chs. 7–9.
63 Cf. Bull, *The Anarchical Society*, pp. 147–58; C. Jenks, *Law, Freedom and Welfare* (London, Stevens and Son, 1963), ch. 5; and R. Falk, *The Status of Law in International Society* (Princeton, NJ, Princeton University Press, 1970), ch. 5.
64 It is interesting to note that the tradition of natural law thinking, which informed early modern international law in particular, recognized a certain tension between the requirement of governmental consent and the existence of international rights and duties.
65 Cassese, 'Violence, war and the rule of law', p. 256.
66 I have drawn these points from Cassese, *International Law in a Divided World*, pp. 398–400.
67 First propounded in the late 1960s, the concept of 'the common heritage of mankind' has been enshrined in two notable treaties: the Convention on the Moon and Other Celestial Bodies (1979) and the Convention on the Law of the Sea (1982). The concept has been proposed as a device to exclude a state or private right of appropriation over certain resources and to permit the development of these resources, where appropriate, for the benefit of all, with due regard paid to environmental protection.
68 See Falk, *A Study of Future Worlds*, pp. 69–72; R. Falk, *A Global Approach to National Policy* (Cambridge, MA, Harvard University Press, 1975), pp. 169–96; Cassese, *International Law in a Divided World*, pp. 142–3, 200–1, 213–14 and 246–50.
69 Cf. R. Falk, 'Reflections on democracy and the Gulf War', *Alternatives*, 16: 2 (1991), p. 272.
70 In making these proposals I do not wish to imply that the UN Charter itself is a fully coherent document. It includes some contradictory stipulations and procedures; some of its clauses are vague at best; and some of its recommendations can generate conflicting priorities. It is, in short, open to conflicts of interpretation which would have to be addressed thoroughly if it were to take on a more robust role.
71 P. Gourevitch, 'The second image reversed: the international sources of domestic politics', *International Organization*, 32 (1978).
72 Or, as Anthony Giddens usefully put it, globalization can be defined as 'the intensification of worldwide social relations which link distant localities in such a way that local happenings are shaped by events occurring many miles away and vice versa', in *Consequences of Modernity* (Cambridge, Polity Press, 1990), p. 64.
73 See A. McGrew, 'Conceptualizing global politics', in A. McGrew, P. Lewis et al., *Global Politics* (Cambridge, Polity Press, 1992), pp. 1–28.
74 C.W. Kegley and E.R. Wittkopf, *World Politics* (Basingstoke, Macmillan, 1989), p. 511.
75 I have discussed these processes and structures in 'Democracy, the nation-state and the global system', pp. 207–27 and at greater length in *Foundations of Democracy: the Principle of Autonomy and the Global Order* (Cambridge, Polity Press, 1993).
76 See above pp. 84–5.
77 In previous publications I have referred to this as 'the federal model', but given the current controversy about 'federalism' in Europe the term has become unhelpful in conveying my intentions. I would like to thank Daniele Archibugi for pressing this point. A central theme of my forthcoming work, *Foundations of Democracy*, is what I now prefer to call 'the cosmopolitan model of democracy' or, better still, of 'democratic autonomy'. Of course, anyone who seeks to use the term 'cosmopolitan' needs to clarify its meaning, especially in relation to Kant's thought. I seek to do this in *Foundations*.
78 It is beyond the scope of this essay to set out my particular conception of rights which I link to the notion of a 'common structure of action': the necessary conditions for people in principle to enjoy free and equal political participation. See Held, 'Democracy, the nation-state and global system', pp. 227–35, and, particularly, Held, *Foundations of Democracy*.
79 Among other difficulties to be faced would be the rules determining the Assembly's representative base. One country, one vote? Representatives allocated according to population size? Would major international functional organizations be represented? Cf. I. McLean, 'Forms of representation and systems of voting', in D. Held (ed.), *Political Theory Today* (Cambridge, Polity Press, 1991),

pp. 190–6 and J. Burnheim, *Is Democracy Possible?* (Cambridge, Polity Press, 1985), pp. 82–124.

80 European Community law embodies a range of relevant distinctions among legal instruments and types of implementation which are helpful to reflect on in this context. However, I leave open these complex issues in this essay.

81 Hobbes, *Leviathan*, p. 223.

82 The models for the organization of such spheres are, it must be readily acknowledged, far from settled. See D. Held and C. Pollitt (eds.), *New Forms of Democracy* (London, Sage, 1986).

83 The proposed European Social Charter embodies principles and rules which are compatible with the idea of generating elements of a common structure of action. If operationalized it would, in principle, alter the structure and functioning of market processes in a number of ways. While the Charter falls considerably short of what I have in mind by a common structure of action, and its details require extensive consideration which I shall not offer here, it is a useful illustration of the possibility of legislation to alter the background conditions and operations of the economic organizations of civil society.

84 Cf. R. Falk, *Positive Prescriptions for the Near Future* (Princeton, NJ, Princeton University, Center for International Studies, World Order Studies Program Occasional Paper, No. 20, 1991), pp. 8–10.

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Transnationalizing the Public Sphere: On the Legitimacy and Efficacy of Public Opinion in a Postwestphalian World

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It is commonplace nowadays to speak of "transnational public spheres," "diasporic public spheres," "Islamic public spheres," and even an emerging "global public sphere." And such talk has a clear point. A growing body of media studies literature is documenting the existence of discursive arenas that overflow the bounds of both nations and states. Numerous scholars in cultural studies are ingeniously mapping the contours of such arenas and the flows of images and signs in and through them.[1] The idea of a "transnational public sphere" is intuitively plausible, then, and seems to have purchase on social reality.

Nevertheless, this idea raises a problem. The concept of the public sphere was developed not simply to understand communication flows but also to contribute to a critical theory of democracy. In that theory, a public sphere is conceived as a space for the communicative generation of public opinion. Insofar as the process is inclusive and fair, publicity is supposed to discredit views that cannot withstand critical scrutiny and to assure the legitimacy of those that do. Thus, it matters who participates and on what terms. In addition, a public sphere is conceived as a vehicle for marshaling public opinion as a political force. Mobilizing the considered sense of civil society, publicity is supposed to hold officials accountable and to assure that the actions of the state express the will of the citizenry. Thus, a public sphere should correlate with a sovereign power. Together, these two ideas – the *normative legitimacy* and *political efficacy* of public opinion – are essential to the concept of the public sphere in critical theory.[2] Without them, the concept loses its critical force and its political point.

Yet these two features are not easily associated with the discursive arenas that we today call "transnational public spheres." It is difficult to associate the notion of legitimate public opinion with communicative arenas in which the interlocutors are not fellow members of a political community, with equal rights to participate in political life. And it is hard to associate the notion of efficacious communicative power with discursive spaces that do not correlate with sovereign states. Thus, it is by no means clear what it means today to speak of "transnational public spheres." From the perspective

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of critical theory, at least, the phrase sounds a bit like an oxymoron.

Nevertheless, we should not rush to jettison the notion of a "transnational public sphere." Such a notion is indispensable, I think, to those who aim to reconstruct critical theory in the current "postnational constellation." But it will not be sufficient merely to refer to such public spheres in a relatively casual commonsense way, as if we already knew what they were. Rather, it will be necessary to return to square one, to problematize public-sphere theory – and ultimately to reconstruct its conceptions of the normative legitimacy and political efficacy of communicative power. The trick will be to walk a narrow line between two equally unsatisfactory approaches. On the one hand, one should avoid an empiricist approach that simply adapts the theory to the existing realities, as that approach risks sacrificing its normative force. On the other hand, one should also avoid an externalist approach that invokes ideal theory to condemn social reality, as that approach risks forfeiting critical traction. The alternative, rather, is a critical-theoretical approach that seeks to locate normative standards and emancipatory political possibilities precisely within the historically unfolding constellation.

This project faces a major difficulty, however. At least since its 1962 adumbration by Jürgen Habermas, public-sphere theory has been implicitly informed by a Westphalian political imaginary: it has tacitly assumed the frame of a bounded political community with its own territorial state.[3] The same is true for nearly every subsequent egalitarian critique of public-sphere theory, including those of feminists, multiculturalists, and anti-racists. Only very recently, in fact, have the theory's Westphalian underpinnings been problematized. Only recently, thanks to post-Cold-War geopolitical instabilities, on the one hand, and to the increased salience of transnational phenomena associated with "globalization," on the other, has it become possible – and necessary – to rethink public-sphere theory in a transnational frame. Yet these same phenomena force us to face the hard question: Is the concept of the public sphere so thoroughly Westphalian in its deep conceptual structure as to be unsalvageable as a critical tool for theorizing the present? Or can the concept be reconstructed to suit a postwestphalian frame? In the latter case, the task would not simply be to conceptualize transnational public spheres as actually existing institutions. It would rather be to reformulate *the critical theory of the public sphere* in a way that can illuminate the emancipatory possibilities of the present constellation.

In this chapter I sketch the parameters for such a discussion. I shall be mapping the terrain and posing questions rather than offering definitive answers. But I start with the assumption that public-sphere theory is in principle an important critical-conceptual resource that should be reconstructed rather than jettisoned, if possible. My discussion will proceed in three parts. First, I shall explicate the implicit Westphalian presuppositions of Habermas's public-sphere theory and show that these have persisted in its major feminist, anti-racist, and multicultural critiques. Second, I shall identify several distinct facets of transnationality that problematize both traditional public-sphere theory and its critical counter-theorizations. Finally, I shall propose some strategies whereby public-sphere theorists might begin to respond to these challenges. My overall aim is to repoliticize public-sphere theory, which is currently in danger of being depoliticized.

Classical Public-sphere Theory and Its Radical Critique: Thematizing the Westphalian Frame

Let me begin by recalling some analytic features of public-sphere theory, drawn from the *locus classicus* of all discussions, Jürgen Habermas's *Structural Transformation of the Public Sphere*. In this early work, Habermas's inquiry proceeded simultaneously on two levels, one empirical and historical, the other ideological-critical and normative. On both levels, the public sphere was conceptualized as coextensive with a bounded political community and a sovereign territorial state, often a nation-state. To be sure, this was not always fully explicit. Tacitly, however, Habermas's account of the public sphere rested on at least six social-theoretical presuppositions, all of which took for granted the Westphalian framing of political space:

1. *Structural Transformation* correlated the public sphere with a modern state apparatus that exercised sovereign power over a bounded territory. Thus, Habermas assumed that public opinion was addressed to a Westphalian state that was capable in principle of regulating its inhabitants' affairs and solving their problems.[4]
2. *Structural Transformation* conceived the participants in public-sphere discussion as fellow members of a bounded political community. Casting the *telos* of their discussions as the articulated general interest of a *demos*, which should be translated into binding laws,

Habermas tacitly identified members of the public with the citizenry of a democratic Westphalian state.[5]

3. *Structural Transformation* conceived a principal *topos* of public-sphere discussion as the proper organization of the political community's economic relations. The latter, in turn, it located in a capitalist market economy that was legally constituted and subject in principle to state regulation. In effect, Habermas assumed that a primary focus of the public's concern was a national economy, contained by a Westphalian state.[6]
4. *Structural Transformation* associated the public sphere with modern media that, in enabling communication across distance, could knit spatially dispersed interlocutors into a public. Tacitly, however, Habermas territorialized publicity by focusing on national media, especially the national press and national broadcasting. Thus, he implicitly assumed a national communications infrastructure, contained by a Westphalian state.[7]
5. *Structural Transformation* took for granted that public-sphere discussion was fully comprehensible and linguistically transparent. Tacitly presupposing a single shared linguistic medium of public communication, Habermas effectively assumed that public debate was conducted in a national language.[8]
6. Finally, *Structural Transformation* traced the cultural origins of the public sphere to the letters and novels of eighteenth- and nineteenth-century print capitalism. It credited those bourgeois genres with creating a new subjective stance, through which private individuals envisioned themselves as members of a public.[9] Thus, Habermas grounded the structure of public-sphere subjectivity in the very same vernacular literary forms that also gave rise to the imagined community of the nation.[10]

These six social-theoretical presuppositions tie Habermas's early account of the public sphere to the Westphalian framing of political space. In *Structural Transformation*, publics correlate with modern territorial states and national imaginaries. To be sure, the national aspect went largely unthematized in this work. But its presence there as an implicit subtext betrays a point that Habermas has since made explicit: historically, the rise of modern publicity coincided with the rise of the nation-state, in which the Westphalian territorial state became fused with the imagined community of the nation.[11] It may be true, as Habermas now claims, that present-day democratic states can dispense with national identity as a basis of social integration.[12] But it remains the case that *Structural Transformation*'s conception of publicity had a national subtext. That work's account of the public sphere presupposed a nationally inflected variant of the Westphalian frame.

But that is not all. Thanks to its (national) Westphalian presuppositions, *Structural Transformation* conceptualized the public sphere from the standpoint of a historically specific political project: the democratization of the modern territorial (nation-)state. Far from putting in question that project's Westphalian frame, Habermas envisioned a deliberative model of democracy that was situated squarely within it. In this model, democracy requires the generation, through territorially bounded processes of public communication, conducted in the national language and relayed through the national media, of a body of national public opinion. This opinion should reflect the general interest of the national citizenry concerning the organization of their territorially bounded common life, especially the national economy. The model also requires the mobilization of public opinion as a political force. Effectively empowering the national citizenry, publicity should influence lawmakers and hold state officials accountable. Serving thus to "rationalize" national political domination, it should ensure that the actions and policies of the Westphalian state reflect the discursively formed political will of the national citizenry. In *Structural Transformation*, therefore, the public sphere is a key institutional component of (national) Westphalian democracy.

Empirically, then, *Structural Transformation* highlighted historical processes, however incomplete, of the democratization of the Westphalian nation-state. Normatively, it articulated a model of deliberative democracy for a territorially bounded polity. Accordingly, the public sphere served as a benchmark for identifying, and critiquing, the democratic deficits of actually existing Westphalian states. Thus, Habermas's early theory enabled us to ask: Are all citizens really full members of the national political public? Can all participate on equal terms? In other words, is what passes as national public opinion genuinely *legitimate?* Moreover, does that opinion attain sufficient political force to rein in private powers and to subject the actions of state officials to citizen control? Does the communicative power generated in Westphalian civil society effectively translate into legislative and administrative power in the Westphalian state? In other words, is national public opinion politically *efficacious*? By inviting us to explore such questions, *Structural Transformation* constituted a contribution to the critique of actually existing democracy in the modern Westphalian state.

Some readers found the critique insufficiently radical. In the discussion that followed the work's belated translation into English, the objections tended to divide into two distinct streams. One stream interrogated the *legitimacy* of public opinion along lines beyond those pursued by Habermas. Focused on relations within civil society, exponents of what I shall call "the legitimacy critique" contended that *Structural Transformation* obscured the existence of systemic obstacles that deprive some who are nominally members of the public of the capacity to participate on a par with others, as full partners in public debate. Highlighting class inequalities and status hierarchies in civil society, these critics analyzed their effects on those whom the Westphalian frame included in principle, but excluded or marginalized in practice: propertyless workers, women, the poor; ethno-racial, religious, and national minorities.[13] Thus, this critique questioned the legitimacy of what passes for public opinion in democratic theory and in social reality.

A second stream of criticism radicalized Habermas's problematization of the *efficacy* of public opinion. Focused on relations between civil society and the state, proponents of "the efficacy critique" maintained that *Structural Transformation* failed to register the full range of systemic obstacles that deprive discursively generated public opinion of political muscle. Not convinced that these had been adequately captured by Habermas's account of the "refeudalization" of the public sphere, these critics sought to theorize the structural forces that block the flow of communicative power from civil society to the state. Highlighting the respective roles of private economic power and entrenched bureaucratic interests, their critique served to deepen doubt about the efficacy of public opinion as a political force in capitalist societies.[14]

Notwithstanding the difference in focus, the two streams of criticism shared a deeper assumption. Like *Structural Transformation*, both the legitimacy critics and the efficacy critics took for granted the Westphalian framing of political space. To be sure, some proponents of the legitimacy critique exposed the national subtext of publicity that had largely gone without saying in Habermas's account. Analyzing its exclusionary effects on national minorities, multiculturalist critics sought to purge the public sphere of majority national privilege in hopes of reducing disparities of participation in public debate. The point, however, was not to question the territorial basis of the public sphere. Far from casting doubt on the Westphalian frame, the critics sought to enhance the legitimacy of public opinion within it. An analogous objective informed the efficacy critique. Taking for granted that public opinion was addressed to a territorial state, proponents of this critique hoped to subject the latter more firmly to the discursively formed will of its *demos*. Like Habermas, then, if arguably more radically, both sets of critics placed their reflections on the public sphere within the Westphalian frame.

My own earlier effort to "rethink the public sphere" was no exception. In an article originally published in 1991, I directed criticisms of both types against what I called, following Habermas, "the liberal model of the bourgeois public sphere." In its legitimacy aspect, my critique focused on the effects on public opinion of inequality within civil society. Rebutting the liberal view that it was possible for interlocutors in a public sphere to bracket status and class differentials and to deliberate "as if" they were peers, I argued that social equality is a necessary condition for political democracy. Under real-world conditions of massive *in*equality, I reckoned, the only way to reduce disparities in political voice was through social movement contestation that challenged some basic features of bourgeois publicity. Complicating the standard liberal picture of a single comprehensive public sphere, I claimed that the proliferation of subaltern counterpublics could enhance the participation of subordinate strata in stratified societies. Exposing, too, the bourgeois masculinist bias in standard liberal views of what counts as a public concern, I endorsed efforts by movements such as feminism to redraw the boundaries between public and private. Yet this critique presupposed the national-territorial understanding of publicity. Far from challenging the Westphalian frame, it aimed to enhance the legitimacy of public opinion within it.[15]

My article also propounded an efficacy critique, which interrogated the capacity of public opinion to achieve political force. Identifying forces that block the translation of communicative power into administrative power, I questioned the standard liberal view that a functioning public sphere always requires a sharp separation between civil society and the state. Distinguishing the "weak publics" of civil society, which generate public opinion but not binding laws, from the "strong publics" within the state, whose deliberations issue in sovereign decisions, I sought to envision institutional arrangements that could enhance the latter's accountability to the former. Aiming, too, to open space for imagining radical-democratic alternatives, I questioned the apparent foreclosure by Habermas of hybrid forms, such as "quasi-strong" decision-making publics in civil society. Yet here, too, I neglected to challenge the Westphalian

frame. The thrust of my argument was, on the contrary, to enhance the efficacy of public opinion vis-à-vis the Westphalian state.[16]

Both the legitimacy critique and the efficacy critique still seem right to me as far as they went. But I now believe that neither went far enough. Neither critique interrogated, let alone modified, the social-theoretical underpinnings of *Structural Transformation*, which situated the public sphere in a Westphalian frame. Still oriented to the prospects for deliberative democracy in a bounded political community, both critiques continued to identify the public with the citizenry of a territorial state. Neither abandoned the assumption of a national economy, whose proper steering by the democratic state remained a principal *topos* of public-sphere debate, which was itself still envisioned as being conducted in the national language through the national media. Thus, neither the legitimacy critique nor the efficacy critique challenged the Westphalian frame. Animated by the same political project as *Structural Transformation*, both sought to further deliberative democracy in the modern territorial state.

The same is true for Habermas's subsequent discussion of publicity in *Between Facts and Norms*. Among other things, that work revisited the public sphere and incorporated elements of the two critiques. Stressing the "co-implication of private and public autonomy," Habermas valorized the role of emancipatory social movements, such as second-wave feminism, in promoting democracy by pursuing equality, and vice versa.[17] By thus acknowledging the mutual dependence of social position and political voice, he grappled here with previously neglected aspects of the legitimacy deficits of public opinion in democratic states. In addition, *Between Facts and Norms* was centrally concerned with the problem of efficacy. Theorizing law as the proper vehicle for translating communicative into administrative power, the work distinguished an "official," democratic circulation of power, in which weak publics influence strong publics, which in turn control administrative state apparatuses, from an "unofficial," undemocratic one, in which private social powers and entrenched bureaucratic interests control lawmakers and manipulate public opinion. Acknowledging that the unofficial circulation usually prevails, Habermas here provided a fuller account of the efficacy deficits of public opinion in democratic states.[18]

One may question, to be sure, whether Habermas fully succeeded in addressing his critics' concerns on either point.[19] But even if we grant him the benefit of that doubt, the fact remains that *Between Facts and Norms* continued to assume the Westphalian frame. Its many departures from *Structural Transformation* notwithstanding, the later work still conceived the addressee of public opinion as a sovereign territorial state, which could steer a national economy in the general interest of the national citizenry; and it still conceived the formation of public opinion as a process conducted in the national media via a national communications infrastructure. Granted, Habermas did advocate a postnationalist form of social integration, namely "constitutional patriotism," with the aim of emancipating the democratic state from its nationalist integument.[20] But in this he effectively endorsed a more purely Westphalian, because more exclusively territorial, conception of publicity.

In general, then, the publicity debate in critical theory contains a major blindspot. From *Structural Transformation* through *Between Facts and Norms*, virtually all the participants, including me, correlated public spheres with territorial states. Despite their other important disagreements, all assumed the Westphalian framing of political space – at precisely the moment when epochal historical developments seemed to be calling that frame into question.

The Postnational Constellation: Problematizing the Westphalian Frame

Today, the Westphalian blindspot of public-sphere theory is hard to miss. Whether the issue is global warming or immigration, women's rights or the terms of trade, unemployment or the "war on terror," current mobilizations of public opinion seldom stop at the borders of territorial states. In many cases, the interlocutors do not constitute a *demos* or political citizenry. Often, too, their communications are neither addressed to a Westphalian state nor relayed through national media. Frequently, moreover, the problems debated are inherently transterritorial and can neither be located within Westphalian space nor be resolved by a Westphalian state. In such cases, current formations of public opinion scarcely respect the parameters of the Westphalian frame. Thus, assumptions that previously went without saying in public-sphere theory now cry out for critique and revision.

No wonder, then, that expressions like "transnational public spheres," "diasporic public spheres," and "the global public sphere" figure so prominently in current discussions. Views about these phenomena divide into two camps. One camp treats transnational publicity as a new development, associated with late twentieth-century

globalization. Claiming that the modern interstate system previously channeled most political debate into state-centered discursive arenas, this camp maintains that the Westphalian frame was appropriate for theorizing public spheres until very recently.[21] The second camp insists, in contrast, that publicity has been transnational at least since the origins of the interstate system in the seventeenth century. Citing Enlightenment visions of the international "republic of letters" and cross-national movements such as abolitionism and socialism, not to mention world religions and modern imperialism, this camp contends that the Westphalian frame has always been ideological, obscuring the inherently unbounded character of public spheres.[22] Undoubtedly, both interpretations have some merit. Whereas the first accurately captures the hegemonic division of political space, the second rightly reminds us that metropolitan democracy arose in tandem with colonial subjection, which galvanized transnational flows of public opinion. For present purposes, therefore, I propose to split the difference between them. Granting that transnational publicity has a long history, I shall assume that its present configuration is nevertheless new, reflecting yet another "structural transformation of the public sphere." On this point, all parties can surely agree: the current constitution of public opinion bursts open the Westphalian frame.

Yet the full implications remain to be drawn. Focusing largely on cultural aspects of transnational flows, such as "hybridization" and "glocalization," many students of transnational publicity neglect to pose the questions of greatest importance for a *critical* theory: If public opinion now overflows the Westphalian frame, what becomes of its *critical* function of checking domination and democratizing governance? More specifically, can we still meaningfully interrogate the *legitimacy* of public opinion when the interlocutors do not constitute a *demos* or political citizenry? And what could legitimacy mean in such a context? Likewise, can we still meaningfully interrogate the *efficacy* of public opinion when it is not addressed to a sovereign state that is capable in principle of regulating its territory and solving its citizens' problems in the public interest? And what could efficacy mean in this situation? Absent satisfactory answers to these questions, we lack a usable *critical* theory of the public sphere.[23]

To clarify the stakes, I propose to revisit the six constitutive presuppositions of public-sphere theory. I shall consider, in the case of each presupposition, how matters stand empirically and what follows for the public sphere's status as a *critical* category.

1. Consider, first, the assumption that the addressee of public opinion is a modern Westphalian state, with exclusive, undivided sovereignty over a bounded territory. Empirically, this view of sovereignty is highly questionable – and not just for poor and weak states. Today, even powerful states share responsibility for many key governance functions with international institutions, intergovernmental networks, and nongovernmental organizations. This is the case not only for relatively new functions, such as environmental regulation, but also for classical ones, such as defense, policing, and the administration of civil and criminal law – witness the International Atomic Energy Agency, the International Criminal Court, and the World Intellectual Property Organization.[24] Certainly, these institutions are dominated by hegemonic states, as was the interstate system before them. But the mode in which hegemony is exercised today is evidently new. Far from invoking the Westphalian model of exclusive, undivided state sovereignty, hegemony increasingly operates through a *postwestphalian model of disaggregated sovereignty*.[25] Empirically, therefore, the first presupposition of public-sphere theory does not stand up.

But what follows for public-sphere theory? The effect, I submit, is not simply to falsify the theory's underpinnings, but also to jeopardize the *critical* function of public opinion. If states do not fully control their own territories, if they lack the sole and undivided capacity to wage war, secure order, and administer law, then how can their citizenries' public opinion be politically effective? Even granting, for the sake of argument, that national publicity is fairly generated and satisfies criteria of legitimacy; even granting, too, that it influences the will of parliament and the state administration; how, under conditions of disaggregated sovereignty, can it be *implemented?* How, in sum, can public opinion be *efficacious* as a critical force in a postwestphalian world?

2. Consider, next, the assumption that a public coincides with a national citizenry, resident on a national territory, which formulates its common interest as the general will of a bounded political community. This assumption, too, is counterfactual. For one thing, the equation of citizenship, nationality, and territorial residence is belied by such phenomena as migrations, diasporas, dual- and triple-citizenship arrangements, indigenous community membership, and patterns of multiple residency. Every state now has non-citizens on its territory; most are multicultural and/or multinational; and *every* nationality is territorially dispersed.[26] Equally confounding, however, is the fact that public spheres today are not coextensive with political

membership. Often the interlocutors are neither co-nationals nor fellow citizens. The opinion they generate, therefore, represents neither the common interest nor the general will of any *demos*. Far from institutionalizing debate among citizens who share a common status as political equals, postwestphalian publicity appears in the eyes of many observers to empower transnational elites, who possess the material and symbolic prerequisites for global networking.[27]

Here, too, the difficulty is not just empirical but also conceptual and political. If the interlocutors do not constitute a *demos*, how can their collective opinion be translated into binding laws and administrative policies? If, moreover, they are not fellow citizens, putatively equal in participation rights, status, and voice, then how can the opinion they generate be considered legitimate? How, in sum, can the *critical* criteria of *efficacy* and *legitimacy* be meaningfully applied to transnational public opinion in a postwestphalian world?

3. Consider, now, the assumption that a principal *topos* of public-sphere discussion is the proper regulation by a territorial state of a national economy. That assumption, too, is belied by present conditions. We need only mention outsourcing, transnational corporations, and offshore business registry to appreciate that territorially based national production is now largely notional. Thanks, moreover, to the dismantling of the Bretton Woods capital controls and the emergence of 24/7 global electronic financial markets, state control over national currency is presently quite limited. Finally, as those who protest policies of the World Trade Organization, the International Monetary Fund, the North American Free Trade Agreement, and the World Bank have insisted, the ground rules governing trade, production, and finance are set transnationally, by agencies more accountable to global capital than to any public.[28] In these conditions, the presupposition of a national economy is counterfactual.

As before, moreover, the effect is to imperil the critical function of public spheres. If states cannot in principle steer economies in line with the articulated general interest of their populations, how can national public opinion be an effective force? Then, too, if economic governance is in the hands of agencies that are not locatable in Westphalian space, how can it be made accountable to public opinion? Moreover, if those agencies are invalidating national labor and environmental laws in the name of free trade, if they are prohibiting domestic social spending in the name of structural adjustment, if they are institutionalizing neoliberal governance rules that would once and for all remove major matters of public concern from any possibility of political regulation, if in sum they are systematically reversing the democratic project, using markets to tame politics instead of politics to tame markets, then how can citizen public opinion have any impact? Lastly, if the world capitalist system operates to the massive detriment of the global poor, how can what passes for transnational public opinion be remotely legitimate, when those affected by current policies cannot possibly debate their merits as peers? In general, then, how can public opinion concerning the economy be either *legitimate* or *efficacious* in a postwestphalian world?

4. Consider, as well, the assumption that public opinion is conveyed through a national communications infrastructure, centered on print and broadcasting. This assumption implies that communicative processes, however decentered, are sufficiently coherent and politically focused to coalesce in "public opinion." But it, too, is rendered counterfactual by current conditions. Recall the profusion of niche media, some subnational, some transnational, which do not in any case function as national media, focused on subjecting the exercise of state power to the test of publicity. Granted, one can also note the parallel emergence of global media, but these market-driven, corporately owned outlets are scarcely focused on checking transnational power. In addition, many countries have privatized government-operated media, with decidedly mixed results: on the one hand, the prospect of a more independent press and TV and more inclusive populist programming; on the other hand, the further spread of market logic, advertisers' power, and dubious amalgams like talk radio and "infotainment." Finally, we should mention instantaneous electronic, broadband, and satellite communications technologies, which permit direct transnational communication, bypassing state controls. Together, all these developments signal the denationalization of communicative infrastructure.[29]

The effects here, too, pose threats to the critical functioning of public spheres. Granted, we see some new opportunities for critical public opinion formation. But these go along with the disaggregation and complexification of communicative flows. Given a field divided between corporate global media, restricted niche media, and decentered internet networks, how could critical public opinion possibly be generated on a large scale and mobilized as a political force? Given, too, the absence of even the sort of formal equality associated with common citizenship, how could those who comprise transnational media audiences deliberate together as peers? How, once

again, can public opinion be normatively *legitimate* or politically *efficacious* under current conditions?

5. Consider, too, the presupposition of a single national language, which was supposed to constitute the linguistic medium of public-sphere communication. As a result of the population mixing already noted, national languages do not map onto states. The problem is not simply that official state languages were consolidated at the expense of local and regional dialects, although they were. It is also that existing states are *de facto* multilingual, while language groups are territorially dispersed, and many more speakers are multilingual. Meanwhile, English has become the *lingua franca* of global business, mass entertainment, and academia. Yet language remains a political fault-line, threatening to explode countries like Belgium, if no longer Canada, while complicating efforts to democratize countries like South Africa and to erect transnational formations like the European Union.[30]

These developments, too, pose threats to the critical function of public opinion. Insofar as public spheres are monolingual, how can they constitute an inclusive communications community of all those affected? Conversely, insofar as public spheres correspond to linguistic communities that straddle political boundaries and do not correspond to any citizenry, how can they mobilize public opinion as a political force? Likewise, insofar as new transnational political communities, such as the EU, are multi-linguistic, how can they constitute public spheres that can encompass the entire *demos*? Finally, insofar as transnational publics conduct their communications in English, which favors global elites and Anglophone postcolonials at the expense of others, how can the opinion they generate be viewed as legitimate? For all these reasons, and in all these ways, language issues compromise both the *legitimacy* and *efficacy* of public opinion in a postwestphalian world.

6. Consider, finally, the assumption that a public sphere rests on a national vernacular literature, which supplies the shared social imaginary needed to underpin solidarity. This assumption, too, is today counterfactual. Consider the increased salience of cultural hybridity and hybridization, including the rise of "world literature." Consider also the rise of global mass entertainment, whether straightforwardly American or merely stylistically informed by American entertainment. Consider, finally, the spectacular rise of visual culture, or, better, of the enhanced salience of the visual within culture, and the relative decline of print and the literary.[31] In all these cases, it is difficult to recognize the sort of (national) literary cultural formation seen by Habermas (and by Benedict Anderson) as underpinning the subjective stance of public-sphere interlocutors.[32] On the contrary, insofar as public spheres require the cultural support of shared social imaginaries, rooted in national literary cultures, it is hard to see them functioning effectively today.

In general, then, public spheres are increasingly transnational or postnational with respect to each of the constitutive elements of public opinion.[33] The "who" of communication, previously theorized as a Westphalian-national citizenry, is often now a collection of dispersed interlocutors, who do not constitute a *demos*. The "what" of communication, previously theorized as a Westphalian-national interest rooted in a Westphalian-national economy, now stretches across vast reaches of the globe, in a transnational community of risk, which is not, however, reflected in concomitantly expansive solidarities and identities. The "where" of communication, once theorized as the Westphalian-national territory, now increasingly occupies deterritorialized cyberspace. The "how" of communication, once theorized as Westphalian-national print media, now encompasses a vast translinguistic nexus of disjoint and overlapping visual cultures. Finally, the "to whom" or addressee of communication, once theorized as a sovereign territorial state, which should be made answerable to public opinion, is now an amorphous mix of public and private transnational powers that is neither easily identifiable nor rendered accountable.

Rethinking the Public Sphere – Yet Again

These developments raise the question of whether and how public spheres today could conceivably perform the democratic political functions with which they have been associated historically. Could public spheres today conceivably generate *legitimate* public opinion, in the strong sense of considered understandings of the general interest, filtered through fair and inclusive argumentation, open to everyone potentially affected? And if so, how? Likewise, could public spheres today conceivably render public opinion sufficiently *efficacious* to constrain the various powers that determine the conditions of the interlocutors' lives? And if so, how? What sorts of changes (institutional, economic, cultural, and communicative) would be required even to imagine a genuinely *critical* and democratizing role for transnational public spheres under current conditions? Where are the sovereign powers that public opinion today should constrain? Which publics are relevant to which powers? Who are

the relevant members of a given public? In what language(s) and through what media should they communicate? And via what communicative infrastructure?

These questions well exceed the scope of the present inquiry. And I shall not pretend to try to answer them here. I want to conclude, rather, by suggesting a conceptual strategy that can clarify the issues and point the way to possible resolutions.

My proposal centers on the two features that together constituted the *critical* force of the concept of the public sphere in the Westphalian era: namely, the *normative legitimacy* and *political efficacy* of public opinion. As I see it, these ideas are intrinsic, indispensable elements of *any* conception of publicity that purports to be critical, regardless of the socio-historical conditions in which it obtains. The present constellation is no exception. Unless we can envision conditions under which current flows of transnational publicity could conceivably become legitimate and efficacious, the concept loses its critical edge and its political point. Thus, the only way to salvage the critical function of publicity today is to rethink legitimacy and efficacy. The task is to detach those two ideas from the Westphalian premises that previously underpinned them and to reconstruct them for a postwestphalian world.

Consider, first, the question of *legitimacy*. In public-sphere theory, as we saw, public opinion is considered legitimate if and only if all who are potentially affected are able to participate as peers in deliberations concerning the organization of their common affairs. In effect, then, the theory holds that the legitimacy of public opinion is a function of two analytically distinct characteristics of the communicative process, namely, the extent of its *inclusiveness* and the degree to which it realizes *participatory parity*. In the first case, which I shall call the inclusiveness condition, discussion must in principle be open to all with a stake in the outcome. In the second, which I shall call the parity condition, all interlocutors must, in principle, enjoy roughly equal chances to state their views, place issues on the agenda, question the tacit and explicit assumptions of others, switch levels as needed, and generally receive a fair hearing. Whereas the inclusiveness condition concerns the question of *who* is authorized to participate in public discussions, the parity condition concerns the question of *how*, in the sense of on what terms, the interlocutors engage one another.[34]

In the past, however, these two legitimacy conditions of public opinion were not always clearly distinguished. Seen from the perspective of the Westphalian frame, both the inclusiveness condition and the parity condition were yoked together under the ideal of *shared citizenship in a bounded community*. As we saw, public-sphere theorists implicitly assumed that citizenship set the legitimate bounds of inclusion, effectively equating those affected with the members of an established polity. Tacitly, too, theorists appealed to citizenship in order to give flesh to the idea of parity of participation in public deliberations, effectively associating communicative parity with the shared status of political equality in a territorial state. Thus, citizenship supplied the model for both the "who" and the "how" of legitimate public opinion in the Westphalian frame.

The effect, however, was to truncate discussions of legitimacy. Although it went unnoticed at the time, the Westphalian frame encouraged debate about the parity condition, while deflecting attention away from the inclusiveness condition. Taking for granted the modern territorial state as the appropriate unit, and its citizens as the pertinent subjects, that frame foregrounded the question of *how* precisely those citizens should relate to one another in the public sphere. The argument focused, in other words, on what should count as a relation of participatory parity among the members of a bounded political community. Engrossed in disputing the "how" of legitimacy, the contestants apparently felt no necessity to dispute the "who." With the Westphalian frame securely in place, it went without saying that the "who" was the national citizenry.

Today, however, the question of the "who" can no longer be swept under the carpet. Under current conditions of transnationality, the inclusiveness condition of legitimacy cries out for explicit interrogation. We must ask: If political citizenship no longer suffices to demarcate the members of the public, then how should the inclusiveness requirement be understood? By what alternative criterion should we determine who counts as a bonafide interlocutor in a postwestphalian public sphere?

Public-sphere theory already offers a clue. In its classical Habermasian form, the theory associates the idea of inclusiveness with the "all-affected principle." Applying that principle to publicity, it holds that all potentially affected by political decisions should have the chance to participate on terms of parity in the informal processes of opinion formation to which the decision-takers should be accountable. Everything depends, accordingly, on how one interprets the all-affected principle. Previously, public-sphere theorists assumed, in keeping with the Westphalian frame, that what most affected people's life conditions was the constitutional order of the territorial

state of which they were citizens. As a result, it seemed that in correlating publics with political citizenship, one simultaneously captured the force of the all-affected principle. In fact, this was never truly so, as the long history of colonialism and neocolonialism attests. From the perspective of the metropole, however, the conflation of membership with affectedness appeared to have an emancipatory thrust, as it served to justify the progressive incorporation, as active citizens, of the subordinate classes and status groups who were resident in the territory but excluded from full political participation.

Today, however, the idea that citizenship can serve as a proxy for affectedness is no longer plausible. Under current conditions, one's conditions of living do not depend wholly on the internal constitution of the political community of which one is a citizen. Although the latter remains undeniably relevant, its effects are mediated by other structures, both extra- and non-territorial, whose impact is at least as significant.[35] In general, globalization is driving a widening wedge between affectedness and political membership. As those two notions increasingly diverge, the effect is to reveal the former as an inadequate surrogate for the latter. And so the question arises: Why not apply the all-affected principle directly to the framing of publicity, without going through the detour of citizenship?

Earlier, I considered this a promising path for reconstructing a critical conception of inclusive public opinion in a postwestphalian world. Today, however, I prefer the alternative, "all-subjected principle" introduced in chapter 4 of *Scales of Justice*.[36] Although I cannot explore this alternative fully here, let me recall the essential point: the all-subjected principle holds that what turns a collection of people into fellow members of a public is not shared citizenship, or co-imbrication in a causal matrix, but rather their joint subjection to a structure of governance that set the ground rules for their interaction. For any given problem, accordingly, the relevant public should match the reach of the governance structure that regulates the relevant swath of social interaction. Where such structures transgress the borders of states, the corresponding public spheres must be transnational. Failing that, the opinion that they generate cannot be considered legitimate.

With respect to the legitimacy of public opinion, then, the challenge is clear. In order for public-sphere theory to retain its critical orientation in a postwestphalian world, it must reinterpret the meaning of the inclusiveness requirement. Renouncing the automatic identification of the latter with political citizenship, it must redraw publicity's boundaries by applying the all-subjected principle directly to the question at hand. In this way, the question of the "who" emerges from under its Westphalian veil. Along with the question of the "how," which remains as pressing as ever, it, too, becomes an explicit focus of concern in the present constellation. In fact, the two questions, that of inclusiveness and that of parity, now go hand in hand. Henceforth, public opinion is legitimate if and only if it results from a communicative process in which all who are jointly subjected to the relevant governance structure(s) can participate as peers, *regardless of political citizenship*. Demanding as it is, this new, postwestphalian understanding of legitimacy constitutes a genuinely critical standard for evaluating existing forms of publicity in the present era.

Let me turn, now, to the second essential feature of a critical conception of publicity, namely, the political *efficacy* of public opinion. In public-sphere theory, as we saw, public opinion is considered efficacious if and only if it is mobilized as a political force to hold public power accountable, ensuring that the latter's exercise reflects the considered will of civil society. In effect, therefore, the theory treats publicity's efficacy as a function of two distinct elements, which I shall call the *translation* condition and the *capacity* condition. According to the translation condition, the communicative power generated in civil society must be translated first into binding laws and then into administrative power. According to the capacity condition, the public power must be able to implement the discursively formed will to which it is responsible. Whereas the translation condition concerns the flow of communicative power from civil society to an instituted public power, the capacity condition concerns the ability of an administrative power to realize its public's designs, both negatively, by reining in private powers, and positively, by solving its problems and organizing common life in accord with its wishes.

In the past, these two efficacy conditions were understood in the light of the Westphalian frame. From that perspective, both the translation condition and the capacity condition were linked to the idea of the sovereign territorial state. As we saw, public-sphere theorists assumed that the addressee of public opinion was the Westphalian state, which should be constituted democratically, so that communication flows unobstructed from weak publics to strong publics, where it can be translated into binding laws. At the same time, these theorists also assumed that the Westphalian state had the necessary administrative capacity to implement those

laws so as to realize its citizens' aims and solve their problems. Thus, the Westphalian state was considered the proper vehicle for fulfilling both the translation and capacity conditions of public-sphere efficacy.

Here, too, however, the result was to truncate discussions of efficacy. Although the Westphalian frame fostered interest in the translation condition, it tended to obscure the capacity condition. Taking for granted that the sovereign territorial state was the proper addressee of public opinion, that frame foregrounded the question of whether the communicative power generated in the national public sphere was sufficiently strong to influence legislation and constrain state administration. The argument focused, accordingly, on what should count as a democratic circulation of power between civil society and the state. What was not much debated, in contrast, was the state's capacity to regulate the private powers that shaped its citizens' lives. That issue went without saying, as public-sphere theorists assumed, for example, that economies were effectively national and could be steered by national states in the interest of national citizens. Engrossed in debating the translation condition, they apparently felt no necessity to dispute the capacity condition. With the Westphalian frame in place, the latter became a non-issue.

Today, however, these assumptions no longer hold. Under current conditions of transnationality, the capacity condition demands interrogation in its own right. We must ask: If the modern territorial state no longer possesses the administrative ability to steer "its" economy, ensure the integrity of "its" national environment, and provide for the security and well-being of "its" citizens, then how should we understand the capacity component of efficacy today? By what means can the requisite administrative capacity be constituted and where precisely should it be lodged? If not to the sovereign territorial state, then to what or whom should public opinion on transnational problems be addressed?

With respect to these questions, alas, existing public-sphere theory affords few clues. But it does suggest that the problem of publicity's efficacy in a postwestphalian world is doubly complicated. A critical conception can no longer restrict its attention to the direction of communicative flows in established polities, where publicity should constrain an already known and constituted addressee. In addition, it must consider the need to construct new addressees for public opinion, in the sense of new, transnational public powers that possess the administrative capacity to solve transnational problems. The challenge, accordingly, is twofold: on the one hand, to create new, transnational public powers; on the other, to make them accountable to new, transnational public spheres. Both those elements are necessary; neither alone is sufficient. Only if it thematizes both conditions (capacity as well as translation) will public-sphere theory develop a postwestphalian conception of communicative efficacy that is genuinely critical.

In general, then, the task is clear: if public-sphere theory is to function today as a *critical* theory, it must revise its account of the normative legitimacy and political efficacy of public opinion. No longer content to leave half the picture in the shadows, it must treat each of those notions as comprising two analytically distinct but practically entwined critical requirements. Thus, the legitimacy critique of existing publicity must now interrogate not only the "how" but also the "who" of existing publicity. Or, rather, it must interrogate parity and inclusiveness together, by asking: *participatory parity among whom?* Likewise, the efficacy critique must now be expanded to encompass both the translation and capacity conditions of existing publicity. Putting those two requirements together, it must envision new transnational public powers, which can be made accountable to new democratic transnational circuits of public opinion.

Granted, the job is not easy. But only if public-sphere theory rises to the occasion can it serve as a *critical* theory in a postwestphalian world. For that purpose, it is not enough for cultural studies and media studies scholars to map existing communications flows. Rather, critical social and political theorists will need to rethink the theory's core premises concerning the legitimacy and efficacy of public opinion. Only then will the theory recover its critical edge and its political point. Only then will public-sphere theory keep faith with its original promise to contribute to struggles for emancipation.

Notes

1 See, for example, John R. Bowen, "Beyond Migration: Islam as a Transnational Public Space," *Journal of Ethnic & Migration Studies* 30, 5 (2004): 879–94; *Globalizations and Social Movements: Culture, Power, and the Transnational Public Sphere*, ed. John A. Guidry, Michael D. Kennedy, and Mayer N. Zald (Ann Arbor: University of Michigan Press, 2000); Warwick Mules, "Media Publics and the Transnational Public Sphere," *Critical Arts Journal* 12, 1/2 (1998):

24–44; Thomas Olesen, "Transnational Publics: New Spaces of Social Movement Activism and the Problem of Global Long-Sightedness," *Current Sociology* 53, 3 (2005): 419–40; Rudolf Stichweh, "The Genesis of a Global Public Sphere," *Development* 46, 1 (2003): 26–9; Khachig Tololyan, "Rethinking Diaspora(s): Stateless Power in the Transnational Moment," *Diaspora* 5, 1 (1996): 3–36; Ingrid Volkmer, "The Global Network Society and the Global Public Sphere," *Development* 46, 1 (2003): 9–16; and Pnina Werbner, "Theorising Complex Diasporas: Purity and Hybridity in the South Asian Public Sphere in Britain," *Journal of Ethnic & Migration Studies* 30, 5 (2004): 895–911.

2 See, above all, Jürgen Habermas, *Structural Transformation of the Public Sphere*, trans. Thomas Burger (Cambridge, MA: MIT Press, 1989), esp. pp. 51–6, 140 and 222ff.; and *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy,* trans. William Rehg (Cambridge, MA: MIT Press, 1996), esp. pp. 359–79. Hereafter I shall refer to these texts as *STPS* and *BFN,* respectively.

3 For an explanation of my use of the term "Westphalian," see Nancy Fraser, *Scales of Justice*, ch. 2, note 1.

4 *STPS*, pp. 14–26 and 79–88; see also *BFN*, pp. 135–8, 141–4, 352, 366–7, and 433–6.

5 *STPS*, pp. 20–4, 51–7, 62–73, 83–8, 141ff.; see also *BFN*, pp. 365–6, 381–7.

6 *STPS*, pp. 14–20, esp. p. 17; see also *BFN*, pp. 344–51, esp. pp. 349–50.

7 *STPS*, pp. 58, 60–70; see also *BFN*, pp. 373–4 and 376–7.

8 *STPS*, pp. 24–39, esp. 36–7, 55–6, 60–3; see also *BFN*, pp. 360–2, 369–70, 375–7.

9 *STPS*, pp. 41–3, 48–51; see also *BFN*, pp. 373–4. The phrase "print capitalism" is not Habermas's, but Benedict Anderson's. See his *Imagined Communities: Reflections on the Origin and Spread of Nationalism*, second edition (London: Verso, 1991).

10 Anderson, *Imagined Communities*.

11 Jürgen Habermas, "The European Nation-State: On the Past and Future of Sovereignty and Citizenship," *Public Culture* 10, 2 (1998): 397–416.

12 Ibid.

13 The Black Public Sphere Collective, *The Black Public Sphere* (Chicago: University of Chicago Press, 1995); Evelyn Brooks-Higginbotham, *Righteous Discontent: The Women's Movement in the Black Baptist Church, 1880–1920* (Cambridge, MA: Harvard University Press, 1993); Geoff Eley, "Nations, Publics, and Political Cultures: Placing Habermas in the Nineteenth Century," in *Habermas and the Public Sphere*, ed. Craig Calhoun (Cambridge, MA: MIT Press, 1995), pp. 289–350; Nilufer Gole, "The Gendered Nature of the Public Sphere," *Public Culture* 10, 1 (1997): 61–80; Michael Rabinder James, "Tribal Sovereignty and the Intercultural Public Sphere," *Philosophy & Social Criticism* 25, 5 (1999): 57–86; Joan Landes, *Women and the Public Sphere in the Age of the French Revolution* (Ithaca, NY: Cornell University Press, 1988); Jane Rendall, "Women and the Public Sphere," *Gender & History* 11, 3 (1999): 475–89; Mary P. Ryan, *Women in Public: Between Banners and Ballots, 1825–1880* (Baltimore: Johns Hopkins University Press, 1990); and "Gender and Public Access: Women's Politics in Nineteenth-Century America," in *Habermas and the Public Sphere*, ed. Calhoun, pp. 259–89; Yasemin Nuhoglu Soysal, "Changing Parameters of Citizenship and Claims-Making: Organized Islam in European Public Spheres," *Theory and Society* 26 (1997): 509–27; Michael Warner, *Publics and Counterpublics* (New York: Zone Books, 2002); and Iris Marion Young, "Impartiality and the Civic Public: Some Implications of Feminist Critiques of Moral and Political Theory," in *Feminism as Critique*, ed. Seyla Benhabib and Drucilla Cornell (Minneapolis: University of Minnesota Press, 1987), pp. 56–76.

14 An early form of this critique can be found in Niklas Luhman, "Öffentliche Meinung," *Politische Vierteljahresschrift* 11 (1970): 2–28. See also Stanley Aronowitz, "Is a Democracy Possible? The Decline of the Public in the American Debate," in *The Phantom Public Sphere*, ed. Bruce Robbins (Minneapolis: University of Minnesota Press, 1993), pp. 75–92; Nicholas Garnham "The Media and the Public Sphere," in *Habermas and the Public Sphere,* ed. Calhoun, pp. 359–76; Jürgen Gerhards and Friedhelm Neidhardt, *Strukturen und Funktionen Moderner Öffentlichkeit* (Berlin: Fragestellungen und Ansätze, 1990); and Michael Warner, "The Mass Public and the Mass Subject," in *The Phantom Public Sphere*, ed. Robbins, pp. 234–56.

15 Nancy Fraser, "Rethinking the Public Sphere: A Contribution to the Critique of Actually Existing Democracy," in *Habermas and the Public Sphere*, ed. Calhoun, pp. 109–42, esp. pp. 117–29. See also Nancy Fraser, "Sex, Lies, and the Public Sphere: Some Reflections on the Confirmation of Clarence Thomas," *Critical Inquiry* 18 (1992): 595–612.

16 Fraser, "Rethinking the Public Sphere," esp. pp. 129–32.

17 *BFN*, pp. 420–3.

18 Ibid., pp. 360–3.

19 According to William E. Scheuerman, for example, Habermas oscillates inconsistently between two antithetical stances: on the one hand, a "realistic," resigned, objectively conservative view that accepts the grave legitimacy and efficacy deficits of public opinion in really existing democratic states; on the other, a radical-democratic view that is still committed to overcoming them. I suspect that Scheuerman may well be right. Nevertheless, for purposes of the present argument, I shall stipulate that Habermas convincingly negotiates the tension "between fact and norm" in the democratic state. William E. Scheuerman, "Between Radicalism and Resignation: Democratic Theory in Habermas' *Between Facts and Norms*," in *Habermas: A Critical Reader*, ed. Peter Dews (Oxford: Blackwell, 1999), pp. 153–78.

20 *BFN*, pp. 465–6 and 500.

21 *Political Space: Frontiers of Change and Governance in a Globalizing World*, ed. Yale H. Ferguson and Barry Jones (Albany: State University of New York Press, 2002); David Held, *Democracy and the Global Order: From the Modern State to Cosmopolitical Governance* (Cambridge: Polity, 1995); David Held, Anthony McGrew, David Goldblatt, and Jonathan Perraton, *Global Transformations: Politics, Economics and Culture* (Cambridge: Polity, 1999); Saskia Sassen, *Globalization and Its Discontents* (New York: Free Press, 1998); and *Territory, Authority, Rights: From Medieval to Global Assemblages* (Princeton: Princeton University Press, 2006).

22 *Constructing World Culture: International Nongovernmental Organizations since 1875*, ed. John Boli and John Thomas (Stanford: Stanford University Press, 1999); and Margaret E. Keck and Kathryn Sikkink, *Activists beyond Borders: Advocacy Networks in International Politics* (Ithaca, NY: Cornell University Press, 1998).

23 Some scholars do raise these questions. For genuinely critical treatments, see James Bohman, "The Globalization of the Public Sphere: Cosmopolitan Publicity and the Problem of Cultural Pluralism," *Philosophy and Social Criticism* 24, 2–3 (1998): 199–216; and "The Public Spheres of the World Citizen," in *Perpetual Peace: Essays on Kant's Cosmopolitan Ideal*, ed. James Bohman and Matthias Lutz-Bachmann (Cambridge, MA: MIT Press, 1997); and Maria Pia Lara, "Globalizing Women's Rights: Building a Public Sphere," in *Recognition, Responsibility, and Rights: Feminist Ethics and Social Theory. Feminist Reconstructions*, ed. Robin N. Fiore and Hilde Lindemann Nelson (Totowa, NJ: Rowman & Littlefield, 2003), pp. 181–93.

24 *Global Transformations*; James N. Rosenau, Held et al., "Governance and Democracy in a Globalizing World," in *Re-imagining Political Community: Studies in Cosmopolitan Democracy*, ed. Daniel Archibugi and David Held (Stanford: Stanford University Press, 1999), pp. 28–58, and *Along the Domestic-Foreign Frontier: Exploring Governance in a Turbulent World* (Cambridge: Cambridge University Press, 1997); William E. Scheuerman, "Economic Globalization and the Rule of Law," *Constellations* 6, 1 (1999): 3–25; David Schneiderman, "Investment Rules and the Rule of Law," *Constellations* 8, 4 (2001): 521–37; Anne-Marie Slaughter, *A New World Order* (Princeton: Princeton University Press, 2005); Susan Strange, *The Retreat of the State: The Diffusion of Power in the World Economy* (Cambridge: Cambridge University Press, 1996); and Mark W. Zacher, "The Decaying Pillars of the Westphalian Temple," in *Governance without Government*, ed. James N. Rosenau and Ernst-Otto Czempiel (Cambridge: Cambridge University Press, 1992), pp. 58–101.

25 Michael Hardt and Antonio Negri, *Empire* (Cambridge, MA: Harvard University Press, 2000); Raul C. Pangalangan, "Territorial Sovereignty: Command, Title, and Expanding the Claims of the Commons," in *Boundaries and Justice: Diverse Ethical Perspectives*, ed. David Miller and Sohail H. Hashmi (Princeton: Princeton University Press, 2001), pp. 164–82; Saskia Sassen, *Losing Control? Sovereignty in an Age of Globalization* (New York: Columbia University Press, 1995); and Strange, *The Retreat of the State*.

26 *Citizenship Today: Global Perspectives and Practices*, ed. T. Alexander Aleynikoff and Douglas Klusmeyer (Washington, DC: Carnegie Endowment for Peace, 2001); *Theorizing Citizenship*, ed. Ronald Beiner (Albany: State University of New York Press, 1995); Seyla Benhabib, *The Rights of Others: Aliens, Residents, and Citizens* (Cambridge: Cambridge University Press, 2004) and "Transformations of Citizenship: The Case of Contemporary Europe," *Government and Opposition: An International Journal of Comparative Politics* 37, 4 (2002): 439–65; Charles Husband, "The Right to be Understood: Conceiving the Multi-ethnic Public Sphere," *Innovation: The European Journal of Social Sciences* 9, 2 (1996): 205–15; and Andrew Linklater, "Citizenship and Sovereignty in the Post-Westphalian European State" and Ulrich Preuss, "Citizenship in the European Union: A Paradigm for Transnational Democracy?" both in *Re-imagining Political Community*, ed. Archibugi and Held, pp. 113–38 and 138–52, respectively.

27 Craig Calhoun, "Imagining Solidarity: Cosmopolitanism, Constitutional Patriotism, and the Public Sphere," *Public Culture* 14, 1 (2002): 147–71.

28 Phil Cerny, "Paradoxes of the Competition State: The Dynamics of Political Globalization," *Government and Opposition* 32, 2 (1997): 251–74; Randall Germain, "Globalising Accountability within the International Organisation of Credit: Financial Governance and the Public Sphere," *Global Society: Journal of Inter-disciplinary International Relations* 18, 3 (2004): 217–42; Held et al., *Global Transformations;* Eric Helleiner, "From Bretton Woods to Global Finance: A World Turned Upside Down," in *Political Economy and the Changing Global Order*, ed. Richard Stubbs and Geoffrey R. D. Underhill (New York: St Martin's Press, 1994), pp. 163–75; Jonathan Perraton, David Goldblatt, David Held, and Anthony McGrew, "The Globalisation of Economic Activity," *New Political Economy* 2, 2 (1997): 257–77; Gunter G. Schulze, *The Political Economy of Capital Controls* (Cambridge: Cambridge University Press, 2000); *Global Change and Transformation: Economic Essays in Honor of Karsten Laursen*, ed. Lauge Stetting, Knud Erik Svendsen and Edde Yndgaard (Copenhagen: Handelshojskolens Forlag, 1999); and Joseph E. Stiglitz, *Globalization and Its Discontents* (New York: Norton, 2003).

29 Bart Cammaerts and Leo van Audenhove, "Online Political Debate, Unbounded Citizenship, and the Problematic Nature of a Transnational Public Sphere," *Political Communication* 22, 2 (2005): 179–96; Peter Dahlgren, "The Internet, Public Spheres, and Political Communication:

Dispersion and Deliberation," *Political Communication* 22, 2 (2005): 147–62; Held et al., *Global Transformations*; Robert W. McChesney, *Rich Media, Poor Democracy: Communications Politics in Dubious Times* (Chicago: University of Illinois Press, 1999) and "Global Media, Neoliberalism, and Imperialism," *Monthly Review* 50, 10 (2001): 1–19; Zizi Papacharissi, "The Virtual Sphere: The Internet as a Public Sphere," *New Media & Society* 4, 1 (2002): 9–36; and George Yudice, *The Expediency of Culture: Uses of Culture in the Global Era* (Durham, NC: Duke University Press, 2004).

30 Jean-Bernard Adrey, "Minority Language Rights before and after the 2004 EU Enlargement: The Copenhagen Criteria in the Baltic States," *Journal of Multilingual & Multicultural Development* 26, 5 (2005): 453–68; Neville Alexander, "Language Policy, Symbolic Power and the Democratic Responsibility of the Post-Apartheid University," *Pretexts: Literary & Cultural Studies* 12, 2 (2003): 179–90; Matthias König, "Cultural Diversity and Language Policy," *International Social Science Journal* 51, 161 (1999): 401–8; Alan Patten, "Political Theory and Language Policy," *Political Theory* 29, 5 (2001): 691–715; Robert Phillipson, *English-Only Europe? Challenging Language Policy* (New York: Routledge, 2003); Omid A. Payrow Shabani, "Language Policy and Diverse Societies: Constitutional Patriotism and Minority Language Rights," *Constellations* 11, 2 (2004): 193–216. Philippe van Parijs, "The Ground Floor of the World: On the Socio-economic Consequences of Linguistic Globalization," *International Political Science Review* 21, 2 (2000): 217–33; and Kenton T. Wilkinson, "Language Difference and Communication Policy in the Information Age," *Information Society* 20, 3 (2004): 217–29.

31 Arjun Appadurai, *Modernity at Large: Cultural Dimensions of Globalization* (Minneapolis: University of Minnesota Press, 1996); Kevin Michael DeLuca and Jennifer Peeples, "From Public Sphere to Public Screen: Democracy, Activism, and the 'Violence' of Seattle," *Critical Studies in Media Communication* 19, 2 (2002): 125–51; Ulf Hannerz, *Transnational Connections: Culture, People, Places* (New York: Routledge, 1996); Fredric Jameson, *The Cultural Turn* (London: Verso, 1998); P. David Marshall, *New Media Cultures* (New York: Oxford University Press, 2004); and George Yudice, *The Expediency of Culture*.

32 Anderson, *Imagined Communities*.

33 Habermas has himself remarked many of the developments cited above that problematize the Westphalian presuppositions of public-sphere theory. See his essay, "The Postnational Constellation and the Future of Democracy," in Jürgen Habermas, *The Postnational Constellation: Political Essays*, trans. and ed. Max Pensky (Cambridge, MA: MIT Press, 2001), pp. 58–113.

34 Certainly, these conditions are highly idealized and never fully met in practice. But it is precisely their idealized character that ensured the *critical* force of public-sphere theory. By appealing to the standard of inclusive communication among peers, the theory was able to criticize existing, power-skewed processes of publicity. By exposing unjustified exclusions and disparities, the theory was able to motivate its addressees to try to overcome them.

35 Thomas W. Pogge, *World Poverty and Human Rights: Cosmopolitan Responsibilities and Reforms* (Cambridge: Polity, 2002), especially the sections on "The Causal Role of Global Institutions in the Persistence of Severe Poverty," pp. 112–16, and "Explanatory Nationalism: The Deep Significance of National Borders," pp. 139–44.

36 Here I have modified the text. In its original publication as an article, this chapter endorsed the affectedness standard embedded in Habermas's discourse principle. For reasons explained in chapter 4 ("Abnormal Justice") of my book, *Scales of Justice*, I propose in future work to develop a modified form of the discourse principle, centered on the idea that what turns a collection of people into fellow members of a public is their joint subjection to a governance structure that sets the ground rules for their interaction.

48

Migration and Poverty

Thomas Pogge

Many privileged and influential persons and governments hold that they have no weighty moral responsibility toward foreigners in desperate need. I have attacked this view elsewhere, arguing that we do have such a responsibility.[1] Of those who accept a weighty responsibility toward needy foreigners, most advocate that more such persons be admitted into the richer states and that more be done to ensure that those already here gain equal citizenship with ourselves in the fullest sense. I will argue here that such advocacy is not a good way of discharging our responsibility.

This argument may be a little hard to understand, because I agree with what I say we should not advocate. I agree that the richer states ought to admit more needy persons and ought to give equal citizenship to foreigners already here. But I question whether we should expend our scarce political energy and resources on these issues. Rather than try to get our compatriots to support admitting more needy foreigners and to support equal citizenship for foreigners already here, we should instead try to enlist them for other moral projects with regard to which our mobilizing efforts can be much more effective. What these other moral projects are will become clear in due course.

For purposes of the present argument, I can take for granted a moral concern for needy foreigners, many of whom would like to be admitted into the rich countries. To get a sense of the real-life dimensions of this issue, we must ask: who are the persons seeking admission? Why do they want to come? And what moral claims do they have on us?

The answers to the first two questions are familiar. Very large numbers of persons live under truly terrible conditions: desperately poor and without effective rights of any sort. Every now and then, one can learn about some such lives through the media.[2] One can learn, for example, about the other side of the sex tourism advertisements – about the young girls and boys who, after being kidnapped, or sold by their parents, spend their teenage years enslaved in brothels in Bangkok or in Bombay or in any one of hundreds of cities in the so-called Third World. One can learn about the other side of those beautiful oriental rugs by reading about that little boy who was relinquished by his parents to settle a debt of $15 and who was then chained to a loom and forced to make carpets during every waking hour of his life. He escaped and tried to mobilize world public opinion in order to rescue other children forced into a similar

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fate. But his campaign did not last long: he was shot and killed in his native Pakistan still only twelve years old. One can read, finally, the latest Amnesty International annual report, detailing how some 150 national governments imprison and torture their political opponents.

We know at least vaguely that such things are going on, and this knowledge lends moral urgency to our conviction that the rich states have a moral obligation to take such people in, to rescue them from their dreadful situation. But before we act on this conviction, before we publicize it and try to win the support of our compatriots and governments, we should reflect upon two further facts.

The first further fact is the sheer extent of desperate need, which can be grasped by looking merely at the problem of global poverty. Some 20 million deaths per year – mostly female and mostly children[3] – are attributed to poverty: "Nearly 800 million people do not get enough food, and about 500 million people are chronically malnourished" and about 1300 million people (24 percent of humankind) live below the international poverty line[4] – which is defined as "that income or expenditure level below which a minimum, nutritionally adequate diet plus essential non-food requirements are not affordable"[5] and currently corresponds to an annual *per capita* income of ca. $75. With hundreds of millions falling significantly below this line, we can assume that the income of the poorest fifth (1100 million) of humankind is about one-quarker percent of world income, or $50 *per capita* annually – while the richest fifth has over 90 percent of world income, or $19000 *per capita* annually, nearly 400 times more than the poorest fifth.[6] With regard to wealth, the disparity is even greater, because the poor tend to have much less wealth than annual income, while the rich tend to have much more wealth than annual income. The wealth of the richest five persons suffices to match the combined annual income of the poorest fifth, and the wealth of the richest 358 (the dollar billionaires) suffices to match the combined annual income of the poorest 45 percent.[7]

Two important lessons may be drawn from these amazing statistics – one piece of bad news and one piece of good news. The bad news is that the number of desperate foreigners whom the rich countries now admit every year, and also the larger number of desperate foreigners they might conceivably come to admit under the best of circumstances – these numbers are ridiculously small in comparison to the number of those who are in desperate need and would like to come. The good news is that, despite the huge number of the global poor, it would be quite possible to improve their conditions decisively, if the rich countries were willing to make a concerted effort. Remember: just one percent of the income of the richest fifth is nearly *four times* the income of the poorest fifth of humankind.

I will now discuss each of these two points, before drawing the obvious conclusion from them, which is: other things being equal, those who accept a weighty moral responsibility toward needy foreigners should devote their time, energy, and resources *not* to the struggle to get more of them admitted into the rich countries, but *rather* to the struggle to institute an effective program of global poverty eradication. The rider "other things being equal" is meant to exclude those whose jobs or expertise give them special opportunities to support needy foreigners who are seeking or have gained admission into one of the rich countries. My argument may not apply to them.

The first point – the bad news – was that the admission of needy foreigners into the rich countries cannot possibly protect all who now live under dreadful conditions and would want to come. One reason for this is that the number of needy persons in the world – including at least those 1300 million who cannot afford "a minimum, nutritionally adequate diet plus essential non-food requirements" – is simply out of all proportion to the number of needy foreigners which the rich countries admit or could admit. To see this, compare the 1300-million figure to two other numbers:

(a) The number of refugees legally admitted in 1995 by all the countries of the European Union combined: ca. 25,000;
(b) The number of legal aliens from all outside countries estimated to be now living in the European Union: ca. 10 million.[8]

For every person we can persuade some rich country to admit, there will be hundreds, if not thousands, left in desperate need.

There is another reason why the admission of needy foreigners will not solve the problem. This is the second further fact I had wanted to mention, namely: not many of those whom the rich countries admit are really among the worst-off. It is quite obvious, on reflection, why this should be so: it helps a very great deal, in the scramble to gain admission, to have money for bribing officials, for paying smugglers, and for hiring a lawyer; to have some education, professional skills, and language training; to have some relative who has already succeeded in gaining

admission; and also to be well endowed: bright, tall, healthy, and good looking. But persons with these advantages will rarely be among the neediest. In whatever way the rules for admitting needy foreigners may be designed – in this or that rich country, now or in the future – the truly worst-off always compete at a great disadvantage against more privileged persons from the poor countries who will often be able to elbow them aside.

This important second fact also helps to put into perspective an argument often made in favor of admitting needy foreigners. When admitted and allowed to work in one of the rich countries, so it is said, they are likely to send money back home to their families. This is true. But the families to whom this money is being sent are often among the more privileged in the poor country in question. Of course, some of these funds may "trickle down" to the poorest. But some will also be used to cement and entrench the oppression of the poorest by Third-World "elites." In any case, these funds are far more likely to increase than to reduce domestic inequality in the poor countries and therefore are a mixed blessing at best.

I must respond at least briefly to one prominent objection against my claim that the task of persuading our compatriots and governments to admit more needy foreigners has less moral urgency than we tend to suppose. The objection is this: there is a small class of needy foreigners whose admission is of much greater moral importance than that of the desperately poor. These are *political refugees*, fleeing persecution for their expressed beliefs or peaceful political activity. In response: I cannot see why the moral importance of admitting political refugees should be any greater than that of admitting so-called economic migrants. For one thing, the politically persecuted are not, in general, worse off than the desperately poor. Being imprisoned for one's beliefs is not, in general, worse than working 16-hour days while being permanently hungry. Being beaten to death for participating in a demonstration is not, in general, worse than dying of diarrhoea or simple starvation. Second, the politically persecuted are generally better educated and more resourceful, hence better able to protect themselves. Third, the desperately poor are *also* the victims of political oppression, for they are excluded from all better economic opportunities through the coercive power of governments. Their plight is produced by the present national and international economic order which is coercively upheld by their governments and ours.[9] And fourth, even if this third reason did not hold and desperate poverty were not then imposed upon the global poor by others, there would still be no moral reason to discriminate. For protecting one person from being killed by an attacker is not, in general, morally more important than protecting another from drowning. There may be special circumstances, of course, as when our own government has played a role in the attack – for example, by delivering arms to a government that now uses them to oppress its opponents. But such special circumstances often obtain also in regard to desperate poverty, as when our market demand for coffee and flowers causes land use in some poor country to be converted toward these export crops, thereby driving the prices of rice and beans beyond the means of the local poor.

So much in support of the first point. There are hundreds of millions of needy people in this world. Helping to protect them is of great moral importance. Getting such persons admitted into one of the rich countries does indeed protect them. But by this method only a ridiculously small fraction of those in desperate need can be protected, even under the most optimistic assumptions about what we can get our governments and compatriots to accept.

Let us now attend to the second point, the *good* news, which is that it is quite possible to protect most of those in desperate need by other means. You may remember my estimate that the annual *per capita* income of the poorest fifth of humankind is around $50. You may have thought this estimate misleading because, as is well known, one dollar buys much more in a poor country than it would buy in a developed country. Economists take account of this fact by converting annual income figures in terms of "purchasing power parities" (PPP). Instead of saying of some poor textile worker in India that she is earning one dollar a week, they say that she is earning, say, five dollars PPP per week. Behind this lies the following thought. While the 36 rupees this woman earns weekly are equivalent to one dollar at the market exchange rate, these 36 rupees can buy much more in India than one dollar can buy in the developed countries. So the translation of 36 rupees into five dollars PPP means that this woman can buy with her 36 rupees about as much as we can buy with five dollars.[10]

I mention purchasing power parities for two reasons. First, to respond to the suspicion that I have shamelessly overstated the severity of global poverty. I plead guilty. So instead of saying that the annual income of the global poor is around $50, let us instead say that it is around $250 PPP.[11] But this surely does not invalidate what I have said about the severity of global poverty. Having on average as much purchasing power as $250 annually would supply in the developed countries, the poorest

fifth are still desperately poor. They can perhaps, in normal times, afford just enough basic foodstuffs to survive – but virtually nothing else by way of vacations, education or medicines, presents for the children, or savings. Any small mishap – such as an illness or a rice shortage with increase in price – can spell disaster.

My second reason for getting into purchasing power parities is to reinforce my plea for the alternative strategy toward protecting the global poor. The fact that 36 rupees buys much more in India than one dollar buys in the developed world presents a golden opportunity. This is so, because in the currency market one can actually receive 36 rupees for a dollar and thus multiply the purchasing power of one's funds. It is therefore much cheaper than one might think to reduce global poverty despite the huge number of persons affected by it. Ironically, those who like to claim that eradicating world poverty would impoverish the developed countries do not know how incredibly poor the global poor really are. Thus Rorty, for example, doubts that we are able to "help" the global poor by appealing to the claim that "a politically feasible project of egalitarian redistribution of wealth, requires there to be enough money around to insure that, after the redistribution, the rich will still be able to recognize themselves – will still think their lives worth living."[12] Rorty can rest assured; the total amount of money that the poorest 1300 million persons are lacking toward being able to satisfy their basic needs is exceedingly small. For them $75 billion a year would make a phenomenal difference – it could *double* their current income – while for us it is just 0.4 percent of the GDP of the developed countries (or one-seventh of the value of annual crude oil production or one-third of US military expenditure).

Of course, in the real world things are not so simple. Even if $75 billion could be raised in or from the rich countries, there would be no possible way of spending this money, in a concentrated way, toward the emancipation of the global poor. This is so for at least three reasons. First, there will be transaction costs, as the disbursement of the funds in dozens of countries must be planned and organized. Hundreds of people would need to be hired, including economists and accountants, and the money would have to be exchanged and transported to where it is needed, generally by hand. Second, there will be targeting costs, as some of the funds will inevitably benefit persons not in desperate need. And, third, there will be corruption costs as well: members of the local "elites" will try very hard to divert some of the funds into their own pockets, for instance by demanding payment for all sorts of bureaucratic licences and authorizations; and some of the persons involved in the distribution will inevitably be tempted to engage in extortion, passive bribery, or theft.

Because of these costs, considerably more than $75 billion per year would be needed to double the income of the global poor. Nevertheless, getting the rich countries and their citizens to support such a project is still vastly more effective than getting them to support the admission of more needy foreigners – effective, that is, toward the purpose of protecting those in desperate need. And the same holds on a smaller scale as well: with the political effort it would take to pressure some Western government to admit an extra hundred needy foreigners, we could alternatively pressure this same government to allocate a few extra million dollars to global poverty eradication. And these few extra million dollars, if effectively spent, could protect not a hundred, but thousands or even tens of thousands of desperately poor persons.

Let me be clear about the conclusion I want to draw from the two points I have developed thus far. My conclusion is *not* that we should oppose the admission of needy foreigners into our richer countries. *Not at all*. Nor am I denying that persuading our governments and compatriots to accept more needy foreigners is a worthy cause. But if this *is* a worthy cause, it is so in virtue of the protection it affords to persons who are very badly off. Protecting such persons from the oppressive conditions imposed upon them by current institutional arrangements is indeed a principal moral priority. I have argued, however, that we can do much more in respect to this priority by attempting to promote better living conditions in the poorer countries than by attempting to promote the admission of needy foreigners. Through efforts of the first kind we can protect many more, and more needy, people than through efforts of the second kind.

What then should we try to persuade our compatriots and governments to do? First, we should probably not spend our time and resources on advocating more governmental development aid. It is now abundantly clear to those who care to know that such aid is generally ineffective in protecting the global poor and is rarely even intended to do so.[13] This should not be surprising. Our government officials have some public-relations reasons to care about our country's overall foreign aid allocation as a percentage of national income. Charts with these percentages are compiled and circulated widely in the media. But why should they be concerned whether foreign aid projects they are funding now will help alleviate severe poverty in the long run? Who will evaluate those

projects, keep track of who authorized them, and hold these officials accountable for their decisions in two or five or ten years' time? The only incentives our officials have toward spending foreign-aid funds well are *moral* incentives, and among politicians these are, alas, somewhat of a rarity. Moreover, these moral incentives are opposed by powerful prudential incentives. When a rich country's government has at its disposal funds targeted for foreign aid, it has opportunities to spend them so as to promote its own interests and perhaps those of its country. Such a government can, for example, use its foreign aid funds to buy political support from domestic creditor banks and exporters, or from "elites" in strategically important Third-World countries. Moreover, such a government is likely to gain more recognition and prestige from large, high-visibility projects, which tend to benefit the poorest segments of the recipient country's population only very indirectly, if at all. A large new power plant affords nice photo opportunities, and it may also provide lots of cheap electricity. But the poorest of the poor have no electric outlets or appliances and need safe drinking water much more urgently in any case. Pressing for additional governmental development aid is not, then, the most promising idea. The rich countries are already spending some $60 billion under this rubric,[14] but the effect of this spending on the global poor is rather slight.

It is a much better idea, secondly, to persuade our compatriots to support the more efficient anti-poverty organizations such as UNICEF and Oxfam. At very low cost, these organizations provide what the poorest really need – for example, oral rehydration therapy to combat diarrhoea, wells for safe drinking water, elementary education so people can read and write and understand their rights, micro-loans to break the dependence on local landlords and loan sharks, quality seeds to increase crop yields and to reduce the need for fertilizers, stoves for fuel-efficient cooking, medical and family-planning services. The proven effectiveness of these organizations entails, on a small scale, that we as individuals have strong moral reasons to support them: we can help protect many more persons by collecting a few thousand dollars for UNICEF or Oxfam than by getting a few additional needy foreigners admitted into our country; and we are also far more likely to succeed with the first project than with the second. The proven effectiveness of these organizations entails, on a larger scale, that severe global poverty could be largely eradicated in a matter of years, if such organizations had anything like the money now available for official development aid.

This suggests a third idea about what we might persuade our compatriots and governments to do with respect to global poverty. This idea would seek to combine the best of what we already have. Official development aid is mostly inefficient, but it does provide an amount of money – about $60 billion per year – that is at least in the right ballpark. The better anti-poverty organizations are quite effective, but they do not have anything like the funds they would need to succeed on a large scale.[15] The third idea is then to create by treaty suitable global institutional mechanisms for raising a stable flow of international financing for global poverty eradication. The funds to be raised should initially be between $65 and $200 billion a year (or between one-third and one percent of the combined GNP of 25 OECD countries).

Let me indicate, just very briefly, how these funds might be raised and spent. The simplest way of raising the funds would be to oblige the governments of the rich countries to pay them out of general tax revenues. But other ways of raising the funds are better by being morally more compelling and/or by having positive collateral effects. One such idea has been floated for many years by the Nobel laureate James Tobin. He proposes a half-percent tax on currency transactions in order to discourage currency speculation. The specific intent of this tax is to reduce speculation-induced exchange rate fluctuations and thereby to enable national governments and central banks better to adapt their monetary policy to domestic economic conditions. But the tax would also raise revenues, which Tobin proposes to use for global poverty eradication.[16] Presently the volume of currency transactions is an incredible $1.5 *trillion per day*. Even if the tax achieved its purpose by reducing this volume dramatically, by a factor of 25, say, down to $60 billion a day, this tax would still raise $300 million per day or $110 billion annually – enough to eradicate malnutrition, trivial diseases, and severe poverty in a matter of years.

Another, quite plausible idea almost became reality. It was the basic principle of Part XI of the 1982 *United Nations Convention on the Law of the Sea* that natural resources on the ocean floors beneath international waters "are the common heritage of mankind" (Article 136), to be used "for the benefit of mankind as a whole … taking into particular consideration the interests and needs of developing States [through an] equitable sharing of financial and economic benefits" (Article 140), which was to have been effected by sharing of seabed mining technologies and profits (Annex III, Articles 5 and 13) under the auspices of the International Seabed

Authority, or ISA (Annexes III and IV). How could anyone have wanted to oppose this idea, to exclude the global poor, who are literally starving, from the value of seabed resource? Three successive US administrations have tried quite hard to secure the great benefits of the treaty in "protecting and promoting the wide range of US ocean interests"[17] without the sharing regime. Shortly before the Convention was to come into force (November 28, 1996), the Clinton Administration succeeded in having the sharing provisions replaced by a superseding *Agreement*.[18] This *Agreement* endorses the US view that the common-heritage principle really means that the oceans and their resources "are open to use by all in accordance with commonly accepted rules."[19] Accordingly, it frees mining companies from having to share seabed mining technologies[20] and greatly reduces the sharing of profits.[21] The *Agreement* further accommodates US demands by "1) guaranteeing a US seat in the Council [the executive organ of the ISA]; 2) allowing ourselves and a few other industrialized nations acting in concert to block decisions in the Council …"[22] In managing to renegotiate the *Law of the Sea Convention* – by pressing the Reagan era threat of founding a competing seabed resources regime with a few like-minded countries[23] – the Clinton Administration won a great victory for the US and any other countries that will have the capital and technologies for profitable seabed mining. The reaction in these wealthy countries was quiet relief: their governments raised no objections and their media largely ignored the event. The governments of the poorer countries went along as well in the interest of making the treaty universal. It is the poor persons, in any case, who can least afford being shut out from this common heritage of humankind. And so, for rather trivial gains,[24] one viable and morally plausible opportunity of raising funds for poverty eradication through the sale of seabed mining rights has been lost.[25] A mobilization in defense of the common-heritage idea could have achieved much more for foreigners in desperate need than any comparable mobilization for the sake of having more of them admitted into the rich countries.

A Global Resources Dividend or GRD offers yet another alternative for raising the requisite funds.[26] Here states, while retaining full control over the natural resources in their territories, would be required to pay a dividend proportional to the value of any of these resources they decide to use or sell. The word "dividend" is meant to suggest that all human beings, including those now excluded, are viewed as owning an inalienable stake in all limited natural resources. As with preferred stock, this stake confers no control over whether or how natural resources are to be used, but merely a claim to share in their economic benefits. Take crude oil for example. Every state extracting crude oil might be required to pay a $2 dividend per barrel ($0.0125 per liters) extracted, which would be, for the most part, passed along to the end users of petroleum products. The current global crude oil production is about 4 trillion liters (or four cubic kilometers) per year. From just the consumption of this single resource, the GRD scheme could therefore raise $50 billion annually – or somewhat less if, as is desirable, crude oil demand would decline as a consequence of its slightly increased price. The GRD could be extended to other nonrenewable resources and also, importantly, to the use of air, water and soil for the discharging of pollutants. It would then not only raise the needed revenues, but would also tend to slow down the depletion of natural resources and the pollution of our environment.

I can speak only briefly about how the funds raised for global poverty eradication should be spent. Here the most obvious idea – transferring the funds to the governments of the poorest countries – is clearly problematic: many Third-World governments and officials are even less interested in effective poverty eradication than most rich-country politicians in charge of foreign aid funds. Making them the recipients of funds raised from seabed mining, or through a Tobin tax or GRD, would greatly dilute, if not erase, their intended benefits.

To make development funds effective, the full spectrum of possible channels must be explored and exploited in a competitive way. The most important possibilities are to give funds directly to the poor themselves or to their local organizations, to spend funds through specialized organizations such as UNICEF and Oxfam, and to transfer funds to poor-country governments. The idea of competitive allocation provides that fund flows be directed and redirected to where they have the greatest effect in enabling the global poor to fulfill their needs and to defend their basic interests on their own. The effects of fund flows in terms of poverty eradication are to be closely monitored and the allocation of funds is to be adjusted accordingly, pursuant to clear rules announced in advance, so that funds flow through *those* channels and to *those* countries which lead them to their most effective use. By formulating the allocation rules in this way, incentive effects are created and mobilized. Thus, the political and economic elite of any poor country has an interest in attracting funds to its country because it, too, will benefit from these funds in various

ways. The rules governing fund disbursement should be designed to take full advantage of this interest – making it clear to such elites that, if they want to benefit from their society's receipt of funds, they must cooperate in making these funds effective toward improving the conditions and opportunities of the domestic poor. In general terms, the rules for the disbursement of funds must be designed so as to stimulate a worldwide peaceful competition in poverty eradication.[27]

It is time to take stock. We have organized our social world – and, in particular, our world economy – so that it produces and reproduces truly monstrous poverty and inequality. Over 20 million persons die each year from poverty-related causes, hundreds of millions are in desperate need. It is quite understandable, and noble actually, that our first reaction to this suffering should be to insist that we must take these people in.

> Give me your tired, your poor,
> your huddled masses yearning to breathe free the
> wretched refuse of your teeming shore …

I have argued that this first reaction is nevertheless mistaken. If there were no political resistance to open or fairly open borders, if our compatriots and governments were quite ready to receive the moral argument for them and to act on it, then things might be different. But as things stand, the needy foreigners we manage to get admitted are very costly indeed in terms of the political effort necessary to get them in and in terms also of the hostility and anger they generate among our compatriots, which makes it ever harder to enlist their support for *any* initiatives on behalf of the global poor. We can be vastly more effective in protecting those we are concerned to protect by adopting a different strategy.

Having presented the argument that this is so, it strikes me that this argument is not particularly difficult or unobvious. This raises the question why people do not generally see things my way. Why do most of those who care about needy foreigners at all think in terms of taking people in, rather than in terms of alleviating the terrible conditions that make them want to come here in the first place? To make my argument complete, I should be able to explain why this is so and also to show that any reasons others might have for thinking as they do are not good reasons.

One possible explanation is patriotism. Here I have in mind not the silly view that our country is so wonderful that no one can be happy outside of it – though I must say that this view does have its adherents, e.g. in France and the US. Nor do I have in mind the chauvinist view that only Europeans with their rich history and political traditions can govern a country well, though this view, too, seems to have some adherents, albeit a dying breed. What I mean by patriotism, rather, is the idea that we have more moral reason to promote the justice and moral perfection of our own country than those of the rest of the world. The idea is that the hostility many of our compatriots harbor against the admission of foreigners is a flaw in them that we ought to correct quite independently of the effects this correction would have on the fate of needy foreigners. We have a special responsibility, as it were, for the sentiments and prejudices of our compatriots which can seem to trump the more general responsibility we feel for global poverty.

I can surely feel the emotional force of this idea. I certainly share the moral preference for living in a country where needy foreigners are welcomed. But reversing the moral priority I have been arguing for on this ground is nevertheless, I believe, a gross mistake – for two reasons: First, it is true that our countries are often actively involved in turning away needy foreigners. But it is just as true, if much less obvious, that our countries are also actively involved in upholding the prevailing world order and, in particular, the present structure of the world economy which, quite regularly and predictably, produces and reproduces severe global poverty and inequality. In the latter case, the active involvement of the officials who purport to act in our name is so much less obvious, because the present global economic order is already in place and appears to reproduce itself without any human agency, and also because we and our officials are no more involved in its reproduction than millions of persons from the other rich countries. You feel awful, if one desperate asylum seeker is turned away by a consular official purporting to act in your name. But you feel much less awful if your government, like all the others, shows no interest in supporting or defending global economic reforms and thereby collaborates in continuing Third-World starvation and disease at current levels. The economic exclusion of 1300 million persons is brought about by the citizens and governments of the rich countries, together with corrupt Third-World elites, and, though we clearly are collectively responsible for it, we have a tendency not to feel particularly responsible, because no one is really in a position to alter this exclusion, to change the world economy. The fact that so many are maintaining this exclusion together creates the illusion that no one is really doing it, that it just happens, naturally, as it were.

A second explanation of the widespread mistaken priority is somewhat related to the first. We tend to think of refugees and asylum seekers as particular individuals, as persons with a face. We think of them as having stepped forward and knocked on our door and told us their story. How can we slam the door in their face? Of course, no one will deny that the 1300 million global poor are also persons with faces. But we think of them as an anonymous, amorphous mass. Since they have not stepped forward, they can become persons with faces only if *we* reach out to *them*, selecting them from the crowd. This requires an initiative that few of us ever take. Fundraisers, by the way, know about this quirk in our psychology and, instead of requesting a donation for poverty-stricken children in the Third World, often ask us to sponsor some *particular* child, picture enclosed. With such an appeal, the project of protecting needy children can gain some of the psychological urgency that we tend to attach to not turning back needy foreigners asking for admission.

Two other sample contrasts display the same psychological propensity of ours. Think back to World War II, of those forced to live under the terror of German occupation. Imagine what it was like to know Jews threatened by deportation while also knowing about some reasonably safe places to hide or routes of escape. It is *much* easier, psychologically, merely to fail to approach any of the Jews one knows with the offer to help than to turn away a Jewish family standing on one's doorstep. Or think of a person trapped in a cave or in a well. In such a case, we are willing to move heaven and earth, to spend millions of dollars and thousands of hours to save a human life. Do we feel the same moral urgency about installing a guard rail on a busy highway which we know would save two or three lives a year? Or about reducing emissions from a plant which we know would prevent several cancer deaths? No, we do not. We have a tendency to accept much greater costs for the sake of protecting someone we think of as a determinate individual – though on reflection this seems quite irrational, especially in a case like global poverty, where the only distinction of the determinate individuals is that they have asked for admission or have somehow managed to come here – which, if anything, tends to show that they are *less* in need than many others.

A third explanation why people might think it morally more important to work for the admission of more needy foreigners than for global poverty eradication projects is that they take the former itself to be the most effective means for promoting the latter. Once persons from the poor countries are living among us, so one might reason, they can influence those around them to be more sympathetic to the plight of Third-World populations and they can also work through our political process to initiate the kind of global poverty eradication mechanisms I have proposed. While some may accept this line of thought, I do not think there is much evidence for it. In Europe's recent experience, the influx of poor foreigners has made the population in general *less* sympathetic to suffering in foreign lands. And in the US, which has a much longer history of significant Third-World immigration, there is little indication of such immigrants even *attempting* to influence government policy in favor of their former compatriots (in contrast to Polish-, Irish-, and Jewish-Americans, for example, who make considerable political efforts on behalf of, respectively, Polish, Irish, and Israeli causes).

I have taken a position that goes against the moral beliefs, sentiments, and conduct of many persons I respect. I have tried to show, in a rudimentary way, that their contrasting view can be explained in a way that does not provide reasons against mine. For the moment, then, I believe that my view is correct. Let me say clearly, one last time, what my view is and what it is not. I have *not* argued against the admission of needy foreigners into the rich countries, nor against equal citizenship for those already here. I have *not* denied that it is wrong to refuse admission to truly needy foreigners. What I have argued is, *first*, that awful living conditions abroad are due, for the most part, to the economic exclusion of the global poor as practiced by the citizens and governments of the rich countries; and, *second*, that there are much more effective ways of protecting these poor persons from the deprivations they now suffer than by trying to get them admitted into the rich countries. Given that we – those who recognize a weighty moral responsibility toward foreigners in desperate need – have only limited resources at our disposal and cannot possibly devote ourselves to every worthy political goal, we should focus our efforts to where we can achieve the most toward overcoming the greatest injustice of our time: the impoverishment and starvation of hundreds of millions of people. We should stop attempting to get more needy foreigners admitted into the rich countries and instead concentrate on improving the local living conditions of the global poor through international institutional reforms, like the Tobin Tax or the GRD, and through effective international aid organizations, like UNICEF and Oxfam.

Notes

1 Pogge 1989, ch. 6, Pogge 1992, Pogge 1994, Pogge 1995; Pogge 1997a; Pogge 1997b.

2 For example: "Asia's Plantations of the '90s," *International Herald Tribune*, April 15, 1996, p. 2; "The Flourishing Business of Slavery," *The Economist*, September 21, 1996, pp. 43–4.

3 Some 3 million children annually die of simple diarrhoea because their parents cannot obtain a 15-cent oral rehydration pack. Lack of vitamins and antibiotics leads to another 3.5 million deaths from pneumonia, one million deaths from measles, and so on. See Grant 1993.

4 UNDP 1996, p. 20.

5 Ibid., p. 222.

6 What I say here may seem to conflict with a prominent statement in the Report: "The poorest 20% of the world's people saw their share of global income decline from 2.3% to 1.4% in the past 30 years. Meanwhile, the share of the richest 20% rose from 70% to 85%. That doubled the ratio of the shares of the richest and the poorest – from 30:1 to 61:1" (ibid, p. 2). These ratios were, however, calculated from country aggregates. The two relevant fifths were formed by simply taking the populations of the richest and poorest *countries*, with each set of countries selected so that it represents one fifth of world population (according to the written explanation I received from Mr. Selim Jahan, Deputy Director of the UNDP Human Development Report Office, New York City). But this yields the ratio between the average income in the richest countries and the average income in the poorest countries, not the income ratio between the richest and poorest fifths of "the world's people." The former ratio is obviously a very bad estimate of the latter: the income of the richest fifth is underestimated, as many poor in the richest countries are much poorer than many rich in non-rich countries (so the latter, not the former, should be included in the top fifth). And the income of the poorest fifth is hugely inflated as the poorest in middle-income countries such as Brazil are excluded in favor of more affluent persons in the poorest countries (among them, for instance, President Mobutu Sese Seko, whose income is a rather considerable part of the Zairian national income).

7 Ibid, p. 13.

8 These two figures are from the *International Herald Tribune*, March 5, 1996, p. 5.

9 See Pogge 1997b.

10 The 5:1 ratio is realistic, in that India's 1993 GDP *per capita* is $250 (calculated from GDP and population; UNDP 1996, pp. 179, 185) and its real GDP (PPP) *per capita* is given as $1240 (*ibid*, p. 136). The weighted average ratio for all poor countries is close to 5:1, though the ratios given for individual poor countries differ significantly – ranging from 2:1 (Mali) to 8:1 (Tanzania).

11 Similarly, the international poverty line should then be expressed not as annual *per capita* income of $75 (20 cents a day), but as annual *per capita* purchasing power of $375. Being poor means having less purchasing power than $1 a day affords in the developed countries. 1300 million persons, 24 percent of humankind, are poor in this sense (UNDP 1996, 27). (Mr Selim Jahan, Deputy Director of the UNDP Human Development Report Office, has confirmed orally that the $1-per-day figure printed in the Report represents purchasing power, not income. This squares with figures given in Dasgupta 1993, pp. 79–80.)

12 Rorty 1996, pp. 14–15. Rorty's essays are, of course, to be taken as "narratives."

13 There are important exceptions, notably the Scandinavian countries and the Netherlands. The present paragraph does not apply to them.

14 Official development assistance by the rich countries was $59 billion, or 0.3 percent of their combined GNP, in 1994. Of this, less than one quarter went to the least developed countries. Norway was the most generous country, allocating 1.05 percent of its GNP (0.44 percent for the least developed countries). The US was the least generous, allocating 0.15 percent of its GNP (0.04 percent for the least developed countries). Though Norway, Sweden, Denmark and the Netherlands together have only 13 percent of the US population and 12 percent of US GNP, they spend more than the US on aid for the least developed countries. For all these 1994 data, see UNDP 1996, pp. 199, 203, 208. In 1995, the US reduced its official development aid by more than one quarter, from $9.927 billion to $7.367 billion (written communication from Sigismund Niebel, OECD, Paris).

15 The entire United Nations Organization with its dozens of agencies has an annual budget of $1.3 billion and is undergoing drastic cut-backs this year [1997] as a result of unpaid membership dues. The UN is owed some $3 billion in back dues, about half of this by the US.

16 For a brief statement of the idea, see Tobin 1994, where he acknowledges that "raising revenues for international purposes was not a primary motivation of my proposal."

17 Ambassador David A. Colson, Deputy Assistant Secretary of State for Oceans, in testimony before the Subcommittee on Oceanography of the Merchant Marine and Fisheries Committee of the US House of Representatives (April 26, 1994).

18 *Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982*. Its Article 2(1) says: "In the event of an inconsistency between this agreement and Part XI, the provisions of this agreement shall prevail."

19 US Department of State: *Commentary on the Law of the Sea Convention including the 1994 Amendments* p. 3. "The

Agreement fully meets the objections of the United States and other industrialized states to Part XI" (ibid, p.2), which were that: "it established a structure for administering the seabed mining regime that does not accord the industrialized States influence in the regime commensurate with their interests; it incorporated economic principles inconsistent with free market philosophy; and its specific provisions created numerous problems from an economic and commercial policy perspective that would have impeded access by the United States and other industrialized countries to the resources of the deep seabed beyond national jurisdiction" (ibid, pp. 2–3).

20 The provisions of Annex III, article 5, of the Convention shall not apply. Section 5(2) of the Annex to the *Agreement* (cited in note 18).

21 Section 7(1) of the Annex to the *Agreement* (cited in note 18) limits the sharing of profits to "economic assistance" to "developing countries which suffer serious adverse effects on their export earnings or economies resulting from a reduction in the price of an affected mineral or in the volume of exports of that mineral, to the extent that such reduction is caused by [seabed mining]." Section 8(3) halves the application fee for exploration and exploitation of sites to $250,000 and Section 8(2) eliminates the $1,000,000 annual production fee as well as the profit-related financial contributions (all of which were mandated in the *Convention*'s Annex III, Article 13).

22 Colson *op.cit*. (note 17).

23 Germany and Great Britain were especially willing to go along with such a move.

24 At current metals prices, seabed mining is not expected to become commercially worthwhile for quite some time.

25 One may object that any funds Part XI of the *Convention* might have raised for the least developed countries would – like so much official development aid – have ended up in the pockets of corrupt Third-World politicians and bureaucrats. But, surely, the choice of throwing money at corrupt Third-World elites versus ignoring global poverty does not exhaust the available options. Clinton might well have pressed for terms that ensure that the funds raised are spent on effective poverty eradication.

26 For an elaborate statement of this proposal, see Pogge 1995c.

27 Pogge 1995c, section 3, develops these points in more detail.

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Humanity and Justice in Global Perspective

Brian Barry

This chapter has three sections. The first argues that considerations of humanity require that rich countries give aid to poor ones. The second argues that considerations of justice also require transfers from rich countries to poor ones. The third picks up the distinction between aid and transfer and argues that, when we get into detail, the obligations imposed by humanity and justice are different, although not incompatible.

I Humanity

Introduction

What is it to act in a way called for by humanity? A humane act is a beneficent act, but not every beneficent act is a humane one. To do something that helps to make someone who is already very happy even happier is certainly beneficent, but it would not naturally be described as an act called for by considerations of humanity.

The *Oxford English Dictionary* defines humanity as "Disposition to treat human beings and animals with consideration and compassion, and to relieve their distresses; kindness, benevolence."[1] In this essay I shall understand by "humanity" the relief of distress. As a matter of usage, it seems to me that the *OED* is right to put this before the more extended sense of kindness or benevolence in general. In any case, it is this notion that I want to discuss, and the word "humanity" is the closest representation of it in common use.

There are three questions to be dealt with. First, is it morally obligatory to behave humanely, or is it simply laudable but not morally delinquent to fail so to act? Second, if it is morally obligatory, what implications does it have, if any, for the obligations of rich countries to aid poor ones? Third, if (as I shall suggest) rich countries have a humanitarian obligation to aid poor ones, on what criterion can we determine how much sacrifice the rich countries should be prepared to make?

The Obligation of Humanity

I shall begin my discussion by taking up and considering the argument put forward by Peter Singer in his article "Famine, Affluence and Morality."[2] Singer puts forward a simple, clear, and forceful case for a humanitarian obligation for those in rich countries to give economic

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aid to those in poor countries. The premises of his argument are as follows. The first is "that suffering and death from lack of food, shelter, and medical care are bad."[3] The second is given in two alternative forms. One is that "if it is in our power to prevent something bad from happening, without thereby sacrificing anything of comparable moral importance, we ought, morally, to do it."[4] The other, and weaker, form is that "if it is in our power to prevent something very bad from happening, without sacrificing anything morally significant, we ought, morally, to do it."[5] He goes on to say that "an application of this principle [i.e., the second version] would be as follows: if I am walking past a shallow pond and see a child drowning in it, I ought to wade in and pull the child out. This will mean getting my clothes muddy, but this is insignificant, while the death of the child would presumably be a very bad thing."[6] All that has to be added is that the application of the second premise is unaffected by proximity or distance and "makes no distinction between cases in which I am the only person who could possibly do anything and cases in which I am just one among millions in the same position."[7] If we accept these premises, we are committed, Singer claims, to the conclusion that people in the rich countries have a moral obligation to help those in the poor countries.

For the purpose of this chapter, I am going to take it as common ground that one would indeed be doing wrong to walk past Peter Singer's drowning child and do nothing to save it. This of course entails that, at least in the most favorable cases, duties of humanity must exist. In the space available, it hardly makes sense to try to argue for a complete theory of morality from which this can be deduced, and in any case I myself am more sure of the conclusion than of any of the alternative premises from which it would follow. Anyone who disagrees with the claim that there is an obligation to rescue the child in the case as stated will not find what follows persuasive, since I certainly do not think that the case for international aid on humanitarian grounds is *stronger* than the case for rescuing the drowning child.

Does the Drowning Child Case Extend to International Aid?

The extension of the drowning child case may be challenged along several lines. Here I can only state them and say briefly why I do not think they undercut the basic idea that the case for an obligation to save the drowning child applies also to giving international aid. The appearance of dogmatism is purely a result of compression.

The first argument is that the child may be supposed not to be responsible for his plight (or at any rate it may be on that supposition that the example gets to us) but that countries are responsible for their economic problems. My comments here are two. First, even if it were true that the death by disease and or starvation of somebody in a poor country were to some degree the result of past acts or omissions by the entire population, that scarcely makes it morally decent to hold the individual responsible for his plight; nor, similarly, if his predicament could have been avoided had the policies of his government been different.

Let us move on to consider another way in which a challenge may be mounted to Singer's extension of the argument for a duty to aid from the case of the drowning child to that of famine relief. It may be recalled that Singer explicitly made the shift from one case to the other via the statement that neither proximity nor the one-to-one relation between the victim and the potential rescuer makes any moral difference. Clearly, if this claim is denied, we can again agree on the duty to rescue the drowning child but deny that this is an appropriate analogue to the putative duty of people in rich countries to aid those in poor ones. A number of philosophers have tried to drive a wedge between the cases in this way, but I have to say that I am not very impressed by their efforts. The argument for proximity as a relevant factor is that, if we posit a duty to rescue those near at hand, we keep the duty within narrow bounds and thus do not let it interfere with people's life plans; but, if we allow the duty to range over the whole of mankind, it becomes too demanding. Although some people see merit in this, it appears to me that it is invoked simply because it provides a way of arbitrarily truncating the application of the principle so as to arrive at a convenient answer. I shall go on later to agree that there are limits to what people can be required to sacrifice. But I see no ethically defensible reason for saying that, if we can't (or can't be required to) do anything we might, we should simply contract the sphere of operation of the principle that we are obliged to relieve suffering. Perhaps we should channel our limited humanitarian efforts to where they are most needed, which, if we live in a relatively rich country, is likely to be outside its boundaries.

Singer also made it explicit that, if the case of the drowning child were to be extended to international aid, one would have to rule out the one-to-one relation between the rescuer and the potential rescuee as a morally relevant factor. Attempts have been made to do so, but they likewise seem to me to lack merit. If there are

several people who could save the drowning child, it is sometimes said that none of them is particularly responsible for saving it. But if the child drowns because none of them saves it, they are all, I would suggest, morally responsible for its death. Conversely, suppose that several people are drowning at some distance from one another and there is only one person around to save them. It has been argued that since that person cannot do his duty, if that is defined as saving all those whom he might save (assuming that he could save any one of them but cannot save more than one), no such duty exists. The obvious reply to this is that the duty has been incorrectly defined: the duty in this case is to save one, and his duty is not affected by the fact that there are others who cannot be saved.

Finally, it might be accepted that the case of the drowning child would extend to international aid if the aid would do any good, but then denied that it will. The main lines of this argument are two. The first is the one from waste and inefficiency: aid does not get to the right people; development projects are a disaster; and so on. But I would claim that even if waste is endemic in aid to poor (and probably ill-organized) countries, the difference it makes to health and nutrition is sufficient to make it worth giving if only part of it gets to the people it is supposed to get to. And if, as is all too true, aid in the past has often been inappropriate, the answer is not to withhold aid but to make it more appropriate: no more massive dams, electricity-generating stations, or steel mills, but cheaper, less complex, and more decentralized technology.

The second line of argument is the neo-Malthusian: that the only effect of aid in the long run is to lead to population increase and thus to even more suffering. I agree that if this is the only effect of aid, the humanitarian case for it falls to the ground. But it is clear that economic development combined with appropriate social policies and the widespread availability of contraception can actually reduce the rate of population growth. The implication is thus that aid should be given in large amounts where the social and political conditions are right, so as to get countries through the demographic transition from high birthrate and high death rate to low birthrate and low death rate as rapidly as possible.

Where ideological or religious dogmas result in pronatalist government policies or rejection of contraception by the population, one might conclude that aid would be better withheld, since the only foreseeable effect of economic improvement will be to increase numbers. But can we really be so sure that attitudes will not change? The election of a relatively young and doctrinally reactionary pope does not encourage hopes of any early change in official doctrine. But even without any change at that level, it is striking how, in the developed countries, the practices of Roman Catholics have altered dramatically in just a couple of decades. For example, in the Province of Quebec, which had for more than two centuries a birthrate close to the physical maximum, with families of more than 10 children quite common, has now one of the lowest birthrates in North America.

How Far Does the Obligation Extend?

If we accept the conclusion that the rich have some obligation on humanitarian grounds to provide economic aid to the poor, the next question is, How much sacrifice is required? In my view, no simple and determinate criterion is available. This is a problem of the obligation of humanity in general, not a peculiarity of the international context. In the standard case of rescuing someone in danger of drowning, the usual guidance one gets from moral philosophers is that the obligation does not extend to risking one's life, though it does require that one suffer a fair amount of inconvenience. However, the decision in such cases, like that of Singer's drowning child, characteristically has clear and finite limits to its implications. But, given the failure of most people or governments in rich countries to give much aid, it would clearly be possible for individuals to give up a high proportion of their incomes without risking their lives and still leave millions of savable lives in poor countries unsaved. Thus, the question of limits is pressing.

There is an answer that is, in principle, straightforward. It is the one embodied in Singer's claim that one is obliged to help up to the point at which one is sacrificing something of "comparable moral importance." This is, of course, a maximizing form of consequentialism. If you say that pains and pleasures are what is of moral importance, you get Benthamite utilitarianism (in the traditional interpretation, anyway); if you say it is the enjoyment of beauty and personal relationships, you get G.E. Moore's ideal consequentialism; and so on. The trouble with this is, needless to say, that most of us do not see any reason for accepting an obligation to maximize the total amount of good in the universe.

Singer's weaker principle that we should give aid up to the point at which we are sacrificing anything of moral importance seems to me useless: for a Benthamite utilitarian, for example, even getting one's trousers muddy would be in itself an evil – not one comparable to the

death of a child, but an evil none the less. Even Singer's chosen case would therefore be eliminated on this criterion, let alone any more strenuous sacrifices.

Conclusion

I conclude, provisionally and in the absence of any plausible alternative, that there is no firm criterion for the amount of sacrifice required to relieve distress. This does not mean that nothing can be said. I think it is fairly clear that there is a greater obligation the more severe the distress, the better off the potential helper would still be after helping, and the higher the ratio of benefit to cost. What is indefinite is where the line is to be drawn. In the words of C.D. Broad, in what may be the best single article in philosophical ethics ever written, "it is no objection to say that it is totally impossible to determine exactly where this point comes in any particular case. This is quite true, but it is too common a difficulty in ethics to worry us, and we know that we are lucky in ethical questions if we can state upper and lower limits that are not too ridiculously far apart."[8]

What, in any case, are we talking about here as the range? We could perhaps wonder whether the level of aid from a country like the United States should be 3 percent of GNP (the level of Marshall aid) or 10 or 25 percent. But, unless we reject the idea of an obligation to aid those in distress altogether, we can hardly doubt that one quarter of 1 percent is grotesquely too little.

II Justice

The Concept of Justice

"Are we not trying to pack too much into the concept of justice and the correlative concept of rights? The question whether it is *wrong* to act in certain ways is not the same question as whether it is *unjust* so to act."[9] I think the answer to Passmore's rhetorical question is in the affirmative. We should not expect to get out of "justice" a blueprint for the good society – nor should we wish to, since that degree of specificity would inevitably limit potential applicability. Surely it ought to be possible for a just society to be rich or poor, cultivated or philistine, religious or secular and (within limits that are inherent in justice itself) to have more or less of liberty, equality, and fraternity.

Up to this point, I have studiously avoided any reference to justice. I have been talking about the obligation to relieve suffering as a matter of humanity. The fact that the obligation is not derived from justice does not make it a matter of generosity, nor does it entail that it should be left to voluntary action to adhere to it. It is an obligation that it would be wrong not to carry out and that could quite properly be enforced upon rich countries if the world political system made this feasible. And the core of the discussion has been the claim that the obligation to help (and a fortiori the obligation not to harm) is not limited in its application to those who form a single political community.

It is of course open to anyone who wishes to do so to argue that, if the rich have a properly enforceable obligation to give, this is all we need in order to be able to say that the rich must give to the poor as a matter of justice. I have no way of proving that it is a mistake to use the term "just" to mark out the line between, on the one hand, what is morally required and, on the other, what is praiseworthy to do but not wrong to omit doing. All I can say is that such a way of talking seems to me to result in the blunting of our moral vocabulary and therefore to a loss of precision in our moral thinking. Justice, I wish to maintain, is not merely one end of a monochromatic scale that has at the other end sacrifice of self-interest for the good of others to a heroic or saintly degree. Rather, it points to a particular set of reasons why people (or societies) may have duties to one another and to particular features of institutions that make them morally condemnable.[10]

I shall return to the distinction between humanity and justice in Section 3, where I shall be able to refer to the results of my discussions of each of them. My plan is to analyze justice under two heads. The first is justice as reciprocity; the second, justice as equal rights. These are both familiar ideas though I shall give the second a slightly unfamiliar twist. Justice as reciprocity I will discuss in three aspects: justice as fidelity, justice as requital, and justice as fair play.

Justice as Fidelity

The notion of justice as fidelity is that of keeping faith. In addition to covering contract and promises, it extends, in a rather indefinite way, to meeting legitimate expectations not derived from explicit voluntary agreement. Clearly it is an essentially conservative principle and tends if anything to operate contrary to the interests of poor countries, insofar as they often find themselves in the position of seeking to renegotiate disadvantageous deals with transnational corporations within their territories.

Justice as Requital

Justice as requital is also a basically conservative principle but can, on occasion, have revisionist implications vis-à-vis justice as fidelity. No simple rule governs what happens when they conflict. Henry Sidgwick, with characteristic caution, said that we have two standards of justice, as the customary distribution and as the ideal distribution, and added that "it is the reconciliation between these two views which is the problem of political justice."[11] I shall not take up that challenge here, but explore the possible implications of justice as requital for international distribution.

The idea of justice as requital is that of a fair return: a fair exchange, a fair share of benefits from some common endeavor, and so on. The most obvious application in the relations between rich and poor countries is whether poor countries are getting fair prices for their exports and paying fair prices for their imports. This, of course, raises the obvious question of what the criterion of a "fair price" is. Suppose, however, that we say, minimally, that it is the prevailing world price. Then it seems clear that, even on this criterion, many poor countries have legitimate complaints about the transfer pricing of transnational corporations. For example, when in the late 1960s the Andean Pact countries (Bolivia, Colombia, Ecuador, and Peru) started taking a serious interest in the pricing policies of transnational corporations operating within their territories, they found overpricing of imports to be the norm, sometimes by factors of hundreds of percent, and, less spectacularly, underpricing of the value of exports.[12] This enabled the companies to attain rates of return on capital of often more than 100 percent while at the same time evading government limits on repatriation of profits. Since the Andean Pact countries have been politically independent for a century and a half and have relatively sophisticated bureaucracies compared with most countries in the Third World, it is inconceivable that similar practices do not obtain in other, more vulnerable countries.

When we turn to the structure of world prices itself, the criterion of justice as requital becomes less helpful. The countries of the Third World, as part of their demands for a "New International Economic Order" have demanded an "Integrated Program" of commodity management that would be designed to push up the prices of raw materials in relation to manufactured products.

The success of the Organization of Petroleum Exporting Countries (OPEC) is, of course, significant here in providing a dazzling example of the effectiveness of a producer cartel. Oil, however, seems to be unique in that it is so cheap to extract and worth so much to consumers. This means that it has always, since the days of the Pennsylvania oilfields, yielded enormous economic rents. The only question has been who captured them. And clearly, until 1973, the Middle Eastern oil producers were getting only a small proportion of the economic rent.

Other commodities are not like oil. It may indeed be possible to push up the prices by restricting supply, but substitution or recycling is likely to set in. From the long-run point of view of the world, this pressure toward conservation would be desirable, no doubt, but the point is that it does not spell a bonanza for the raw material producers.

Clearly, this is only scratching the surface, but I think that it is, at any rate, important to keep in mind that, even if commodity prices could be raised substantially across the board, this would not make most poor countries *appreciably* better off; and it would make some, including the important cases of India and Bangladesh, worse off. Whatever conclusion one wishes to draw, therefore, about the applicability to world prices of justice as requital, the implications are not going to be such as to solve the problem of poor countries that are also resource poor.

Justice as Fair Play

We still have to see if any redistributive implications flow from the third branch of justice as reciprocity: justice as fair play. The idea here is that if one benefits (or stands to benefit) from some cooperative practice, one should not be a "free rider" by taking the benefits (or being ready to take them if the occasion arises) while failing to do one's part in sustaining the practice when it is one's turn to do so. Thus, if others burn smokeless fuel in their fireplaces, pack their litter out of the backcountry, or clean up after their dogs, it is unfair for you to refuse to do the same.

The principle of fair play has a potentiality for underwriting a certain amount of redistribution from rich to poor insofar as one practice that might be regarded as prospectively beneficial to all concerned would be the practice of helping those in need. If such a practice existed, it would operate analogously to insurance, which is a contractual way of transferring money from those who have not suffered from certain specified calamities to those who have. The principle of fair play would then hold that it would be unfair to be a free rider on a scheme of helping those in need by refusing to do your part when called upon.

The invocation of this notion of what the sociobiologists call "reciprocal altruism" may appear to provide a new way of distinguishing the drowning child case from that of international aid. Perhaps what motivates us in agreeing that there is an obligation to rescue the child is an unarticulated contextual assumption that the child belongs to our community (however widely we may conceive that "community") and that there are norms within that community calling for low-cost rescue from which we stand to gain if ever we find ourselves in need of rescue. Such feelings of obligation as we have in this case can therefore be adequately explained by supposing that they arise from the application of the principle of fair play. It was, thus, an error to have taken it for granted that an acknowledgment of an obligation to help in the drowning child case must show that we accepted a general principle of an obligation to aid those in distress.

I believe that the objection is formally valid. That is to say, it is possible by invoking the principle of fair play to underwrite the obligation to rescue the drowning child without committing oneself to a universal obligation to rescue. One could respond to this by arguing that the conclusions in Section I of this essay can be reinstated by deriving universal obligations from the existence of world community. I shall consider this argument below. But before doing so, I should like to follow an alternative and more aggressive line.

The point to observe is that, although we may indeed be motivated to agree that we ought to rescue the drowning child by considerations of justice as reciprocity, it does not follow that we are motivated solely by those considerations. Suppose that you are briefly visiting a foreign country, with an entirely alien culture, and have no idea about the local norms of rescue. Would you, if you came across Singer's drowning child, have an obligation to wade in and rescue it? I think that most people would say yes in answer to that question. And, clearly, those who do are acknowledging obligations of humanity as distinct from obligations of justice.

None of this, of course, is intended to suggest that the difficulties in moving from a general obligation of humanity to an obligation on the part of rich countries to give economic aid to poor ones is any less problematic than it appeared earlier. But it does fend off a possible challenge to the move from the drowning child case to the universal obligation to aid. The view I want to maintain is that the answer in the drowning child case is overdetermined where the duty of fair play also underwrites rescue. The strength of the obligation depends upon the circumstances, but it never disappears. Both psychologically and morally, the obligation to aid would be strongest if there were an explicit and generally observed agreement among a group of parents to keep an eye on one another's children: humanity, fidelity, and fair play would then coincide and reinforce each other. The obligation would be perhaps a little less strong but still very strong in a small, stable, and close-knit community with a well-developed tradition of "neighborliness," since the obligation of fair play would here have maximum force. It would be less strong if the norm of rescue were more widely diffused over a whole society, and would of course vary according to the society. (New Zealand would rate much higher than the United States on the strength of the norm of helping strangers within the society, for example.) And, finally, in the absence of any established practice of aiding strangers that would give rise to obligations of fair play, there is still, I am suggesting, an obligation of humanity that does not in any way depend upon considerations of reciprocity.[13]

I have been taking for granted that the existence of a practice of rescue does give rise to an obligation to play one's part. This can be questioned. Somebody might say: "Why should I cooperate with the scheme if I'm willing to renounce any benefits that might be due to me under it?"[14] But the cogency of the objection depends upon the existence of stringent conditions of publicity: it must be possible to make this known to all those in the scheme, and it must be remembered perhaps for decades. (This is essential, since many transfers to those in need are going to be predominantly from the young and middle-aged to the old, so it would undermine the integrity of any such cooperative scheme if people could change their minds about its value as they got older.) Neither condition is generally met. Consider a practice of rescuing the victims of accidents – drowning swimmers are the usually cited case. If this practice exists in a whole society, it is not feasible for those who wish to opt out to notify everybody else in advance. And how many could be counted on to be strong-minded enough to wave away a would-be rescuer when they were in need of help themselves? Even if they could, in many cases the rescuer has to incur the trouble and risk in order to get there (as with rescuing a swimmer) or the victim may be unconscious and thus incapable of spurning help.

It is crucially important to notice, however, that the principle of fair play is conditional; that is to say, it stipulates that it is unfair to be a free rider on an actually existing cooperative practice, and that it *would* be unfair to free ride on other mutually beneficial practices if they

did exist. But it does not say that it is unfair for a practice that would, if it existed, be mutually beneficial, not to exist.

As anyone familiar with Rawls's theory of justice will have been aware for some time, we are here on the edge of deep waters. For one strand of Rawls's theory is precisely the notion of justice as reciprocity that is embodied in the principle of fair play. According to Rawls, a society is a scheme of social cooperation, and from this fact we can generate, via the notion of fair play, principles of justice. But, clearly, any actual society simply generates whatever is generated by its actual cooperative practice. If it provides retirement pensions out of social security taxes, it is unfair to be a free rider on the scheme by dodging your share of the cost. And so on. But if I am right about the applicability of the principle of fair play, the most Rawls can say about a society that does not have such a scheme is that it suffers from collective irrationality in that it is passing up a chance to do itself some good. He cannot, I suggest, employ the principle as a step in an argument that such a society is unjust.

I make this point because Charles Beitz, in the last part of his admirable book, *Political Philosophy and International Relations*,[15] has argued, within a Rawlsian framework, for a global difference principle. That is to say, income should be redistributed internationally so that the worst-off representative individual in the world is as well off as possible. Beitz acknowledges that he is taking for granted the general validity of Rawls's theory and is simply arguing from within its basic premises for the dropping of Rawls's restriction on the application of the two principles of justice to societies. I have been suggesting that, even within a society, one cannot use the fact that it is a cooperative scheme to argue that it is unfair not to have more extensive cooperation, though not to do so may be collectively irrational. But the international scene presents two further difficulties. First, I think that Rawls is broadly right in (implicitly) denying that the whole world constitutes a single cooperative partnership in the required sense. Second, I do not think that international redistribution can plausibly be said to be advantageous to rich as well as poor countries. Rawls is therefore probably correct in deducing from his system only nonaggression, diplomatic immunity, and the like as mutually advantageous to countries and thus, on his side of the principle of fair play, just. If I am right, however, they are simply collectively rational and give rise to duties of fair play only to the extent that they are instantiated in actual practice.

Beitz's argument for extending the Rawlsian difference principle is in essense that the network of international trade is sufficiently extensive to draw all countries together in a single cooperative scheme. But it seems to be that trade, however multilateral, does not constitute a cooperative scheme of the relevant kind. Trade, if freely undertaken, is (presumably) beneficial to the exchanging parties, but it is not, it seems to me, the kind of relationship that gives rise to duties of fair play. To the extent that justice is involved it is, I would say, justice as requital, that is, giving a fair return. Justice as fair play arises not from simple exchange but from either the provision of public goods that are collectively enjoyed (parks; defense; a litter-free, or unpolluted, environment; and so on) or from quasi-insurance schemes for mutual aid of the kind just discussed. Trade in pottery, ornamentation, and weapons can be traced back to prehistoric times, but we would hardly feel inclined to think of, say, the Beaker Folk as forming a single cooperative enterprise with their trading partners. No more did the spice trade unite East and West.

To the extent that we are inclined to think of the world as more of a cooperative enterprise now, this is, in my judgment, not because trade is more extensive or multilateral, but because there really are rudimentary organs of international cooperation in the form of United Nations agencies and such entities as the International Monetary Fund (IMF) and the World Bank. But the resulting relationships clearly fall short of those of mutual dependence found within societies. And my second point comes in here to draw attention to the fact that the extent of increased cooperation that would really be mutually beneficial is probably quite limited. In particular, redistribution on the insurance principle seems to have little appeal to rich countries. In the foreseeable future, aid to the needy is going to flow from, say, the United States to Bangladesh rather than vice versa. The conditions for reciprocity – that all the parties stand prospectively to benefit from the scheme – simply do not exist. One could, of course, again retreat behind the "veil of ignorance" and argue that, if people did not know to which society they belonged, they would surely choose something like a global difference principle – or at any rate a floor below which nobody should be allowed to fall. And this seems plausible enough. (I have argued it myself in an earlier work.[16]) But this move clearly points up even more sharply than in the case of a single society the degree to which inserting the "veil of ignorance" takes us away from the sphere of the principle of fair play.

Justice as Equal Rights

In his well-known article, "Are There Any Natural Rights?"[17] H.L.A. Hart argued that special rights must presuppose general rights. Before people can act in ways that modify their, and others', rights (paradigmatically by promising), they must, as a matter of elementary logic, have rights that do not stem from such modifications. Putting this in terms of the present discussion, we can say that justice as reciprocity needs a prior assignment of rights before it can get off the ground.

Now we might try to solve the problem of sanctifying the status quo. We could, in other words, simply declare that we are going to push the principle of justice as the fulfillment of reasonable expections to the limit and say that whatever rights somebody now has are to be taken as the baseline in relation to which all future developments must satisfy the requirements of fidelity, requital, and fair play. If we note that the conservation of value is akin to the Pareto principle, we may observe that this would give us the Virginia school of political economy, especially associated with James Buchanan.

I have criticized his approach elsewhere,[18] and I shall not repeat my criticisms here. But it is surely enough for the present purpose to draw attention to the fact that on the principle of the unquestioned justice of the status quo, the most grotesque features of the existing allocation of rights would be frozen in place forever unless those who suffered from them could find some quid pro quo that would make it worth the while of, say, a shah of Iran or a General Somoza to accept change. But that would be, if it could be found, an improvement in efficiency arising from the reallocation of the existing rights. It would not face the real problem, which was, of course, the injustice of the initial allocation of rights.

Hart's answer to his own question is that the general right that is presupposed by any special rights is an equal right to liberty. He does not give any explicit argument, as far as I can see, for its being equal. But I take it the point is that since a general right is something that is necessarily anterior to any act giving rise to a special right, there is simply no basis for discriminating among people in respect of general rights. In order to discriminate, one would either have to do so on the basis of some quality that is obviously irrelevant to the assignment of rights (e.g., skin color) or on the basis of something the person has done (e.g., made a promise) that provides a reason for attributing different rights to him. But then we get back to the original point, namely that such a differentiation in rights entails that we have an idea of the proper distribution of rights without the special factor adduced. And that must, it seems, be an equal distribution.

In this essay I want to take this idea and apply it to the case of natural resources. I shall suggest that they fit all the requirements for being the subjects of a general right and that therefore everyone has an equal right to enjoy their benefits.

As Hillel Steiner has remarked, "Nozick rightly insists that our commonsense view of what is just – of what is owed to individuals by right – is inextricably bound up with what they *have done* … [but] unlike other objects, the objects of appropriative rights … are *not* the results of individuals' past actions.… Appropriative claims, and the rules governing them, can have nothing to do with desert."[19] Consider, for example, Bruce Ackerman's fable of the spaceship and the manna. One of the claimants, "Rusher," says: "I say that the first person who grabs a piece of manna should be recognized as its true owner" and, when asked for a reason, says, "Because people who grab first are better than people who grab second."[20] That, I think, illustrates my point. What exactly is supposed to be the virtue of getting there first, or even worse, in merely having some ancestor who got there first?

The position with regard to countries is parallel to that of individuals. Today the basis of state sovereignty over natural resources is convention reinforced by international declarations such as votes of the United Nations General Assembly in 1970, 1972, and 1974 to the effect that each country has "permanent sovereignty over natural resources" within its territory.[21] It is easy enough to see the basis of the convention. It has a transcendent simplicity and definiteness that must recommend it in international relations. For, in the absence of a "common power," stability depends heavily on conventions that leave the minimum amount of room for interpretation. Within a municipal legal system, by contrast, it is possible to introduce and enforce complex rules limiting the rights of individual appropriation (e.g., restricting the amount of water that can be drawn off from a river) and transferring a portion of the economic rent from the property owner to the state. Moreover, in the absence of a "common power" it is a convention that is relatively easy to enforce – at any rate easier than any alternative. For a state may be presumed, other things being equal, to be in a better position to control the appropriation of the natural resources of its own territory than to control those of some other country.

In practice, of course, things are not always equal, and many Third World countries have found that controlling

foreign companies that own their natural resources is no easy matter: an unholy alliance of multinational corporations and their patron governments (for most, this is the United States) stand ready to organize international boycotts, to manipulate institutions such as the World Bank and the IMF against them; and, if all else fails, go in for "destabilization" on the Chilean model. The problem is exacerbated when a country seeks to gain control of the exploitation of its own natural resources by expropriating the foreign-based companies that have been there, often long before the country became independent. For the issue of compensation then arises, and this is likely to be contentious, not only because of the possibility of dispute about the current value of the investment, but also because the country may claim compensation for inadequate (or no) royalties paid on extraction in the past, a claim that (as we noted above) falls under the head of justice as requital.

However, as far as I am aware, no body of opinion in either the North or the South is averse to the principle that each country is entitled to benefit exclusively from its own natural resources, and to decide whether they should be exploited and, if so, at what rate and in what order. And even the practice has come a long way in the last twenty years. The OPEC is of course the outstanding illustration, but the same pattern of improved royalties and more control over the amount extracted and the way in which it is done obtains also in other countries and other commodities.

It would hardly be surprising if, when the principle of national sovereignty over natural resources has been so recently and precariously established, Third World countries should be highly suspicious of any suggestion that natural resources should in future be treated as collective international property. They may well wonder whether this is anything more than a cover for the reintroduction of colonialism. I do not see how such doubts can be allayed by mere assertion. Clearly, everything would depend on the principle's being applied across the board rather than in a one-sided way that lets the industrialized countries act on the maxim "What's yours is mine and what's mine is my own." So far, that is precisely how it has been used, as in the proposals of American chauvinists such as Robert Tucker that the United States should be prepared to occupy the Saudi Arabian oilfields by military force in order to maintain the flow of oil at a "reasonable" price, so that Americans can continue to use up a grossly disproportionate share of the world's oil. Since the United States, if it used only domestically produced oil, would still have one of the world's highest per capita levels of consumption, the effrontery of this proposal for the international control of other countries' oil would be hard to beat.

If the Third World countries were too weak to do anything more than hang on to the present position of national sovereignty over natural resources, we would, it seems to me, have to regard that as the best outcome that can be obtained. It is clearly preferable to the earlier setup, in which countries with the power to do so controlled the natural resources of others. For, although the distribution of natural resources is entirely arbitrary from a moral point of view, it has at any rate the kind of fairness displayed by a lottery. That is presumably better than a situation in which the weak are despoiled of their prizes by force and fraud.

In spite of these forebodings about the potential misuse of the principle that natural resources are the joint possession of the human race as a whole, I think it is worth pursuing. For it is scarcely possible to be satisfied with the present situation from any angle except that of extreme pessimism about the chances of changing it for the better rather than for the worse. The overwhelming fact about the existing system is, obviously, that it makes the economic prospects of a country depend, to a significant degree, on something for which its inhabitants (present or past) can take absolutely no credit and lay no just claim to its exclusive benefits, namely its natural resources – including in this land, water, minerals, sunlight, and so on. The claims of collectivities to appropriate natural resources rest, as do those of individuals, on convention or on law (in this case, such quasi-law as the United Nations resolutions cited above). No doubt, the point has been impressed on people in the West by examples such as Kuwait, the United Arab Emirates, or Saudi Arabia, and it may be that such small numbers of people have never before become so rich without any effort on their own part, simply as a result of sitting on top of rich deposits. But I see no coherent way of saying why there is anything grotesque about, say, the case of Kuwait, without acknowledging that the fault lies in the whole principle of national sovereignty over natural resources. If it were simply a matter of a few million people hitting the jackpot, things would not be bad, but of course the obverse of that is countries that have poor land, or little land per head, and few mineral resources or other sources of energy such as hydroelectric power.

Obviously, some countries are richer than others for many reasons, and some, like Japan, are among the more affluent in spite of having to import almost all their oil

and the greatest part of many other natural resources. What, then, about the other advantages that the people in the rich countries inherit – productive capital, good systems of communications, orderly administration, well-developed systems of education and training, and so on? If the point about special rights is that someone must have done something to acquire a special right, what have the fortunate inheritors of all the advantages done to give them an exclusive claim to the benefits flowing from them?

The answer that the defenders of property rights normally give at this point is that, although the inheritors have done nothing to establish any special rights, those who left it to them did do something (namely, help to create the advantages) and had a right to dispose of it to some rather than to others. The special rights of those in the present generation thus derive from the use made by those in the previous generation of *their* special rights.

I cannot, in this already long chapter, undertake here to ask how far this answer takes us. We would have to get into questions that seem to me very difficult, such as the extent to which the fact that people who are no longer alive wanted something to happen, and perhaps even made sacrifices in order to insure that it could happen, provides any basis in justice for determining what those now alive now should do. I shall simply say here that I regard any claims that those now alive can make to special advantages derived from the efforts of their ancestors as quite limited. First, the inheritance must itself have been justly acquired in the first place, and that cannot be said of any country that violated the equal claims of all on natural resources – which means almost all industrial countries. Second, the claims to inheritance seem to me to attenuate with time, so that, although the present generation might legitimately derive some special advantages from the efforts of the preceding one, and perhaps the one before that, the part of what they passed on that was in turn inherited from their predecessors should, I think, be regarded as by now forming part of the common heritage.

Obviously, making this case out would require elaboration beyond the space available. But I do want to emphasize that what follows constitutes, in my view, a minimalist strategy. That is to say, whatever obligations of justice follow from it represent the absolutely rock-bottom requirements of justice in international affairs. To the extent that other advantages can be brought within the net of the principle of equal rights, the obligations of rich countries go beyond what is argued for here.

International Institutions

It would be ridiculous to spend time here on a blueprint for a scheme to put into effect the principle that I have been advancing. Its implementation on a worldwide scale, if it happens at all, is going to occur over a period measured in decades and, indeed, centuries. It will depend on both fundamental changes in outlook and on the development of international organs capable of taking decisions and carrying them out with reasonable efficiency and honesty.

The history of domestic redistribution is, I think, very much to the point here in suggesting that there is a virtuous circle in which the existence of redistributive institutions and beliefs in the legitimacy of redistribution are mutually reinforcing and have a strong tendency to become more extensive together over time. When Hume discussed redistribution in the *Enquiry*, the only form of it that he considered was "perfect equality of possessions."[22] The notion of continuous redistribution of income through a system of progressive taxation does not seem to have occurred to him. The Poor Law did, of course, provide a minimum of relief to the indigent, but it was organized by parishes and it is doubtful that the amateurish and nepotistic central administration of the eighteenth century could have handled a national scheme. The introduction of unemployment and sickness benefits and old age pensions in one Western European country after another in the late nineteenth century and early twentieth century was made possible by the development of competent national administrations.

At the same time, these programs constituted a political response to the extension of the suffrage, or perhaps one might more precisely say a response to conditions that, among other things, made the extension of the suffrage necessary for the continued legitimacy of the state. A certain measure of redistribution was the price the privileged were prepared to pay for mass acceptance of their remaining advantages. Once in place, however, such programs have shown a universal tendency to take on a life of their own and to grow incrementally as gaps in the original coverage are filled in and the whole level of benefits is gradually raised. Indeed, it has been found in cross-national studies that the best predictor of the relative size of a given program (say, aid to the blind) within the whole welfare system is the amount of time the program has been running compared with others. In the long run, the programs seem to generate supporting sentiments, so that even Margaret Thatcher and Ronald Reagan proposed only reductions of a few percentage

points in programs that even thirty years previously would have seemed quite ambitious.

I do not want to drive the comparison with the international arena into the ground, but I think that, if nothing else, reflecting on domestic experience ought to lead us to look at international transfers from an appropriate time perspective. The United Nations Organization obviously has a lot wrong with it, for example, but its administration is probably less corrupt, self-serving, and inefficient than that which served Sir Robert Walpole. If one takes a time span of thirty years, it is, I suggest, more remarkable that the network of international cooperation has developed as far as it has than that it has not gone further. And in the realm of ideas the notion that poor countries have claims of one sort or another to aid from rich ones has moved from being quite exotic to one that is widely accepted in principle. At any rate in public, the representatives of the rich countries on international bodies no longer deny such a responsibility. They merely seek to evade any binding commitment based on it. But in the long run what is professed in public makes a difference to what gets done because it sets the terms of the discussion.

International Taxation

It is not at all difficult to come up with proposals for a system by which revenues would be raised on a regular basis from the rich countries and transferred to the poor ones. Accordingly, no elaborate discussion is needed here. If any such scheme ever gained enough momentum to be a serious international issue, economists and accountants would no doubt have a field day arguing about the details. There is no point in anticipating such arguments, even in outline here. However, the relative brevity of treatment here should not lead to any underestimation of its importance. It is in fact the centerpiece of what is being put forward in this essay.

Now, broadly speaking, two alternative approaches are possible. One would be to take up each of the aspects of international justice that have been discussed – and whatever others might be raised – and to base a system of taxes and receipts upon each. This would be messy and endlessly contentious. The alternative, which is, I predict, the only way in which any systematic redistribution will ever take place, if it ever does, is to have one or two comprehensive taxes and distribute the proceeds according to some relatively simple formula among the poor countries.

The most obvious, and in my view the best, would be a tax on the governments of rich countries, assessed as a proportion of gross national product that increases with per capita income, the proceeds to be distributed to poor countries on a parallel basis of negative income tax. Gross national product reflects, roughly, the use of irreplaceable natural resources, the burden on the ecosphere, and advantages derived from the efforts of past generations, and past exploitation of other countries. Ideally, this tax would be supplemented by a severance tax on the extraction of mineral resources and a shadow tax on the value of land and similar resources. (States could be left to collect the money by any means they chose. But their aggregate liability would be assessed by valuing the taxable base and applying the set rate.) This would certainly be required to take care of some glaring inequities that would still otherwise remain. But the simple system of transfer based on gross national product would be such an advance over the status quo that it would be a mistake to miss any chance to implement it by pursuing further refinements.

I believe that any other kinds of general tax, that is to say, taxes not related specifically to some aspect of justice, should be rejected. For example, a tax on foreign trade, or on foreign trade in fossil fuels has been proposed.[23] This is so obviously arbitrary that it is hard to see how anyone can have considered it worth mooting. It has the manifest effect of penalizing small countries and countries that export (or import, if one believes that the tax on exports of fossil fuel would be shifted forward) coal and oil. It conversely has an absurdly favorable effect on very large countries that import and export little in relation to the size of the GNPs and are relatively self-sufficient in energy derived from fossil fuels. No doubt the State Department loves it, but why anyone else should be imposed on is a mystery to me.

I have assumed without discussion that resources transferred to satisfy the requirements of justice should go straight to poor countries rather than being channeled through international agencies and dispensed in the form of aid for specific projects. I shall spell out the rationale for this in the next section. But I will simply remark here that nothing I have said about justice rules out additional humanitarian transfers. And these would appropriately be administered by international organizations. The basis for raising such revenues for humanitarian aid would very reasonably be a progressive international shadow income tax, since this would perfectly reflect ability to pay. We might thus envisage a dual system of international taxation – one part, corresponding to the requirements of justice, going directly to poor countries to be spent at their own discretion; the other going to the World Bank or some successor organization less dominated by the donor countries.

III The Relations between Humanity and Justice

Introduction

I have been arguing that both humanity and justice require a substantial expansion in the scale of economic transfers from rich countries to poor ones. I should now like to show that, as the two rationales are very different, so are their practical implications. This point is, I think, worth emphasizing because those who pride themselves on the possession of sturdy Anglo-Saxon "common sense" tend to conclude that, if we agree on the humanitarian obligation, we are wasting our breath in arguing about claims of injustice – claims for the rectification of alleged unrequited transfers from poor to rich countries in the past that are hard to assess and impossible to quantify or involving more or less abstruse doctrines about the nature of justice in the contemporary world. If we recognize the case for action on simple and straightforward humanitarian grounds, the idea goes, shouldn't we concentrate on putting into place the appropriate aid policies, rather than allow ourselves to get sidetracked into fruitless wrangles about justice? In this context it is often said that the demands made by the countries of the South are "symbolic" or "ideological" and have the effect only of making more difficult the real, practical task of negotiating actual concessions by the countries of the North. The question that seems to me of more import is the following: If an obligation of humanity is accepted, under whatever name, how much difference does it make whether or not the kinds of claims I have been discussing under the heading of "justice" are also conceded?

Rights and Goals

The answer is, I believe, that it makes a great deal of difference. Putting it in the most abstract terms, the obligations of humanity are goal-based, whereas those of justice are rights-based.[24] I would once have expressed the distinction between humanity and justice as one between an aggregative principle and a distributive principle.[25] I now, however, regard that distinction as less fundamental than the one I wish to mark by talking of goal-based and rights-based obligations. The point is that humanity and justice are not simply alternative prescriptions with respect to the same thing. Rather, they have different subject matters.

Humanity, understood as a principle that directs us not to cause suffering and to relieve it where it occurs, is a leading member of a family of principles concerned with what happens to people (and other sentient creatures) – with what I shall call their well-being, intending to include in this such notions as welfare, happiness, self-fulfillment, freedom from malnutrition and disease, and satisfaction of basic needs. Justice, by contrast, is not directly concerned with such matters at all. As well as principles that tell us what are good and bad states of affairs and what responsibilities we have to foster the one and to avert the other, we also have principles that tell us how control over resources should be allocated. If we understand "resources" in a very wide sense, so that it includes all kinds of rights to act without interference from others, to constrain the actions of others, and to bring about changes in the nonhuman environment, then we can say that the subject matter of justice (at any rate, in modern usage) is the distribution of control over material resources. At this high level of generality, it is complemented by the principle of equal liberty, which is concerned with the control over nonmaterial resources. To put it in a slogan, which has the advantages as well as the disadvantages of any slogan, humanity is a question of doing good; justice is a question of power.

When the contrast is stated in those terms, it might seem that bothering about justice is indeed a waste of time and that the bluff Anglo-Saxon advocates of commonsensical utilitarianism have the best of it after all. Why, it may naturally be asked, should we care about the distribution of *stuff* as against the distribution of *welfare*? Isn't this simply commodity fetishism in a new guise?

The easy but inadequate answer is that the concept of justice is, of course, concerned not only with old stuff but the kind of stuff that has the capacity to provide those who use it with the material means of well-being: food, housing, clothing, medical care, and so on. This is correct as far as it goes and shows that being concerned with justice is not irrational. But it is inadequate because it leaves the supporter of justice open to an obvious flanking movement. His opponent may reply: "You say that the only reason for concern about the distribution of the things whose proper allocation constitutes the subject matter of justice is that they are the means to well-being. Very well. But are you not then in effect conceding that your 'deep theory' is goal-based? For what you are saying is that we really are ultimately concerned with the distribution of well-being. We simply take an interest in the distribution of the means of well-being because they are what we can actually allocate. But this means that justice is a derivative principle."

There are two lines of response open at this point. One is to concede that criteria for the distribution of resources are ultimately to be referred to the goal of well-being, but at the same time to deny that it follows from that concession that we can cut out the middleman (or put in the Michelman) and set out our principles for the allocation of resources with an eye directly on the well-being they are likely to produce. Or, more precisely, we may say that among the constituents of well-being is autonomy, and autonomy includes the power to choose frivolously or imprudently. Thus, on one (admittedly controversial) interpretation, Mill's talk of justice in Book V of *Utilitarianism* and his presentation of the "simple principle" of *On Liberty* in terms of rights is all consistent with an underlying utilitarian commitment if we allow for the importance to people of being able to plan their own lives and make their own decisions.

I think that this is by no means an unreasonable view and has more to be said for it than is, perhaps, fashionable to admit. Anyone who wishes at all costs to hold up a monistic ethical position is, I suspect, almost bound to finish up by trying to make some such argument as this. But I think that it is, nevertheless, in the last analysis a heroic attempt to fudge the issue by using the concept of autonomy to smuggle a basically foreign idea into the goal-based notion of advancing well-being.

The alternative is to deny that, in conceding that control over resources is important only because of the connection between resources and well-being, one is thereby committed to the view that principles for the distribution of resources are derivative. According to this view, there simply are two separate kinds of question. One concerns the deployment of resources to promote happiness and reduce misery. The other concerns the ethically defensible basis for allocating control over resources. Neither is reducible, even circuitously, to the other. When they conflict, we get hard questions, such as those involved in the whole issue of paternalism. But there is no over-arching criterion within which such conflicts can be solved, as is offered (at least in principle) by the idea that autonomy is an important, but not the only, ingredient in well-being.

As may be gathered, this is the position that I hold. In what follows, I want to show what difference it makes to employ an independent principle of justice in considering issues of international distribution. To make the discussion as clear as possible, I shall draw my contrast with a principle of humanity understood in the kind of pretty straightforward way exemplified in Section 1 of this chapter. The contrast would be softened the more weight we were to give to autonomy as a component in well-being. Note, however, that even those who might wish to emphasize the importance of individual autonomy are likely to doubt the value to individual well-being of autonomy for states; yet it is precisely the question of autonomy for states that is going to turn out to be the main dividing line between humanity and justice at the international level.

International Applications

The point is one of control. The rich countries already mostly concede, at least in verbal declarations, that they have a humanitarian obligation to assist the poor countries economically. The importance to the future of the world of their beginning to live up to those declarations can scarcely be overestimated. I trust that nothing in this chapter will be taken as disparaging humanitarian aid. To the extent that it does in fact relieve problems of poverty, disease, malnutrition, and population growth it is, obviously, of enormous value.

But to see its limitations, let us be really utopian about humanitarian aid. Let us imagine that it is collected on a regular and automatic basis from rich countries according to some formula that more or less reflects ability to pay; for example, a shadow tax on GNP graduated by the level of GNP per capita. And suppose that the proceeds were pooled and dispersed through agencies of the United Nations, according to general criteria for entitlement to assistance.

Now, undoubtedly such a world would be an immense improvement over the present one, just as the modern welfare state has transformed, say, Henry Mayhew's London. But it would still have the division between the donor countries, free to spend "their" incomes as they pleased and the recipient countries, which would have to spend their incomes "responsibly." No doubt, this would be less objectionable if the criteria were drawn up in partnership between donor and recipient countries rather than, as now, being laid down by bodies such as the IMF and the World Bank in whose governing councils the rich countries have a preponderant voice. But funds earmarked and conditional upon approved use would still be basically different from income of the usual kind.

In contrast, transfers that were consequential upon considerations of justice would simply reduce the resources of one set of countries and augment those of another set. The distribution of control of resources would actually be shifted. It is therefore easy to see that

the question of justice in the relations between rich and poor countries is by no means a purely "symbolic" one. Real issues are at stake, and it is no self-delusion that leads the poor countries to press for a recognition of the claims of justice and the rich countries to resist.

The conclusion we have reached, then, is that the crucial characteristic of justice is that the obligation to make the transfers required by it does not depend upon the use made of them by the recipient. At this point, I find that the following kinds of objection are usually made: What if the recipient country wastes the resources transferred to it? What if it is going to spend the money on armaments? What if it has a very unequal distribution of income and the additional income will be divided in the same unequal way? Such objections illustrate how difficult it is to get across the idea that if some share of resources is justly owed to a country, then it is (even before it has been actually transferred) as much that country's as it is now normally thought that what a country produces belongs to that country.

The answer that I give is that there are extreme circumstances in which the international community or some particular donor country would be justified in withholding resources owed as a matter of justice to some country. But these are exactly the same extreme conditions under which it would also be justifiable to refuse to pay debts to it or to freeze its assets overseas.

One could envisage a world in which there were indeed an international authority that allowed countries to keep only that income that would be justly distributed internally and used in approved, nonwasteful ways. Such a world would not be at all like ours, since it would accept no principle of national autonomy. It would be a world in which a presently nonexisting world society had inscribed on its banner: "From each according to his ability, to each according to his needs."

The alternative is a world in which the general presumption is of national autonomy, with countries being treated as units capable of determining the use of those resources to which they were justly entitled. This is the world that we now have, and the only modification in the status quo I am arguing for is a redefinition of what justly belongs to a country. It inevitably, as the price of autonomy, permits countries to use their resources in wasteful ways ("theirs," on my interpretation, being of course those in their own territories plus or minus transfers required by justice) and does not insist that a country that allows some to live in luxury while others have basic needs unfulfilled should lose income to which it is entitled as a matter of justice.

My point is that both of the models I have sketched are internally consistent. We could have a system in which there are no entitlements based on justice and in which, assuming that states are still the administrative intermediaries, funds are allocated for worthy purposes and cut off if they are misspent, just as in the United States the federal government cuts off funds to state and local governments that do not comply with various guidelines. Or we could have a world in which, once the demands of just distribution between countries are satisfied, we say that we have justice at the world level, and the question of domestic distribution and national priorities then becomes one for each country to decide for itself.

What is not consistent is to have a world in which those countries that are required by international justice to be donors live under the second system while those that are recipients live under the stern dispensation of the first. If the idea is going to be that countries should have their entitlements reduced if they are wasteful and fail in internal equity, then the obvious place to start is not with some poor country in sub-Saharan Africa or South Asia but with, say, a country that burns one ninth of the world's daily oil consumption on its roads alone and that, in spite of having a quarter of the world's GNP, is unable to provide for much of its population decent medical care, while a substantial proportion live in material conditions of abject squalor that (except for being more dirty and dangerous) recall the cities of Germany and Britain in the aftermath of World War II.

None of this, of course, denies the independent significance of humanity as a criterion in international morality. But we cannot sensibly talk about humanity unless we have a baseline set by justice. To talk about what I ought, as a matter of humanity, to do with what is mine makes no sense until we have established what is mine in the first place. If I have stolen what is rightfully somebody else's property, or if I have borrowed from him and refuse to repay the debt when it is due, and as a result he is destitute, it would be unbecoming on my part to dole out some part of the money that should belong to him, with various strings attached as to the way in which he should spend it, and then go around posing as a great humanitarian. That is, in my judgment, an exact description of the position in which the rich countries have currently placed themselves.

The need for humanitarian aid would be reduced in a world that had a basically just international distribution. It would be required still to meet special problems

caused by crop failure owing to drought, destruction owing to floods and earthquakes, and similar losses resulting from other natural disasters. It would also, unhappily, continue to be required to cope with the massive refugee problems that periodically arise from political upheavals.

Beyond that, humanitarian aid in the form of food, technical assistance, or plain money is always a good thing, of course. How much the rich countries would be obliged to give depends first on the extent of redistribution we hold to be required by justice and, second, on the stringency that we assign to the obligation of humanity – how much sacrifice can be demanded to deal with what level of need.

As will be clear, this chapter is concerned only with a preliminary investigation of the principles relevant to an ethical appraisal of international distribution and redistribution. I must therefore leave any more precise statement of implications for future discussions – and not necessarily by me. Ultimately, if anything is to be done, it will require a widespread shift in ideas. Greater precision can be expected to develop *pari passu* with such a shift. I very much doubt the value of single-handed attempts to produce a blueprint in advance of that.

Notes

1 *Oxford English Dictionary*, sub. Humanity, 3b. In the light of the central example to be discussed below, it is interesting to note that the title of a society founded in England for the rescuing of drowning persons in 1774 was the Humane Society (*OED*, sub. Humane, 1c).
2 *Philosophy & Public Affairs*, 229–43 (1972). See, for a briefer and more recent statement of the same basic case, Peter Singer, *Practical Ethics* (Cambridge: Cambridge University Press, 1979), ch. 8, pp. 158–81.
3 Ibid., p. 231.
4 Ibid.
5 Ibid.
6 Ibid.
7 Ibid.
8 C.D. Broad, "On the Function of False Hypotheses in Ethics," 26 *International Journal of Ethics* 377–97, at 389–90 (1916).
9 John Passmore, "Civil Justice and Its Rivals," in Eugene Kamenka and Alice Erh-Soon Tay, *Justice* (London: Edward Arnold, 1979) pp. 25–49, at 47 [italics in original].
10 For a sustained argument along these lines, see T.D. Campbell, "Humanity before Justice," 4 *British Journal of Political Science* 1–16 (1974).
11 Henry Sidgwick, *The Methods of Ethics* (London: Macmillan, 1907), p. 273.
12 Constantine V. Vaitsos, *Intercountry Income Distribution and Transnational Enterprises* (Oxford: Clarendon Press, 1974), esp. ch. 4.
13 See for an elaboration of these remarks "And Who Is My Neighbor?" 88 *Yale L. J.* 629–58 (1979).
14 Adam Smith expressed this view: "As a man doth, so it shall be done to him, and retaliation seems to be the great law which is dictated to us by nature. Beneficence and generosity we think due to the generous and beneficent. Those whose hearts never open to the feelings of humanity should, we think, be shut out in the same manner, from the affections of all their fellow-creatures, and be allowed to live in the midst of society, as in a great desert, where there is nobody to care for them, or to enquire after them." Adam Smith, *The Theory of Moral Sentiments* (Indianapolis: Liberty Classics, n.d.), p. 160.
15 Princeton, NJ: Princeton University Press, 1979. The part of the book in question was first published in substantially the same form as "Justice and International Relations," 4 *Philosophy & Public Affairs* 360–89 (1975).
16 *The Liberal Theory of Justice* (Oxford: Clarendon Press, 1973), ch. 12.
17 H.L.A. Hart, "Are There Any Natural Rights?" 64 *Philosophical Review* 175–91 (1955). [Reprinted as Chapter 20 of this volume.]
18 See my extended review in 12 *Theory and Decision*, 95–106 (1980).
19 Hillel Steiner, "The Natural Right to the Means of Production," 27 *The Philosophical Quarterly* 41–9, at 44–5 (1977). The reference to Nozick is to *Anarchy, State, and Utopia* (New York: Basic Books, 1974), p. 154.
20 Bruce A. Ackerman, *Social Justice in the Liberal State* (New Haven: Yale University Press, 1980), p. 38.
21 Oscar Schachter, *Sharing the World's Resources* (New York: Columbia University Press, 1977), p. 124, references n, 52, p. 159.
22 David Hume, *An Enquiry Concerning the Principles of Morals*, 3rd edn. (Oxford: Clarendon Press, 1975), pp. 193–4.
23 Eleanor B. Steinberg and Joseph Y. Yager, eds., *New Means of Financing International Needs* (Washington, DC: The Brookings Institution, 1978), ch. 3.
24 For a distinction stated in these terms see Ronald Dworkin, "The Original Position," 4 *Chi. L. Rev.*, 500–33 (1973), reprinted in Norman Daniels, ed., *Reading Rawls* (Oxford: Basil Blackwell, 1975) pp. 16–53. The relevant discussion is on pp. 38–40 of this reprint.
25 *Political Argument* (London: Routledge & Kegan Paul, 1965), pp. 43–4.

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